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Sankaralinga Moodelly v. Rathna Sabapathy Moodelly (*approved*) I.L.R. 21 M. 344 .. ..978, 979, 980
Sarat Chandra Banerjee v. Bhupendra Nath Basu (*referred to*) I.L.R. 25 C. 103 593, 594, 598
Secretary of State v. Ashtamurthi (*referred to*) I.L.R. 13 M. 89. 662, 663, 665, 666, 668
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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

T. V. Tuljaram Row .. Appellant*

v. (*Def. in O. S. N.* 117 *of* '09)

M. K. R. V. Alagappa Chettiar .. Respondent

(*Plaintiff in Do.*).

On appeal from an interlocutory order of Mr. Justice Wallis, in O. S. No. 117 of 1909.

Letters Patent, Cl. 15—"*Judgment,*" *meaning of—Appeal—Interlocutory orders—Orders in independent proceedings, stay of execution, etc.—Exercise of discretion in discretionary matter.* Tuljaram v. Alagappa.

Per Curiam:—No appeal lies from an order of a Judge on the Original Side of the High Court declining to frame an issue asked for by one of the parties to the suit.

Per *Chief Justice*:—The word " judgment " in Cl. 15 of the Letters Patent does not include all orders in civil proceedings. It includes orders in proceedings though interlocutory. The test is not the form of the adjudication but its effect in the suit or proceeding in which it is made. If the effect is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not a "judgment." An order on an independent proceeding ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained), *e.g.*, an order in an application for an interim injunction, for the appointment of a receiver is a "judgment." [3 M. H. C. R. 384 doubted ; 26 M. 437, 1 M. 148 approved ; 27 M. 432, 14 M. 88, 28 M. 28 dissented from; 30 M. 143, 24 M. 252 approved.]

An adjudication on matters of discretion is appealable, if the effect is to dispose of the suit so far as the Court making the adjudication is concerned.

Per *Krishnaswami Aiyar* J.:—The word "judgment" in Cl. 15 of the Letters Patent covers interlocutory or preliminary judgments as well as a final judgment, but it does not include an interlocutory order. But the right or liability with reference to which the Court adjudicates or declines to do so must be the substantive claim or liability and not a right to a particular judicial procedure or a detriment suffered in being denied the benefit of a rule of procedure. Orders in incidental proceedings, *e.g.*, those for attachment and arrest before judgment, temporary injunction, appointment of a receiver, stay of execution and security for costs are appealable.

* O. S. No. 43 of 1909. 29th September 1910.

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The order of a single Judge refusing to exercise his discretion or exercising it in a particular way is also appealable, though it may be that the appellate Court may decline to interfere on the ground of its being a discretionary matter.

Per *Chief Justice* and *Krishnaswami Aiyar* J.—An order refusing to issue a commission is not a judgment.

This appeal coming on for hearing in the first instance on 3rd May 1910, the Court (the *Chief Justice* and *Abdur Rahim* J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—In this case an objection has been taken that no appeal lies against the order of a Judge on the Original Side declining to frame additional issues for which one of the parties asked. We are disposed to uphold this objection on the ground that such an order is not a judgment within the meaning of Section 15 of the Letters Patent:

Ebrahim v. *Fuckrunnissa Begum*[1] is an authority which supports this view. As regards this High Court, however, the authorities would seem to preclude us from so holding. The ground of the decision in *Maruthamuthu Pillai* v. *Krishnamachariar*[2] is applicable to the present case. We may also refer to *R.* v. *R.*[3]; *Sabhapathi Chetti* v. *Narayanasami Chetti*[4]; *Commercial Bank of India, Limited* v. *Sabja Sahib*[5]; *Vyasachary* v. *Keshavacharya*[6]; *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla*[7].

We refer to a Full Bench the question whether an appeal lies to this Court from an order of a Judge on the Original Side declining to frame an issue which is asked for by one of the parties to the suit.

T. V. Seshagiri Aiyar and *V. Masilamoni Pillay* for appellant.

P.R. Sundara Aiyar and *C. P. Ramasami Aiyar for* respondent.

T. V. Seshagiri Aiyar.—"Judgment' in S. 15 of the Letters Patent is very comprehensive and includes decree, sentence and

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1. (1878) I. L. R. 4 C. 531.
2. (1903) I. L. R. 30 M. 143.
3. (1890) I. L. R. 14 M. 88.
4. (1901) I. L. R. 25 M. 555.
5. (1900) I. L. R. 24 M. 252.
6. (1901) I. L. R. 25 M. 654.
7. (1903) I. L. R, 26. M. 502.

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order. All orders affecting the rights of parties (rights to let in evidence, etc., as given to them by law, right as to a rule of procedure or practice) and not based upon the discretion of the judge are appealable. Every order allowing or disallowing evidence (oral and documentary) or issue is appealable. S. 39 read. "Judgment" therein is qualified in two places by the words "final" and "interlocutory." S. 19 of the Judicature Act defines in what cases appeals shall lie from the orders and judgments of a single judge. S. 100 of that Act defines "judgment" and "order." [*Krishnasawmy Aiyar* J.—If judgment in S. 15 includes all orders then why does not the word "order" follow the word "judgment."] It was thought unnecessary. The Calcutta cases take a somewhat narrower view. Even according to them this would be a judgment—*The Justices of the Peace of Calcutta* v. *The Oriental Gas Company*[1]; *Howard* v. *Wilson*[2]. In *Ebrahim* v. *Fuckrunissa Begum*[3] the Chief Justice goes too far, and Mr. Justice *Markby* simply says he does not like to differ. I submit this decision is wrong. The Letters Patent cannot be controlled by the Civil Procedure Code—*Hurrish Chunder Chowdry* v. *Kali Sunderi Debi*[4]; *Kishen Pershad Panday* v. *Tiluckdhari Lall*[5]; *Toolsee Money Dassee* v. *Sunderi Dasee*[6]; *Ut Brij Coomaree* v. *Ramrick Das*[7]; *Gopinath Pati* v. *Moheshwar Pradhan*[8]; *Soubhai* v. *Ahmedbhai Haribhai*[9]; *Hirji Jona* v. *Narran Mialji*[10]. The gist of these cases seems to be whether the order complained against would affect the merits of the case. [*Krishnasawmy Aiyar* J.—No; the test is whether the order has decided any question concerning the merits of the case.] *Soonabhai* v. *Tribhovana Dos*[11]; *Vaghoji Kuverji* v. *Camaji Bomanji*[12]; *Sir Jehangir Cowasjee* v. *The Hope Mills, Limited*[13]; *In re Arbitration, Atlas Assurance Company Ltd.* v. *Ahmedbhoy*[14]; *De Souza* v. *Coles*[15]; *Somasundaram Chetti* v. *Administrator-General*[16]; *Vanangamudy* v. *Ramasami*[17]; *Chappan* v. *Moidin Kutti*[18]; *The Commer-*

1. (1872) 8 Beng. L.R. 451.
2. (1878) I.L.R. 4 C. 231.
3. (1878) I.L.R. 4 C. 531.
4. (1882) I.L.R. 9 C. 4821 493 (P. C.)
5. (1890) I. L. R. 18 C. 182.
6. (1899) I. L. R. 26 C. 361.
7. (1901) 5 C.W.N. 781, 794, 795.
8. (1908) I. L. R. 35 C. 1096.
9. (1872) 9 Bom. H.C.R. 398, 406.
10. (1875) 12 Bom H.C.R. 129.
11. (1908) 10 Bom. L. R. 337.
12. (1904) I.L.R. 29 B. 249, 253.
13. (1908) I.L.R. 33 B. 216.
14. (1908) I.L.R. 34. B. 1.
15. (1868) 3 M.H. C.R. 384.
16. (1876) I. L. R. 1 M. 148, at 151.
17. (1891) I. L. R. 14 M. 406.
18. (1898) I. L. R. 22 M. 68

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cial Bank of India, Ltd. v. *Sabja Sahib* [1]; *Yarlagadda* v. *Yarlagadda*[2]; *Letters Patent Appeal* 5 *of* 1900 (*unreported*); *Kuppusami Chetti* v. *Ratnavelu Chetti*[3]; *Mohabir Prasad Singh* v. *Adhikari Kunwar*[4]; *Sabapathi Chetti* v. *Narayanasami Chetti*[5]; *Vidyapurna* v. *Vidyanidhi*[6]; *Appasawmy Pillay* v. *Somasundara Mudaliar*[7]; *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla*[8]; *Chinnasami Mudali* v. *Arumuga Goundan*[9]; *Veerabadran Chetty* v. *Nataraja Desikar*[10]; *Maruthamuthu Pillai* v. *Krishnamachariar*.[11] For definition of "judgment" see Vol. I. p. 623, DANIELL'S *Chancery Practice*, which seems to be against me; SETON on Decrees Vol. I, Introduction p. 321, is some what likewise.

P. R. Sundara Aiyar.—"Sentence or order" in S. 15, Letters Patent, means a final judgment. Similarly "judgment" means final judgment. [*C. J.*—It is too late now so to contend.] The anomaly would be that before the suit is decided in the Original Court there would be several appeals against several orders or rulings passed in the course of the case. We must put such a construction as would not bring about such an anomaly. A contrast is intended between a *judgment* and a *decree* but no contrast can be intended to have been laid between *judgments* and *orders*. I refer to Letters Patent, Ss. 39, 40, and S. 37 of the Old Letters Patent which lays down a general rule as to procedure. If we see the scheme of the Civil Procedure Code in providing appeals against orders we will observe that appeals lie only against judgments or final pronouncements, even in respect of incidental or interlocutory matters or reliefs. What disposes of a suit, original petition or incidental relief, either on the merits or on any technical grounds, is a judgment. These incidental petitions are not necessary steps in the course of a suit but independent helps to achieve the final end to see whether an order is appealable. We must look at its substance and its result direct and indirect on the right or liability of a party, in the suit. Independent proceedings, *e.g.*, probate and guardian

1. (1900) I. L. R. 24 M. 252.
2. (1901) I. L. R. 24 M. 358, 359.
3. (1901) I. L. R. 24 M. 511.
4. (1894) I.L.R. 21 C. 473.
5. (1901) I. L. R. 25 M. 555, 559.
6. (1901) I.L. R. 25 M. 654
7. (1902) I. L. R. 26 M. 437.
8. (1902) I.L.R. 26 M. 502.
9. (1903) I. L. R. 27 M. 432.
10. (1904) I.L.R. 28 M. 28.
11. (1906) I.L.R. 30 M. 143.

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proceedings and proceedings incidental to a suit do end by judgments. For example, an order giving or refusing leave to file a suit—Wharton's Law Lexicon, p. 425. Orders as to steps in a cause are not judgments—Stroud, Vol. II, p. 1027. The definition given in *Chinnasami Mudali* v. *Armuga Gounden* [1] supports my argument. In *DeSouza* v. *Cotes* [2] the observation is nothing more than a *dictum*. The fact that the order sought to be appealed against involved the exercise of descretion is no ground for non-appealability. If so, all decrees under the Specific Relief Act would have no appeal—*Maruthamuthu* v. *Krishnama Chari*[3]; *Kirani Ahmedula* v. *Subhabhat*[4]; *In re Kally Soondery Dabia* [5]; *Vanangamudy* v. *Ramasami* [6] dissented from in *Yarlagadda* v. *Yarlagadda* [7]; *Maharaja of Jeypure* v. *Papayamma* [8]; *The Commercial Bank of India, Ltd.* v. *Sabja Saheb* [9], Vol. 23, American Cyclopœdia of Law and Procedure, p. 668; 672, as to the definition of *judgment*. [*Krishnaswami Aiyar* J.—Why does S. 40 of the Letters Patent talk of interlocutory judgments?] That is for the purpose of providing appeals in certain cases. The word *judgment* ' in England had a certain meaning. But "interlocutory judgment" includes orders which are not 'judgments'; instead of qualifying, the word *interlocutory* really enlarges the class of judgments.

The Madras cases cited for the appellant were then distinguished by Mr. Sundara Aiyar on the principles enunciated by him. The only cases against my view are *Veerabadran Chetty* v. *Nataraja Desikar* [10]; *Maruthamuthu Pillai* v. *Krishnamachariar* [3]; which say that an appeal lies from orders refusing the issue of commissions to examine the witnesses. Their Lordships did not want Mr. Sundara Aiyar to dwell on the cases of other High Courts as therein the word "judgment" has been held to mean "final judgment."

T. V. Seshagiri Aiyar, in reply, referred to BLACK on *Judgments*, Vol. I., p. 32, and referring to Ss. 15, 39 and 40, of the Letters Patent said the same word should be understood in the same sense in all the sections. [*Court.*—Is not your position

1. (1903) I.L.R. 27 M. 432,
2. (1868) 3 M. H. C.R. 384.
3. (1906) I.L.R. 30 M. 143, 144.
4. (1883) I.L.R. 8 B. 28, 30.
5. (1881) I.L.R. 6. C. 594, 599.
6. (1891) I.L.R. 15 M. 406.
7. (1901) I.L.R. 24 M. 358.
8. (1900) I.L.R. 23 M. 329.
9. (1900) I.L.R. 24 M. 252.
10. (1904) I.L.R. 28. M. 28.

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inconsistent with the scheme of the Judicature Act, Common Law Procedure Act and the Civil Procedure Code ?] To some extent it is. Many orders which are not appealable here are appealable in England, *e.g.*, orders as to discovery and interrogatories.

The Court expressed the following

*OPINIONS.—*The Chief Justice.*—The question we have to determine in this case turns on the meaning of the word 'judgment' in Clause 16 of the Letters Patent. I find it impossible to reconcile the decisions on the point.

I do not think the word 'judgment' is used in contradistinction to the words 'sentence' or 'order' which immediately follow it. The words "not being a sentence or order passed or made in any criminal trial," as it seems to me, were introduced in order to exclude all criminal proceedings from the operation of the section and that it is not to be inferred from the introduction of these words that the Legislature intended that the word 'judgment' should include all orders in civil proceedings.

Further, I am not prepared to infer, from the fact that in Sections 39 and 40 of the Letters Patent a distinction is drawn between final judgments, decrees or orders, and interlocutory judgments, decrees or orders, that the word 'judgment' in S. 15 is to be deemed to include any order in any interlocutory proceeding.

The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.

*29th September 1910.

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I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained), *e.g.*, an order on an application for an interim injunction, or for the appointment of a receiver is a 'judgment' within the meaning of the clause.

Speaking generally I think the word 'judgment' means any 'final order, decree or judgment" within the meaning of those words as used in S. 12 of the English Judicature Act 1875. An order made on an application which is interlocutory in point of form may be a judgment within the meaning of S. 15 of the Letters Patent. On the other hand I am not prepared to say as was held in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[1] and in *Soubhai* v. *Ahmedbhai Haribhai*[2], it must be a decision which affects the merits by determining some right or liability. I think the decision may be a judgment for the purposes of the section though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding.

As regards the authorities I will deal with the Madras cases first. With all respect I think the definition of *judgment* given by *Bittleston* J. in *De Souza* v. *Coles*[3] as "any decision or determination affecting the rights or the interest of any suitor or applicant" is too wide, and I cannot accede to the proposition that it is "impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." I agree, however, with the actual decision in the case which seems to me to satisfy the test which I have ventured to lay down.

The order in *Somasundaram Chetti* v. *Administrator-General*[4] was an order under the Administrator-General's Act giving the Administrator-General commission at a certain rate. I think the order may be regarded as an order which put an end to a proceeding in which the Administrator-General claimed commission at a certain rate, and was therefore appealable.

I am unable to agree with the decision in *R.* v. *R.*[5] that an order fixing a date for the hearing of a suit is appealable. This

1. (1872) 8 Beng. L. R. 433.
2. (1872) 9 Bom. H. C. R. 398.
3. (1868) 3 M. H. C. R. 384.
4. (1876) I. L. R. 1 M. 148.
5. (1890) I.L.R. 14 M. 88.

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case does not appear to have been cited with approval in this Court, and was expressly disapproved in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagodda Mallikarjuna Prasada Nayadu* [1] and in *Mussamut Brij Coomaree* v. *Ramrick Dass.* [2]

The decisions in *Commercial Bank of India, Limited* v *Sabja Saheb*[3] (an order dismissing an application by the assignee of a plaintiff to be brought on the record held appealable) and in *Vyasachary* v. *Keshavacharya* [4] (an order dismissing a petition to receive a sum of money as security for costs of an appeal held appealable) in my opinion satisfy the test I have suggested. I should be prepared to hold that an appeal lay from an order refusing a stay of execution (the application for a stay being an ancillary proceeding) though a contrary view was taken in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* [1].

With all respect I find myself unable to agree with the decisions in *Veerabadran Chetty* v. *Nataraja Desikar* [5] and in *Marutha Muthu Pillai* v. *Krishnama Chariar* [6] that an order for evidence to be taken on commission or an order refusing a commission is an appealable order. As regards the latter case I entirely agree with the observation of the learned Judges that the fact that the making of the order was a matter of discretion does not affect the appealability of the order. This fact may be a good reason for refusing to exercise the appellate jurisdiction, but, as it seems to me, it is no reason for holding that the appellate jurisdiction does not exist.

I am unable to agree with what I understand to be the principle of the decision in *Appasami Pillai v. Somasundra Mudaliar*, [7] and I think that the adjudication based on a refusal to exercise discretion, if the effect of the adjudication is to dispose of the suit so far as the Court making the adjudication is concerned, is appealable. This being my view, I must hold, though I do so with considerable reluctance, that the decision in

1. (1901) I. L. R. 24 M. 358.
2. (1901) 5 C. W. N. 781.
3. (1900) I. L. R. 24 M, 252.
4. (1901) I. L. R. 25 M. 654.
5. (1904) I. L. R. 28 M. 28.
6. (1906) I. L. R. 30 M. 143.
7. (1902) I. L. R. 26 M. 437.

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Chinnasami Mudali v. *Arumuga Goundan*[1], is not, in my opinion, good law.

As regards the Calcutta cases I have already referred to *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[2], in connection with the grounds of the decision in that case. As regards the actual decision I should feel some difficulty in following it and I should be disposed to hold such an order was appealable. In *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi*[3] the Privy Council held, on the facts of the case, that an order refusing to transmit for execution an order of the Privy Council was appealable. Their Lordships do not discuss the general question of the meaning of the word 'judgment.'

I am of opinion that an appeal lies from a refusal to confirm an award (*Howard* v. *Wilson*[4]) or a refusal to set aside an award (*Toolsee Money Dassee* v. *Sudevi Dassee*[5]).

I think an appeal would lie from an order refusing to extend the time for giving security for costs, as the effect of the order would be to put an end to the appeal. (In *Kishen Pershad Panday* v. *Tilukdhari Lall*[6] the Calcutta High Court took a different view). In *Gopinath Pati* v. *Moheshwar Pradhan*[7], an order was made setting aside a judgment and a decree and ordering a "remand," and this order was held to be appealable. I agree. The learned Judges observe: "we think, it is a 'judgment' because it disposes of the suit."

As regards the Bombay authorities I may refer to *Vaghogi* v. *Camaji*[8] where it was held 'that an appeal lay from an order dismissing a Judge's summons to show cause why leave granted under Clause 12 of the Letters Patent should not be rescinded and the plaint taken off the file.' Here the adjudication asked for, if made, would have disposed of the suit. So also would an order made on an application to revoke a submission to arbitration. I think such an order is appealable. See *Atlas Assurance Company, Limited* v. *Ahmedbhoy Habibhoy*[9].

I agree with the view expressed by *Garth* C. J. in *Ebrahim* v. *Fuckhrunnissa Begum*,[10] on the point which has been referred

1. (1903) I. L. R. 27 M. 432.
2. (1872) 8 Beng. L.R. 433.
3. (1882) I. L. R. 9 C. 482.
4. (1878) I. L. R. 4 Cal. 231.
5. (1899) I. L. R. 26 C. 361.
6. (1890) I. L. R. 18 C. 182.
7. (1908) I. L. R. 35 C. 1096.
8. (1904) I. L. R. 29 B. 249.
9. (1908) I. L. R. 34 B. 1.
10. (1878) I. L. R. 4 C. 531.

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to us, and I think our answer to the question referred should be in the negative.

Krishnaswami Aiyar J.

Krishnaswami Aiyar J :—In this case the defendant in O. S. No. 117 of 1909 on the file of the High Court (Original Side) moved upon Judge's summons for certain additional issues before Mr. Justice Wallis. The learned Judge dismissed the summons and the defendant appeals under Clause 15 of the Letters Patent of 1865. The question has been referred to the Full Bench whether the order in this case is a judgment within the meaning of that clause. The meaning of the word 'judgment' has often come up for consideration in this Court and the cases show a considerable diversity of opinion. Apart from the question of the true signification of that word in Clause 15 there has also been considerable difficulty in the application of the definition to the facts of individual cases. It is perhaps to be regretted that the question was not set at rest earlier so far as this Court was concerned by the authoritative pronouncement of a Full Bench. Having regard to the contrariety of opinion it is inevitable, whatever view we may take of the meaning of the term 'judgment,' that some decisions of this Court at all events will be found to be at variance with it.

What then does the word 'judgment' mean in Clause 15 of the Letters Patent? In DANIELS' *Chancery Practice*, Vol. I, page 625, the following definition occurs:—"A *judgment* is a sentence or order of the Court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the cause or matter. It is either interlocutory or final." These judicial pronouncements are known as 'judgments' at Common Law and as 'decrees' in Chancery. See page 321, Introduction to SETON on *Decrees*. A more accurate definition is to be found in BLACK on *Judgments*, at page 2, where the author says:—"We may define a 'judgment' as the determination or sentence of the law pronounced by a competent Judge or Court as the result of an action or proceeding instituted in such Court affirming that upon the matters submitted for decision a legal duty or liability does or does not exist." Again at page 3, "the term which, in equity practice, corresponds to 'judgment' at Common Law is 'decree.' A 'decree' is a determination or sentence of equity pronounced by a competent Court upon the controversies submitted for decision.'

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At page 32 the author proceeds to define an interlocutory judgment. "A 'judgment' which is not final is called 'interlocutory,' *i.e.*, an 'interlocutory judgment' is one which determines some preliminary or subordinate point or plea or settles some step, question or default arising in the progress of the cause but does not adjudicate the ultimate rights of the parties or finally put the case out of Court. Thus a judgment or order passed upon any provisional or accessory claim or contention is in general merely 'interlocutory' though it may finally dispose of that particular matter." Distinguishing between judgments and orders the learned author says at page 5 "an 'order' is the mandate or determination of the Court upon some subsidiary or collateral matter arising in an action, not disposing of the merits but adjudicating a preliminary point or directing some steps in the proceedings." It is unnecessary to refer to other definitions some of which are collected in *Chinnasami Mudali* v. *Arumuga Goundan.*[1] But these citations are hardly sufficient for defining the meaning of the term 'judgment' in the Letters Patent though they render us substantial assistance in arriving at the exact signification intended by the framers of the Letters Patent. We find the terms judgment, sentence, order, decree and preliminary or interlocutory judgment, employed in the Letters Patent. It is necessary to understand the use of the term 'judgment' in Clause 15 in such a manner as to give effect to the several words above noted that are employed in the Letters Patent. When the terms final, preliminary, and interlocutory judgment occur in other parts of the Letters Patent it is only reasonable to assign to the word 'judgment' standing by itself in Clause 15 an interpretation which will cover the various kinds of judgments specifically dealt with in other clauses of the Letters Patent. Clauses 39 to 42 of the Letters Patent of 1865 as well as the corresponding clauses of the Letters Patent of 1862 deal with appeals to the Privy Council. They contemplate an appeal from a final judgment, decree or order as a matter of course, provided certain requirements as to value or certificate of fitness are satisfied. An appeal to the same tribunal is allowed from any preliminary or interlocutory decree, judgment, order, or sentence with the leave of the Court. If an interlocutory

1. (1903) I. L. R. 27 M. 432.

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judgment is appealable to the Privy Council with the leave of the Court, it can only be when it is a decision of the High Court on appeal or in its original jurisdiction if the Bench passing the interlocutory judgment is composed of the majority of the Judges of the Court. It would be a strange result to hold that from an interlocutory judgment from the original side leave may be given to appeal to the Privy Council under Section 40 even though it is a pronouncement of a single Judge, there being no appeal to the High Court itself under Clause 15. The proper view, therefore, to take of the meaning of the word 'judgment' in S. 15 is to understand it as covering an 'interlocutory or preliminary judgment.' But a preliminary or interlocutory judgment is not the same thing as an interlocutory order. And, whatever width of interpretation the term 'judgment' may be capable of, it ought not to be so understood as to cover 'interlocutory orders.' It was contended by Mr. Seshagiri Aiyar that as Clause 15 speaks of 'judgment' not being a 'sentence' or 'order' passed and made in a criminal trial, that all orders other than those that are made in a criminal trial should be held to be comprised within the term 'judgment.' This argument appears to me to be inadmissible. An order in a criminal trial does not correspond to the interlocutory order in a civil cause but ordinarily to an order of discharge or acquittal which terminates in a criminal proceeding in favour of a prisoner as a sentence does the other way. The phrase "not being a sentence or order passed or made in any Criminal trial" was not in Clause 14 of the Letters Patent of 1862 which corresponded to Clause 15 of the later Letters. It appears to have been inserted in Clause 15 of the Letters Patent of 1865 mainly to indicate the exception dealt with in Clause 25 later, though it is not confined to a sentence or order in the exercise of Orginal Criminal Jurisdiction as Clause 25 is.

It was suggested in the course of the argument that Act VIII of 1859 which was in force at the time of the issue of the Letters Patent would be a valuable guide to the meaning of the word 'judgment' though the provisions of the Act were not binding as to what should be held to be appealable judgments. Having regard to the language of Clause 37 of the original Letters Patent and of the later Letters the view appears to

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have been entertained that the class of appealable judgments must be confined to those that were appealable under the Code of Civil Procedure. Both in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* [1] and in *Sonbai, widow of Fazul Habibhai* v. *Ahamed Bhai Habibhai* [2] the opinion was expressed that as S. 363 of Act VIII of 1859 prohibited appeals from interlocutory orders in the course of the suit and the only appeals from orders were under S. 36, 76, 85, 95, and 119, the word 'jndgment' in Sections 15 of the Letters Patent should receive a restricted interpretation so as not to allow an appeal in cases where no appeal lay under the Code. This view was obviously open to exception. The rules to be made under Clause 37 for regulating proceedings in civil cases, though the Court was to be guided as far as possible by the provisions of the Code of Civil Procedure, could hardly include a provision regulating the right of appeal already determined by S. 15, and as pointed out by the Full Bench of this Court in *Chappan* v. *Moidin Kutti*[3], the provision as to appeals in the Code applies to cases in which appeals lie from one Court to another and not from one member of a Court to other members of the same Court. Having arrived then at the conclusion that the word 'judgment' covers a 'preliminary or interlocutory' judgment as well as a 'final' judgment, that it does not include an 'interlocutory' order and the interpretation is uncontrolled by any provision of the Code of Civil Procedure though having regard to the reference to the Code in S. 37 radical divergence from it is hardly to be expected, we may proceed to further delimit the exact boundaries of the field covered by the term as used in Clause 15.

The definitions with which we started will hardly suffice to mark the boundary accurately. There is no doubt that the adjudication of a right or liability which determines a suit or appeal is a judgment. Even a refusal to adjudicate which puts an end to a particular suit or appeal must equally amount to a 'judgment.' This has not always been borne in mind as we shall find later on in dealing with the case of *Chinnasawmi Mudali* v. *Arumuga Goundan*[4] A decision on the merits of the controversy between the parties is

1. (1872) 8 Beng. L. R. 433.
2. (1872) 9 B. H. C. R. 398.
3. (1872) I. L. R. 22 M. 68.
4. (1903) I. L. R. 27 M. 432.

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not essential to the termination of a suit or appeal. Even though the proceeding is not a suit or appeal as technically understood, but is only what may be called an original petition like an application for a succession certificate or the appointment of a guardian, the pronouncement which terminates the proceeding has the characteristics of a judgment, though there is a formal difference in the designation of the proceeding (see Rule 4, Mofussil Rules of Practice). But the right or liability with reference to which the Court adjudicates or declines to do so must be the substantive claim or liability and not, as Mr. Seshagiri Aiyar tried to maintain, a right to a particular judicial procedure or a detriment suffered in being denied the benefit of a rule of procedure. But I do not think we shall be justified in confining the term 'judgment' to final disposal of suits, appeals or original petitions or proceedings in execution. Preliminary or interlocutory judgments which ascertain rights and direct further inquiries which determine liabilities, though further directions are given for ascertaining the measure of those liabilities, must be deemed to fall within Clause 15. See, however, *Rahimbhoy Habibhoy* v. *Turner*[1] and *Syed Muzhar Husein* v. *Bodha Bibi*[2], as to final judgments under S. 595 of the Civil Procedure Code of 1882.

The Common Law Procedure Act, 15 and 16 Victoria, Chapter 76, recognised the distinction between interlocutory and final judgments. See Ss. 27 and 140. But they were both 'judgments' as distinguished from 'interlocutory orders' under Ss. 52, 54 and 222. I am unable to agree with Mr. Sundara Aiyer that interlocutory judgments which decide the merits are not judgments under S. 15. The question still remains whether orders in incidental proceedings for attachment or arrest before judgment, for a temporary injunction or for the appointment of a receiver are judgments within the meaning of the term as used in Clause 15. Such proceedings are not natural steps in the determination of the cause. But they are remedies though provisional in their character, and the judicial determination of those proceedings may well be deemed to be analogous to the disposal of orginal petitions which determines the rights of parties. An appeal was specially provided from

1. (1890) I. L. R. 15 B. 155 (P. C.) 2. (1894) I.L.R. 17 A. 112 (P. C.)

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such orders even in the Code of 1859 and the decisions in such cases may well be treated as interlocutory judgments ; cases of stay of execution, or security for costs, whether the order is in favour of one party or another, must stand on the same footing as temporarily affecting the rights of parties.

We have now to examine the decisions to see how far these principles are in accord with the rules that are deducible from the cases. So far as I have been able to discover, there are only four or five decisions in which an endeavour has been made to arrive at a definition of the term 'judgment' as used in Clause 15 of the Letters Patent. The decision in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* [1] stands at the head of them all. A mandamus was issued by Mr. Justice *Phear* sitting on the Orginal Side to the Justices of the Peace of Calcutta to compel them to refer to arbitration a question of compensation. "The Mandamus was to do certain things or to show cause to the contrary so that the order of the Orginal Judge did not determine any question whatever between the parties. It only initiated the proceedings by which the liability of the Justices to make compensation would be ascertained and determined." *Couch*, C. J., says : "We think *judgment* in Clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." I would only stop here to remark that a decision which determines the cause or proceeding so far as the particular Court is concerned, though it refuses to adjudge the merits, must also be deemed to be a judgment : for otherwise the rejection of a plaint for defect of form or insufficiency of Court fee or a return of it for want of jurisdiction would be outside the definition of the learned Chief Justice which could hardly have been his meaning. I may also observe that the "part" which is determined may be a part of the claim separable from the rest or a determination of liability generally, though the actual measure of liability may be a matter of account.

1. (1872) 8 Beng. L. R. 433.

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The decision in *Sonbai, widow of Fazul Habibhai* v. *Ahmed Bhai Habibhai*[1] is in substantial accord with the judgment of the High Court of Bengal though Chief Justice *Sargeant* seemed to consider that Clause 15 was governed by Act VIII of 1859. That this latter view is erroneous appears to be clear from the decision of the Privy Council in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi*,[2] where an order of a single Judge refusing to transmit an order of the Privy Council to a Subordinate Court for execution was held to be appealable as a 'judgment' under S. 588 of the Code of 1882. The decision in *De Souza* v. *Coles*[3] was the first attempt in Madras to ascertain the meaning of the word 'judgment' in the Letters Patent. Leave to institute a suit having been refused by the Judge sitting on the Original Side on the ground that the cause of action having in great part arisen outside Madras, an appeal was preferred under Clause 15. The two very learned Judges who decided that case held that the term meant any decision or determination affecting the rights or the interest of any suitor or applicant. If they had stopped there it might be doubted whether this language was not in substantial accord with that of Sir *R. Couch* in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[4]. But Sir *Adam Bittlestone* proceeds to say at page 388: "When the language giving the appeal is so general in its terms as that contained in the fifteenth clause of the chapter, it is, we think, impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." It seems to me that this is manifestly too wide a definition. And the opinion has been expressed in later cases in Madras and elsewhere that this is so. I need not stop to notice the passing remark in *R.*——v. *R.*——[5] that every order of a single Judge is a judgment. For this has been disapproved of in two later cases—*Srimantu Rajah Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasad Nayadu*[6] and *Kuppusami Chetti* v. *Rathnavelu Chetti*[7]—in which one of the learned Judges who was a party to the judgment in *R*—v. *R*—[5] joined in the disapproval. In *Chinnasamy Mudali* v. *Arumuga Goundan*[8] which was an appeal from a decision of a

1. (1872) 9 Bom. H. C. R. p. 398.
2. (1882) I. L. R. 9. C. 482 at p. 493.
3. (1868) 3. M. H. C. R. 384.
4. (1872) 8 Beng. L. R. p. 433.
5. (1890) I. L. R. 14 M. 88.
6. (1900) I. L. R. 24 M. 358.
7. (1900) I. L. R. 24 M. 511.
8. (1903) I. L. R. 27 M., 432.

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single Judge declining to interfere under S. 25 of the Small Cause Courts Act, Sir *S. Subrahmanya Aiyar*, officiating C. J., and *Russell*, J. defined 'judgment' in S. 15 of the Letters Patent by confining it to an adjudication of the right or liability. But they regarded a refusal to interfere as no judgment. This raises a question as to whether the refusal to exercise a discretion does not involve the application of the judicial mind as much as a decision in the exercise of discretion. Observations similar to those that have been made in this case are to be found in *Srimantu Raja Yarlayadda Durga Prasad Nayadu* v. *Srimantu Raja Yarlagadda Millikarjuna Prasada Nayadu*[1] and in *Appasamy Pillai* v. *Somasundaram Mudaliar*[2] in which latter case *Benson* and *Boddam*, JJ. refused to entertain an appeal from an order refusing leave to appeal *in forma pauperis* because it was within the discretion of the court to grant or refuse such leave. I am unable to agree in the principle enunciated in these decisions as regards discretionary orders and orders refusing to exercise a discretion not being appealable. The view was expressly disapproved of by *Subrahmanya Aiyar* and *Miller*, JJ. in *Marutha Muthu Pillai* v. *Krishnamachariar*[3]. In the Privy Council case of *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi*[4] it was held (see page 493) that the appellate court had rightly entertained the appeal under S. 15 from the order of the single Judge who refused to transmit the order of the Privy Council for execution. The appellate court which entertained the appeal in Calcutta had expressly stated in *In the matter of the Petition of Kally Soondery Debia*[5] that the wrong exercise of discretion by the judge below was the ground on which the appeal was entertained. In *De Souza* v. *Coles* [6] the point was well put by Sir *Adam Bittleston* at page 388. The question of the right of appeal, he pointed out, was different from how a matter of discretion should be dealt with by an appellate court. He said " it is obvious that the duty of the appellate court in disposing of the appeal may vary considerably according to the nature of the order or decree complained of. And we think it may be stated as a general rule that when the determination complained of is merely the result of the exercise of discretion on

1. (1900) I. L. R. 24 M., 358.
2. (1902) I. L. R. 26 M., 437.
3. (1906) I. L. R. 30 M., 143.
4. (1882) I. L. R. 9 C. 482.
5. (1880) I. L. R. 6 C. 594.
6. (1868) 3 M. H. C. R. 384.

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the part of the judge, in a matter which was a proper subject for the exercise of that discretion, the appellate court would rightly decline to interfere." The fact of a matter being within the discretion of the original judge is not a ground for refusing to entertain the appeal but a sufficient reason for declining to interfere with that discretion. I cannot therefore accept Mr. Seshagiri Aiyar's apparent contention that if the order of the single judge is one which he has made in the exercise of discretion, a party has no right to the exercise of that discretion in a particular way and is therefore not entitled to appeal when he is aggrieved by an erroneous exercise of that discretion.

It is unnecessary to examine all the cases in detail. It is sufficient to say that I have gone through every one of them. In some of them the true principle does not appear to have been recognised or kept in view. In some others the application of the principle to the particular facts of the case appears to be open to exception. All the Calcutta cases cited at the bar—*The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[1]; *Howard* v. *Wilson*[2]; *Ebrahim* v. *Fuckhrunnissa Begum*[3]; *Hur-Chunder Chowdhry* v. *Kali Sundari Debi*[4]; *Toolseemoney Dassee* v. *Sudevi Dassee*[5]; *Mussamut Brij Coomaree* v. *Ram-rickdass*[6]; *Gopinath Pati* v. *Moheswar Pradhan*[7]; with the exception perhaps of the decisions in *Mussamut Amirrunnessa* v. *Baboo Behary Lall*[8]; *Mowla Buksh* v. *Kishen Pertab Sahi*[9]; *Manly Paterson*[10] *Lutf Alikhan* v. *Asgur Reza*[11]; and *Kishen Pershad Panday* v. *Tiluckdhari Lall*[12] which are cases of leave to appeal to the Privy Council dealt with on special grounds, appear to be in accord with the principles I have endeavoured to formulate. So are also all the Bombay cases cited: *Sonbai, widow of Fazul Habibhai* v. *Ahmadbhai Habibhai*[13]; *Hirji Jina* v. *Narran Mulji*[14]; *Vaghoji* v. *Camaji*[15]; *Jehangir Cowasji* v. *The Hope Nills Limited*[16]; *Atlas Assurance, Company, Limited* v. *Ahamedbhoy*

1. (1872) 8 Beng. L. R. 433.
2. (1878) I. L. R. 4 C. 231.
3. (1878) I. L. R. 4 C. 531.
4. (1882) I. L. R 9 C. 482.
5. (1899) I. L. R. 26 C. 361.
6. (1901) 5 C. W. N. 781.
7. (1908) I. L. R. 35 C., 1096.
8. (1876) 25 W.R. 529.
9. (1875) I. L. R. 1 C., 102.
10. (1881) I. L. R. 7. Cal. 339.
11. (1890) I. L. R. 17 C. 455.
12. (1891) I. L. R. 18 C., 182.
13. (1872) 9 B., H.C.R. 398.
14. (1904) I. L R. 29 B., 249.
15. (1875) 12 B. H. C. R. 129.
16. (1909) I. L. R. 33 Bom.216.

Habibhoy[1]; and *Soonabai* v. *Tribhovan Das* [2]. As regards the Madras cases it is impossible to express oneself as in agreement with them all. The decision in *De Souza* v. *Coles* [3] is certainly right, whatever may be said with reference to the definition given of "judgment." In *Somasundaram Chetty* v. *Administrator General*[4] an appeal was rightly held to lie against an order determining the rate of commission payable to the Administrator General. In *R.* —v. *R*—[5] the order of adjournment was certainly not appealable. But an appeal lay as regards the application to vary the rate of alimony and though the definition of judgment there was certainly open to exception the order of adjournment itself was not varied in appeal. In *Vanangamudi* v. *Ramasami*, [6] where a single judge had set aside a decree for rent in part and called for a report as to the remainder, there was at least an interlocutory judgment from which an appeal was rightly held to lie. In *Commercial Bank of India, Limited* v. *Sabja Saheb* [7] the application of a transferee from the plaintiff to be added as a party was refused. As the refusal was a determination of the proceeding so far as he was concerned, it seems to me he was rightly held entitled to appeal. The decision in *Srimanta Raja Yarlagadda Durga Prasada Nayadu* v. *Srimanta Raja Yarlagadda Mallikarjuna Prasada Nayadu*[8] where an order refusing to stay execution was held not to be a judgment, proceeded on the authority of L. P. A. No. 5 of 1900 and *Mohabir Prasad Singh* v. *Adhikari Kunwar*[9] and upon the view that the order of the single judge was one made by him in the exercise of his discretion. Staying execution is a temporary interference with a right adjudged, and the refusal to stay is a refusal of a provisional remedy, as would be the refusal of an injunction or an attachment before judgment. It appears to me that the sounder view is that of the Calcutta High Court in *Mussammat Brij Coomaree* v. *Ramrick Dass*[10]. The Calcutta case *Mohabir Prosad Singh* v. *Adhikari Kunwar*[11], which this court purported to follow, is explained away in the later decision in *Mussammut Brij Coomaree* v. *Ramrick Dass*[10]. I

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1. (1907) I. L. R. 34 B. 1.
2. 10 Bom. L. R. 337.
3. (1868) 3 M. H. C. R. 384.
4. (1876) I. L. R. 1 M., 148.
5. (1890) I.L.R. 14 M. 88.
6. (1890) I.L.R. 14 M 106.
7. (1900) I. L. R. 24 M., 252.
8. (1900) I. L. R. 24 M. 358.
9. (1894) I. L. R. 21 C. 473.
10. (1901) 5 C. W. N. 781.
11. (1894) I. L. R. 21 C. 473.

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have already dealt with the argument derived from the discretionary character of the order. If pushed to its full length it would cover all cases of specific relief which are within the discretion of the court and the grant or refusal of such relief would cease to be the subject of appeal under Clause 15 of the Letters Patent, a result which shows its weakness. It is difficult to distinguish in principle between an order staying execution or refusing to stay it and an order directing security for the costs of an appeal during its pendency. Though the failure to furnish the security may eventually lead to the dismissal of the appeal where security was ordered, the refusal to direct security is not attended with any such consequences. All these orders affect the right of the parties though temporarily and must be deemed to fall within the definition of *judgment*. It is worthy of note that in *Kuppusami Chetti* v. *Rathnavelu Chetti*[1] an order for stay of execution and an order for security for costs referred to by way of illustration were treated on the same footing though in favour of the opposite view that no appeal lay. It was rightly held, if I may presume to say so, in *Sabubhathi Chetti* v. *Narayanasami Chetti*[2] and *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla*,[3] that an appeal lay from an order refusing to extend time for the giving of security for the costs of an appeal and from an order directing security to be given. Two further cases remain to be noticed—*Veerabadran Chetty* v. *Nataraja Desikar*[4] and *Marutha Muthu Pillai* v. *Krishnamachariar*[5]. It is difficult to support the latter. An order refusing to issue a commission, however serious the ultimate result to the party, is a purely interlocutory order and not a judgment terminating a ,suit or other proceedings or affecting the merits. As regards the former it is possible to contend that so far as the judgment of the single judge of this court was concerned it was passed in revision and not in the course of an interlocutory proceeding. The Subordinate Judge had refused to issue a commission for the examination of a witness. That was a mere interlocutory order. Mr. Justice *Boddam* set that aside in revision. Could his order be treated as other than an

1. (1900) I. L. R. 24 M. 511.
2. (1902) I. L. R. 26 M. 502.
3. (1902) I. L.R. 26 M. 502.
4. (1904) I.L.R. 28 M. 28.
5. (1906) I LR. 30 Mad. 143.

interlocutory so far as the execution proceeding was concerned in which the witness was to be examined on commission ? It is unnecessary to express an opinion on the question whether Mr. Justice *Boddam's* order was a judgment. A full examination of the cases cited on both sides leads me to the conclusion that no appeal lies from the order of Mr. Justice *Wallis* in the present case. I would answer the reference accordingly.

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Ayling J. :—I agree that the answer to the questions referred for disposal should be in the negative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present.:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

B. Rangiah Chetty	.. Appellant*
v.	.. (*Plaintiff*)
B. Subramania Chetty & others	.. Respondents
	.. (*Defendants*).

Rangiah Chetty v. Subramania Chetty.

Court-fees Act, S. 7, Cl. (iv) (*b*) *Sch. I—Art. I, Sch. II,—Art.* 17 (vi)—*Partition suit—"Suit to enforce right to share on the ground that it is joint family property," meaning of.*

Per Majority (*Ayling* J. *contra*).—A suit for partition of joint family property where the plaintiff is in joint possession with the other co-parceners is governed by Art. I, Sch. I, of the Court Fees Act and not by Art. 17 (vi) of Sch. II of the Act. A suits for partition by a member of a joint Hindu family is governed by S. 7, Cl. (iv) (*b*) of the Court Fees Act.

Meaning of the words, "suit to enforce right to share" "right to share" and "on the ground that it is joint family property" explained.

Per *Ayling* J :—Cl. (iv) (*b*) of S. 7 appears to be designed to cover merely the rare, but quite possible, cases where the plaintiff's status as a co-parcener is in dispute, and is sought to be enforced, and a suit for partition of joint family property where the plaintiff is in joint possession with others is governed by Art. 17 (vi) of Sch. II.

Appeal from the decree of the District Court of North Arcot in O. S. No. 18 of 1905.

This appeal coming on for hearing before Mr. Justice *Munro* and Mr. Justice *Abdur Rahim* † the Court made the following

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*A. No. 12 of 1907. 20th October 1910.

† 25th and 26th August 1910.

Rangiah Chetty v. Subramania Chetty.

ORDER OF REFERENCE TO A FULL BENCH:—The suit was under S. 525 of tne Civil Procedure Code to file an award made in an arbitration for dividing joint family properties. The suit was dismissed, and hence this appeal. The preliminary objection is taken that the court fee paid, Rs. 10, is insufficient. The order refusing to file the award is a decree, and the question in dispute is whether the court fee payable on the appeal is to be fixed under Article 1 of Schedule I of the Court-Fees Act or under Article 17 (vi) of Schedule II. It is contended that, if the appellant had sued for partition of the joint family property, the court fee on the plaint would have been only Rs. 10, and that the court fee for the appeal should be the same. For the proposition that the court fee on the plaint in such a suit is Rs. 10, reliance is placed upon *Kirty Churn Mitter* v. *Aunath Nath Deb*[1] and *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli*.[2] A Bench of this court in Referred Case No. 5 of 1894 refused to follow the above decision and held that a suit for partition of joint family property is chargeable with an *ad valorem* fee. In *Velu Goundan* v. *Kumaravelu Goundan*[4] the same view was accepted, though the point does not appear to have been argued; the actual matter decided being that the value of the suit for the purpose of jurisdiction was the amount at which the plaintiff valued his share. The Clacutta High Court in a recent decision in *Bidhata Roy* v. *Ram Charitra Roy*[5] have dissented from the view taken in *Velu Goundan* v. *Kumaravelu Goundan.*[4] If the court fee is to be fixed under Article 1 of Schedule I of the Court-Fees Act, it is, we take it, because the suit is considered to fall under S. 7, Clause (iv) (*b*) of the Court-Fees Act. We find considerable difficulty in holding that a suit for partition of joint family property, when the plaintiff—as here—is in joint possession with the other co-parceners, falls under this provision. From the statements made at the bar it does not appear that the practice in this court has been uniform. The question is one likely to arise frequently, and we think it should be definitely settled. We, therefore, refer to a full Bench the question whether, in a suit for partition of joint family property where the plaintiff is in

1. (1882) I. L. R., 8 C. 757.
2. (1893) I. L. R., 20 C. 762.
3. (1894) 4 M. L. J. 110.
4. (1896) I. L. R., 20 M. 286,
5. (1907) 6 C. L. J. 651.

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joint possession with the other co-parceners, the fee is to be fixed under Article 1 of Schedule I of the Court-Fees Act or under Article 17 (vi) of Schedule II of the Act.

T. R. Ramachandra Iyer for appellant.

M. K. Narayanasami Iyer K. Srinivasa Aiyengar and M. B. Doraisami Iyengar for respondent.

The arguments and cases quoted on both sides are fully referred to in the judgment of Mr. Justice Krishnaswami Aiyar.

The Court delivered the following

OPINION:—*The Chief Justice*:—The point which has been referred to us is by no means free from difficulty.

I think S. 7, iv (*b*) of the Court-Fees Act 1870 applies when the right which is sought to be enforced is a right to share as a separate sharer in joint family property; in other words, it applies to the ordinary suit for partition.

It was argued that S. 7 (iv) (*b*) of the Court-Fees Act only applies when the right which is sought to be enforced is a right to share as a joint sharer in joint family property, but it seems to me it is not likely that the Legislature would have intended to make specific provision for a comparatively rare form of action and to make no specfiic provision for a very common form of action.

If 'to share' in S. 7 (iv) (*b*) means to share as a separate sharer, the court fee, in a suit for partition of joint family property when the plaintiff is in joint possession with the other co-parceners, is otherwise provided for, is governed by S. 7 (iv) (*b*), and is *ad valorem*.

I have had the advantage of reading the judgments which my learned brethren are about to deliver and I agree with *Krishnaswami Aiyar*, J. that our answer to the question which has been referred to us should be that Article 1 of the 1st Schedule of the Court-Fees Act applies.

Krishnaswami Aiyar J:—The question stated in the order of reference for our decision is as follows:—

"Whether, in a suit for partition of joint family property where the plaintiff is in joint possession with the other co-parceners, the fee is to be fixed under Article 1 of Schedule I of the

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Court Fees Act or under Article 17 (vi) of Schedule II of the Act."

Whichever of the two provisions applies, we have first of all to determine what is the "subject matter in dispute."

The plaintiff being in joint possession of the whole, whether that possession is actual or constructive, seeks to convert that into separate possession of his share. It may, therefore, be said that the value of the subject matter in dispute is the difference between the value of the separate possession of the share and the value of the joint possession of the whole; or, as it has been well put in *Ragendro Loll Gossami* v. *Shama Churn Lahoory*, [1] "it is the value of the convenience of changing the form of the enjoyment of the plaintiff's share." It seems to me that it may at once be conceded that it is not possible to estimate this difference in value or this convenience in the form of the enjoyment at a money value. But this concession is not enough to settle the application of Article 17 (vi) of the 2nd Schedule to the Act. It is further necessary to bring the case within the article, that it is not otherwise provided for by the Act. And herein lies the difficulty.

If either S. 7 (iv) (*b*) or S. 7 (v) should be applicable there would be a provision under the Act which would exclude the application of Article 17 (vi). The referring order does not ask us to decide between S. 7 iv (*b*) and S. 7 (v). The learned judges who have made the reference say that as between these two clauses S. 7 (iv) (*b*) would apply to the present case if Article 17 (vi) was out of the case. S. 7 (iv) (*b*) empowers the plaintiff to state the amount of the value of the relief sought. S. 7 (v) prescribes special rules for ascertaining the value. But in both the cases the fee payable is *ad valorem* under Article 1 of Schedule I of the Court Fees Act.

Section 7 (iv) (*b*) is in these terms: "In suits to enforce the right to share in any property on the ground that it is joint family property." What is the meaning of this clause? Does it cover a suit for partition of joint family property where the plaintiff is in joint possession? It has no application where the property is not the property of a joint family. It must be admitted that a suit by a tenant in common in joint possession

1. (1879) I.L.R. 5 C. 188.

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for the partition of the common property not belonging to a joint family cannot fall under this clause. As the relief in such a case cannot be estimated at a money value, Article 17 (vi) is the only provision applicable. But it does not follow from this, as suggested by Mr. Justice *Mookerjee* in *Bidatha Roy* v. *Ram Charitra Roy*, [1] that where the property belongs to a joint family the suit to enforce the right to share in it may not fall within the special provision enacted in Section 7 (iv) (*b*). It has been argued that the language of the clause is not "to enforce the right to *a* share in the property" but "to enforce the right *to* share." This difference, it is said, indicates that the clause does not deal with the common suit for partition amongst the members of a Hindu family, but with the possible case of a coparcener suing for joint possession where he has been excluded from it or for participation in the profits of the common property, or it may be for a mere declaration of the right to joint possession coupled with a claim to participation in any benefit to which the joint family is entitled. Without in any way repudiating the possibility of such cases being within the scope of the clause in question, as to which, compare *Gundo Anandrav* v. *Krishnarav Govind* [2] and *Muttakke* v. *Thimmappa* [3], we may ask the question whether it is at all likely that special provision is made in this clause for such rare cases without dealing with the common case of a suit for partition by a coparcener in possession. It may also be pointed out, adopting the language of *Candy* J. in *Raoji* v. *Bala* [4] with reference to similar words in Article 127 of the Limitation Act, that the clause provides for a suit "to enforce the right" and not "to establish the right." It has also to be borne in mind that the clause in question does not deal with a suit *to share* in any property which would be more susceptible of the meaning of participation in enjoyment but of a suit to enforce the right to share. Stress has been laid upon the fact that the clause uses the verb 'to share' and not the noun 'share'. And it is argued that if a coparcener's suit for partition was intended to be covered by the clause, the clause would run "in suits to enforce the right in any property." But there seems to be no point in

1. (1907) 6. C. L. J. 651 at page 655.
2. (1867) 4 B. H. C. R. A. C. 55.
3. (1891) I. L. R., 15 M. 186 at p. 191.
4. (1890) I.L.R. 15 B. 135.

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this observation, for the language of the clause is more in accordance with the theory of the Hindu Law as regards a coparcener not being entitled to a definite share until actual partition, He is only entitled to share in the joint family property until partition and becomes entitled to a definite share when a decree for partition is made in the suit. As observed by the Privy Council in *Appovier* v. *Rama Subba Aiyan*, [1] "according to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share." In *Prithi Pal Singh* v. *Thakur Jewahir Singh* [2] their Lordships again observed: "until partition no member of a joint Hindu family is entitled to a definite portion of the family estate." There appears to be therefore no objection to the legislature having avoided the phrase 'a right to a share' and preferred the expression 'a right to share.' But it has been further argued that the words "on the ground that it is joint family property" preclude the construction that a suit for partition is covered by the clause. The result is arrived at by construing the phrase "on the ground that it is joint family property" to mean "on the ground that it is property of a continuing joint family." There appears to be no warrant for so understanding the words of the clause. There is a joint family at the date of the suit. The plaintiff's right to have the property divided is on the ground that the property belongs to the joint family on that date. There is no further cause of action necessary to entitle the plaintiff to sue. The fact that it is joint family property is sufficient to entitle a coparcener without more to claim his share by partition. I am unable therefore to accept the reasoning of the Bombay High Court in *Dagdu* v. *Totaram* [3] or of the Calcutta High Court in *Bidhata Roy* v. *Ram Charitra Roy*.[4] The former of these cases is not in accord with the decision in *Motibhai* v. *Haridas* [5] and it is not clear whether it was a case where the plaintiff was in joint possession. There is no force in the remark that, as the other clauses of S. 7 (iv) deal with reliefs incapable of valuation, S. 7 (iv) *(b)*

1. (1866) 11 M. I. A. 75 at p. 89.
2. (1886) I. LR. 14. C. 493 (P. C.)
3. (1909) I. L. R. 33 B. 658.
4. (1907) 6 C. L. J. 651.
5. (1896) I. L. R. 22 B. 315.

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should be only understood as referring to an abstract claim or right, for as already pointed out, a suit by a coparcener in possession for division of his share is not capable of estimation at a money value. It may be a good argument against allowing a suit by a coparcener out of possession for division or joint possession to fall within it. The Calcutta case merely refuses to disturb the current of authority in that Court as established by the decisions in *Kirty Churn Mitter* v. *Aunath Nath Deb*[1] and *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli*.[2] It may be that the actual decision in *Wali Ullah* v. *Durga Prasad Saidan*[3] is open to no exception as the plaintiff there does not appear to have been in joint possession when he asked for partition. This is, however, apart from the question of the correctness of the approval there expressed of the Calcutta cases. But whatever doubts may still exist as regards the cogency of the above reasoning, they seem to me to be completely set at rest by the corresponding language of the various Limitation Acts and the interpretation that has been uniformly placed upon it. When the Court Fees Act was passed, the Limitation Act in force in the country was Act XIV of 1859. Section 1, Clause 13, of that Act ran as follows: "To suits to enforce the right to share in any property, movable or immoveable, on the ground that it is joint family property* * the period of twelve years" from certain specified dates. Now it will be noticed at a glance that the difference between the first portion of this clause and S. 7 (iv), Cl. (*b*), is that "in" is substituted for the opening word "*to*" and the words "moveable or immoveable" are omitted. Being a law of limitation, the rest of the clause proceeds to specify a starting point for the running of the prescribed period. And it may also be that the clause assumes that the plaintiff is out of possession though there are no express words to say so, for otherwise limitation ought not to be allowed to run against him. The fact, therefore, that the clause of the Limitation Act is applied to a plaintiff out of possession while the clause of the Court Fees Act is sought to be applied to a coparcener in possession has no bearing upon the interpretation of the words " to enforce the right to share in any property on the ground that it

1. (1882) I. L. R. 8 C. 757. 2. (1893) I. L. R. 20 C. 762.
3. (1906) I. L. R. 28 A. 340.

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is joint family property" which are words common to both the enactments. Act IX of 1871, which introduced into the 1st column of Article 127 the result of judicial decisions as to the plaintiff contemplated being one out of possession, made no change whatever in the rest of the language of the 1st part of the old clause. The words "to enforce a right to share" were retained as before. The Article ran thus: "By a Hindu excluded from joint family property to enforce a right to share therein." The same language has been retained in the Limitation Acts of 1877 and 1908 with the mere change of the word "Hindu" into "person." Cause 13 of S. 1 of Act XIV of 1859 and Article 127 of the subsequent Limitation Acts have always been constructed by the Privy Council and by the Courts in India as applicable to suits for partition by a coparcener in a Hindu joint family. Section 7, Clause (iv) (*b*), of the Court Fees Act which followed almost *verbatim* the language of Clause 13 of S. 1 of the Limitation Act of 1859 is bound to receive the same construction. In *Lakshman Dada Naick* v. *Ramachandra Dada Naik*[1] and *Appasami Odayar* v. *Subramanya Odayar*[2] the Privy Council construed the provision of the first Limitation Act. In the latter case they said: "By S. 1, Clause 13, of Act XIV of 1859, a suit for a share of the family property not brought within 12 years from the date of the last participation in the profits of it would be barred." The same view was taken by the Indian High Courts. See *Wooma Soonduree Dossee* v. *Dwarkanath Roy*[3], *Gossain Doss Koondoo* v. *Seroo Koomaree Debia*[4], *Govindan Pillai* v. *Chidambara Pillai*[5] and *Hansji Chhiba* v. *Valabh Chhiba*[6]. Article 127 of the Limitation Act of 1871 received the same construction—*Kali Kishore Roy* v. *Dhununjoy Roy*[7]. The same interpretation was put upon the provision of the Limitation Act of 1877 both by the Privy Council and by the High Courts in India—*Rai Ragunath Bali* v. *Rai Maharaj Bali*[8], *Pirthi Pal Singh* v. *Thakur Jewahir Singh*[9], *Hari* v. *Maruti*[10] and *Nilo Ramachandra* v. *Govind Ballal.*[11] The

1. (1880) I. L. R. 5 B. 48.
2. (1887) I.L.R. 12 M. 26 (P.C.)
3. (1868) 11 W. R. 72.
4. (1873) 19 W. R. 192.
5. (1866) 3. M. H. C. R. 99.
6. (1883) I. L. R. 7. B. 297.
7. (1877) I. L. R. 3. C. 228.
8. (1885) I.L.R. 11 C. 777 (P.C.)
9. (1886) L. R. 14. C. 493 (P. C.)
10. (1882) I. L. R. 6 B. 741.
11. (1885) I. L. R 10 B. 24.

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remark in *Muttakke* v. *Thimmappa*, [1] where, speaking of a suit for a declaration that plaintiff as a member of an Aliyasantana family was joint in estate with the defendants and that he was entitled to the registry in his name of the family property, the Court said that Article 127 did not refer to a suit for a share, must be treated as erroneous in view of the overwhelming consensus of opinion already noticed. In the light therefore of the provisions contained in the various Limitation Acts and especially of the language of Cl. 13, S. 1, of Act XIV of 1859 and the interpretation uniformly placed on them, it is impossible to resist the conclusion that S. 7, Cl. (iv) (*b*), of the Court Fees Act does apply to a suit by a coparcener in possession for partition of joint family property. This view is in accordance with the opinion expressed in *Velu Goundan* v. *Kumarvelu Goundan*[2]. The case (Referred Case No. 5 of 1894) in 4 M. L. J. 110 was not one of joint family property and could not therefore fall under S. 7, Cl. iv (*b*).

During the course of the argument the question was raised whether S. 7, Cl. (v), was not the more appropriate provision. Reference was made to *Balvant Ganesh* v. *Nana Chintamon* [3] and *Degdu* v. *Totaram* [4] as in support of that view. It is not clear from the facts set out in these cases whether the plaintiff was in joint possession at the date of suit. It is impossible therefore to rely on them as any authority for the view that S. 7, Cl. (v), is applicable to a suit where the plaintiff in possession seeks for partition. The learned Judges who made the reference have not stated any question for our consideration as to whether any, and if so, what suits for partition would fall under that clause.

Nor is it necessary for us to express any opinion on the question which was referred to, though not fully discussed, in the course of the argument whether a suit for joint possession by a coparcener excluded from possession would fall within S. 7, Cl. (iv) (*b*), or S. 7, Cl. (v), of the Court Fees Act. When such a question arises it will be material to consider whether a suit for joint possession is not as much a suit for possession as a suit for exclusive possession and whether, both

1. (1891) I. L. R. 15 M. 186 at p. 119.
2. (1896) I. L. R. 20. M. 289.
3. (1893) I. L. R. 18 B. 209.
4. (1909) I. L. R. 33 B. 658.

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kinds of suits being suits in ejectment, (see. WILLIAMS on *Ejectment*, p. 178, and FREEMAN on *Co-tenancy* Ss. 290 and 293) they should not both be held to fall within S. 7 (v.)

I would answer the question referred by saying that Article 1, Schedule I, applies.

Ayling J :—I agree in the view expressed by *Batchelor* and *Beaman* JJ. in *Dagdu* v. *Totaram*, [1] that a suit to recover by partition a definite and ascertained share of specified property cannot fall under S. 7, (iv) (*b*), of the Court Fees Act. This clause appears to be designed to cover merely the rare, but quite possible, cases where the plaintiff's status as a co-parcener is in dispute, and is sought to be enforced. On this view alone, its inclusion with the other cases of doubtful or difficult valuation contained in the section is intelligible. I do not think it is safe to proceed by analogy of the way Article 127 of the Limitation Act has been interpreted.

If S. 7 (iv) (*b*) be ruled out, such a suit must fall under Article 17 (vi) of Schedule II or under S. 7 (v) of the Court Fees Act. I have no hesitation in concurring in the opinion of *Garth* C. J. in *Kirty Churn Mitter* v. *Aunath Nath Deb* [2] as to the correct method of regarding the relief claimed in suits for partition by a coparcener who is in joint enjoyment at the time of suit; his prayer is merely to change the form of enjoyment and could only be valued by deducting from the the value of his share as ascertained in partition the value of his beneficial enjoyment as coparcener before partition. Apart from personal considerations, which it is impossible to appraise, the two should be equal. It appears to me eminently a case in which it is impossible to estimate in money the value of the suit. To tax such a suit on the value of the partitioned share without deduction under S. 7 (v) seems to me inequitable. This point of view does not appear to have been presented to the Court either in *Velu Goundan* v. *Kumaravelu Goundan*, [3] *Motabhai* v. *Haridas*, [4] or *Dagdu* v. *Totaram* [5]

1. (1909) I. L. R. 33B. 658.
2. (1882) I. L. R. 8. C. 757.
3. (1896) I. L. R. 20 M. 289.
4. (1896) I. L. R. 22. B. 315.
5. (1909) I. L. R. 33. B. 658.

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In *Wali Ullah* v. *Durga Prasad Saidan*[1] the remarks of *Garth* C. J. are quoted with approval. But the learned Judges decided that an *ad valorem* fee was leviable under the circumstances of the case under disposal. The plaintiff appears to have been the purchaser of the undivided share of a co-parcener, and the suit was brought "to establish his title and to recover possession of his share, the claim of partition being added merely to make the relief sought effectual." Such a case is easily distinguishable from the suit of a co-parcener in joint possession, who merely seeks to convert his joint possession into separate enjoyment.

In *Balwant Genesh* v. *Nana Chintamon* [2] also, *Garth* C. J's dictum is quoted with approval, though in the case under disposal a different decision was arrived at—on what grounds, it is not easy to say.

For the above reasons, I think the Court fee should be fixed, in cases of the class referred to, under S. 17 (vi) of Shedule II.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Gorakala Kanakayya .. Appellant (*Defendant*).*

v.

Janardhana Padhi & others .. Respondents (*Plaintiffs*).

Madras Acts—Estates Land Act, S. 3, Cl. (7), S. 6, Cl. (1)—"*Final decree.*"

By the Full Bench :—Where an appeal from a decree in ejectment passed under the old law is heard after the date of the commencement of Madras Act I of 1908, the defendant being a ryot in possession of ryoti land on such date, he is entitled to claim a right of occupancy under S. 6, Cl. (1) of the Act notwithstanding the original deeree.

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The words "final decree" in Cl. (7) of S 3 mean a decree which has ceased to be modified on appeal.

Per Chief Justice :—Obiter.—Where a landlord obtains a decree in ejectment before the commencement of the Act, and executes it before the commencement of the Act, the ryot could not claim the benefit of the first part of S. 6.

Per *Krishnaswami Aiyar* J.:—The final decree of a competent Civil Court referred to in the definition of 'old waste' is a decree obtained in a pro-

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* S. A. No. 539 of 1909. 14th November 1910.

1 (1906) I. L. R. 28 A. 340. 2. (1893) I. L. R. 18 B. 209.

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ceeding independent of that in which the question of occupancy right is dealt with under S. 6, Cl. (1) or the presumption under S. 23 is made.

Second appeal from the decree of the District Court of Ganjam in A. S. No. 317 of 1908, presented against the decree of the Court of the District Munsif of Sompeta in O. S. No. 103 of 1908.

Parthasarathi Aiyangar, for *T. Rangachari*, for appellant, contended that the word "final" is not used in contradistinction to 'preliminary' and relied upon *Shaikh Ewaz* v. *Mokuna Bibi* and *Govinda Parama Guruvu* v. *Dandasi Rao Dhaneo*[2]. and S. 6 of the Estate's Land Act.

V. Ramesam for respondent relied upon A. S. 174 and 177 of 1907 and distinguished *Govind* v. *Dandasi*[2] as being a case in which there was no decree in favour of the landlord. If there is once a decree in favour of the landlord, then it can of course be reversed on the merits but it can no longer be reversed on the ground that the land is ryoti land. The word "final" when not used in combination with "decree" means not appellate but when used with "decree," it is a term of art and is always used in contradistinction to "interlocutory"—19 American Cyclopœdia; p. 53; definition of 'final' in S. 2, C.P.C., Order XX, rr. 12, 13; and 15, S. 97—and cited *Huntly (Marchioness of)* v. *Gaskell*[3]; *Standard discount es* v. *Otard de la Grange*[4]; *Neill* v. *Duke of Devonshire*[5]; Rules of Supreme Court, Order 58, r. 3. The Act should not be retrospectively applied. The function of the appellate Court is to see whether the lower Court has power. [*Parthasarathy Aiyangar* refered to S. 177.] —*Ponnama* v. *Arumugan*[6] *Quiltor* v. *Mapleson*[7] is based upon fact that in England appeal is re-hearing.

Statutes must not be read as having reprospective operation —*Egre* v. *Winn Mackenzie*[8] Lastly possession in this case being possession retained owing to a stay order cannot be availed of. Possession after decree is no possession in the eye of the law— *Amrita Ravji* v. *Shirdlia Nangen*[9].

The Court (their Lordships Mr. Justice *Miller* and Mr. Justice *Krishnaswami Aiyar*) made the following

1. (1876) I. L. R. 1 A 132.
2. (1910) 20 M. L. J. 558.
3. (1905) 2 Ch. 656.
4. (1877) L. R. 3 C. P. D. 67 at 71.
5. (1882) 8 App. Cases 135.
6. (1882) L. R. 9 Q. B. D. 672.
7. (1905) A. C. 383.
8. (1896) 1 Ch. 135.
9. (1908) I. L. R. 33 B. 317.

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ORDER OF REFERENCE TO THE FULL BENCH:— The plaintiffs are the proprietors of an 'estate' which falls within the definition of that term in the Estates Land Act. They seek to eject the defendant on the ground that he is only a yearly tenant and that proper notice to quit has been served upon him. The defendant claims permanent rights of occupancy. The District Munsif passed a decree for ejectment on the 25th April 1908. The defendant appealed to the District Court on the 20th July 1908 contending that the District Munsif should have held that he had permanent rights of occupancy. The District Judge agreed with the District Munsif and confirmed his decree on the 23rd of October 1908. The defendant has preferred this second appeal. It is argued on his behalf that he had occupancy rights under S. 6 of the Estates Land Act which came into force on the 1st July 1908. Section 6 declares "that every ryot now in possession * * * of ryoti land not being old waste * * * shall have a permanent right of occupancy." Obviously the word "now" refers to the date of the commencement of the Act. The section speaks of "every ryot now in possession" and the word "now" is used in juxta-position with the word "hereafter" in the clause "or who shall hereafter be admitted by a landholder into possession." The second part of the 1st clause of the section saves rights of permanent occupancy acquired in old waste before the commencement of the Act. If there could be any doubt as to the meaning of the word "now" that has been removed by the explanation added by the amending Act IV of 1909 to sub-section (1). It says the "expression 'every ryot now in possession' shall include every person who continues in possession at the commencement of this Act." It seems impossible to resist the conclusion that it was the deliberate intention of the legislature to confer a right of occupancy upon a ryot in possession at the date of the commencement of the Act. Such an interpretation may have the effect of nullifying vested rights under contracts previously entered into. But it is impossible to refuse to place the interpretation that ryots in possession of land at the date of the commencement of the Act are entitled to occupancy rights on the mere general principle that a legislative enactment should not be interpreted so as to affect vested rights or to give it retrospective operation by applying it to pending suits. As

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pointed out by *Bowen* L. J. "no doubt, as a general rule, a statute does not affect pending proceedings, but that rule is only a guide where the intention of the legislature is obscure; it does not modify the clear words of a statute"—*Quilter* v. *Mapleson* [1]. In *In Re Williams and Stepney* [2] it was held by the Court of Appeal that a submission prior to the Arbitration Act included a provision in the schedule to the Act "that the costs of the submission were in the discretion of the arbitrators or umpire" though the arbitration alone commenced after the commencement of the Act. They gave effect to the plain intention of Parliament that a submission before the Arbitration Act came into force was subject to the provisions of the Act. The institution of the suit in this case before the Estates Land Act came into force cannot affect the applicability of S. 6 if the defendant was in possession of the land at the date of the commencement of the Act. The contention that the possession of the defendant ceases in law by a decree for possession against him is a confounding of possession with title and is not worthy of serious notice. But it is argued that S. 6 has no application because the plaintiffs had obtained a decree for ejectment from the District Munsif and the Appellate Court had no power to set aside the District Munsif's judgment unless the District Munsif was in error in passing his judgment under the law as it stood at the time. Our attention has been called to the decisions of the Privy Council in *Ponnamma* v. *Arumugam* [3] and of the Court of Appeal in *Eyre* v. *Wynn-Mackenzie* [4]. In the first of these cases the Supreme Court of Ceylon had refused a decree for partition of an intestate's estate. The Privy Council was invited to set aside that decree on the ground that the ordinance which precluded the maintenance of a suit without letters of administration to the estate of the deceased had been modified by the new Code of Civil Procedure passed since the decision of the Supreme Court. Without considering the question whether the provision of the new Code was retrospective, their Lordships declined to accede to the prayer of the appellant on the ground that the judgment of the Supreme Court was right when it was given; see page 388. Their Lordships further added that it was not the practice

1. (1882) 8 Q. B. D. 672 at p. 677.
2. (1891) 2 Q. B 257.
3. (1905) L. R. A. C. 383.
4. (1896) 1. Ch.. 135.

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of the Judicial Committee to entertain any other appeal than one strictly so called in which the question was whether the order of the court from which the appeal was brought was right on the materials which that court had brought before it. The decision of the Privy Council is no authority for the broad proposition that if a right decision is pronounced in accordance with the law as it stood at the date of the decision it is not competent to the appellate court under the law as subsequently modified, to which retrospective effect is expressly given, to modify the decision of the original court in accordance with the change in the law. If the appellate court is a mere court of error whose functions are limited to correcting the error committed by the original court, a change in law subsequent to the passing of the original court's decision cannot entitle the appellate court to interfere with the original decision. But nothing has been pointed out to us to lead us to that conclusion. Order 41, Rule 33, entitles the appellate court, and Order 42 read with that rule entitles this court in second appeal, to pass such further or other order as the court thinks fit. Even before the passing of the new Code of Civil Procedure it was not the theory under the old code that the appellate court had only the limited authority to rectify any errors that might be pointed out in the original decision—see Ss. 565 to 569. The appellate court confirmed the original decree, or it varied or reversed it—S. 577. In suits for partition the birth or death of a member subsequent to the decree of the original court for partition has been held to entitle the appellate court to pass the appropriate decree for partition with reference to the added or reduced claimants for partition —see *Sakharam Mahadev Dange* v. *Hari Krishna Dange*[1]. In *Rustomji* v. *Sheth Purushotamadas*[2] it was held by *Jenkins* C.J. and *Chandavarkar* J. that it was open to a court of appeal to vary a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed. See also the learned judgment of *Mookerjee* J. in *Ram Ratan Sahu* v. *Mohant Sahu*[3]. The remarks in *Ramanadan Chetti* v. *Pulikutti Servai*[4] and in *Subbaraya Mudali* v. *Manika Mudali* merely refer to the ordinary practice of the appellate court and do not affect

1. (1881) I. L. R., 6 B. 113.
2. (1901) I. L. R., 25 B. 606.
3. (1907) 6 C.L.J. p. 74.
4. (1898) I.L.R. 21 M. 288 at 290.
5. (1896) I.L.R. 19 M. 345 at 347.

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the power to proceed on grounds not available at the time of the original decision. There is no warrant therefore for supposing that the appellate courts in India are confined to the determination of the correctness of the original decision in accordance with the law as it stood at the date of that decision. See the observation of *Sir V. Bashyam Iyengar* J. in *Kristnama Chariar* v. *Mangammal*[1]. As to the decision in *Eyre* v. *Wynn-Mackenzie*[2] it is sufficient to remark that the time for appeal from the original judgment had expired at the date of the coming into force of the new law and the court of appeal declined to extend the time for appeal to enable the appellant to take advantage of the change in the law. This case has therefore no application to the question under consideration. On the other hand the decision in *Quilter* v. *Mapleson*[3], appears to support the view we have taken. There the change in the law was subsequent to the decision of the Queen's Bench Division. The language of the new law was clearly retrospective. It is true that the court of appeal there said that appeals to the court of appeal under the Chancery practice were in the nature of a re-hearing and this circumstance is adverted to by *Lord Davey* in the judgment of the Judicial Committee in *Ponnama* v. *Arumogam*[4]. But it is equally clear that both the *Master of the Rolls* and *Bowen* L. J. relied on the language of Order 58, rule 5, which empowers the court of appeal to pass such further or other order as the case may require—language which exactly corresponds to the words of Order 41, rule 33, of the Code of 1908. We must therefore disallow the objection based on the ground that the authority of the appellate court is limited to the determination of the question whether the original court was right according to the law in force at the time of its judgment. That S. 6 was applicable to appeals pending when Madras Act I of 1908 came into force was the view taken in *Govinda Parama Guruvu* v. *Dandasi Pradhanu*[5] and in Second Appeal No. 1592 of 1907 by two other Benches of this Court, and we see no reason to depart from the view to which one of us was a party.

1. (1903) I.L.R. 26 M. 91.
2. (1896) 1 Ch. 135.
3. (1882) L. R. 9 Q. B. D. 672.
4. (1905) L. R. A. C. 383.
5. (1910) 20 M. L. J. R. 528.

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Mr. Ramesam next contends that in second appeals this court is limited to the grounds mentioned in S. 100 of the code and that we have no power to interfere unless we can hold that the decision of the District Judge was contrary to law. Whatever difficulty there may arise in case the change of the law came into operation after the preferring of the second appeal, there is none in this case as the Estates Land Act came into force before the appeal was preferred to the District Court and the defendant claimed to be entitled to occupancy rights. The fact that S. 6 of the Estates Land Act was not referred to specifically in the grounds of appeal to the lower appellate court (see, however, Order 41, rule 2) does not prevent the decision of the District Judge being contrary to law within the meaning of S. 100.

There is a further contention, however, which remains to be noticed. Treating S. 6 as applicable, Mr. Ramesan argues on the authority of the decision of the learned *Chief Justice* and Mr. Justice *Abdur Rahim* in Appeal Suits Nos. 197 and 174 of 1905 that the land in suit is old waste within the definition of that term in S. 3, Cl. (7), and is therefore within the exception in Clause (1) of S. 6. He is no doubt fully supported by that decision. But we entertain doubts as to its correctness. Mr. Ramesam drew our attention to some English cases where the phrase "final judgment" has been explained—*Standard Discount Company* v. *La Grange*[1]; *Boyson* v. *Altrnicham Urban District Council*[2]. It is enough to point out with reference to them that the phrase "final judgment" is there understood as in contradistinction to the phrase "interlocutory.' Whenever the expression "final judgment" is used in connection with an appeal from one tribunal to another there can be no doubt whatever that it must be understood as used in contradistinction to the interlocutory judgment of a particular court. In *Marchoiness of Huntly* v. *Gaskell*[3]. however, *Cozens- Hardy* L. J. speaks of a judgment of the Court of Session under appeal to the House of Lords, as a final judgment having the force of *res-judicata* in a proceeding in the English court. See also *Doe* v. *Wright*[4]; *Burnaby* v.

1. (1877) 3 C. P. D. 67 at p. 71.
2. (1903) 1 K. B. 547.
3. (1905) 2 Ch. 656.
4. (1839) 50 R. R. 534.

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Earle[1]. Such a judgment would, however, not be final for the purpose of *res-judicata* under the Code of Civil Procedure. (See *Holloway*, J. in *Sri Raja Kakurlapudi Suriyanarayanarazu* v. *Chellamkuri Chellamma*,[2] for the view of continental jurists). It is true that the explanation of the word "final" attached to S. 13 of the Code of 1882 has no application to S. 3 of the Estates Land Act. The omission in S. 11 of the new code of Explanation IV to S. 13 of the old code cannot affect the meaning of the phrase "finally decided" in that section (see Woodroffe and Amir Ali's Commentary on Act V of 1908, page 138) and is only an argument in favour of the view that that phrase by itself may mean "decided with conclusive effect" without reference merely to a particular tribunal. The framers of the Estates Land Act, which received the assent of His Excellency the Governor on the 25th March 1908, would probably have had in mind, when they used the words "final decree" in S. 3, Cl. (7), the phrase "finally decided" in S. 11 of the C.P.C. which was passed on the 21st March 1908. S. 3, Cl. (7), speaks of a "final decree of a competent civil court" establishing that the ryot has no occupancy right and not of a final judgment. There is no such thing known to the Code of Civil Procedure as a preliminary or interlocutory decree in a suit in ejectment establishing that the ryot has no occupancy right. The word "final" could not have been inserted before the word "decree" in contradistinction to such a preliminary or interlocutory decree. The Estates Land Act which must have been passed with reference to the forms of decrees in force in the country could not appropriately speak of preliminary or interlocutory decrees establishing that the ryot has no occupancy right. The reference to final decree in that clause cannot be treated as the final decree of a particular court in contradistinction to an interlocutory or preliminary decree. It is difficult also to suppose that rights established under the final decree of one court were intended to be protected when the matter becomes at large as soon as an appeal is lodged (see *Nilvaru* v. *Nilvaru*[3], *Bholabhai* v. *Ade Sang*[4], *Balkishan* v. *Kishan Lal*[5]) or that the establishment by one court that the ryot has no occupancy right

1. (1882) 9 Q. B. 490 at p. 472.
2. (1870) 5 M. H. C. R. 176.
3. (1882) I. L. R. 6 B. 110 at p. 112.
4. (1885) I. L.R. 9 B. 75 at p. 81.
5. (1889) I. L. R. 11 A. 148 at p. 161.

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should bring the land within the definition of "old waste" even though the appellate Court might in its turn have arrived at the opposite conclusion that the ryot had occupancy rights, under the law in force prior to the commencement of the Act. S. 177 speaks of the final order or decision fixing the rent. There can be no doubt that the order or decision there referred to is not that of any particular court but a determination which has become conclusive because it has not been appealed against or has been pronounced in appeal with no further possibility of interference. As we entertain doubts about the correctness of the ruling in Appeal Suits Nos. 174 and 197 of 1905 as to the meaning of the phrase "final decree of a competent Civil Court" in clause (7) of S. 3 of the Estates Land Act we refer the following question to the Full Bench :—

"Where an appeal from a decree in ejectment passed under "the old law is heard after the date of the commencement of "Madras Act I of 1908, the defendant being a ryot in possession "of ryoti land on such date, is he entitled to claim a right of "occupancy under S. 6, Clause (1), of the Act notwithstanding "the original decree?"

K. Parthasarathy Aiyangar for appellant, cited *Arunachelathudayan* v. *Veludayan*[1], *Shohrat Singh* v. *Brodgmann*[2], *Seosagar* v. *Sitaramnad Yarkham*[3] to show that a decree under appeal is not final.

V. Ramesam for respondent cited in addition to the cases cited before the referring Bench an instance of preliminary decree in ejectment suits and conditional decrees for ejectment for non-payment of rent. He also contended that the explanation attached to S. 13, C.P.C., of 1882 showed that it was not the normal sense of the term and that the application of fanciful analogies based on other sections of the statute is to be deprecated. See the observations of *Lord Loreburn* in *Pearson and son Ltd.* v. *Dublin and S. E. Ry. Company*[4].

He also contended that whatever the meaning of the word final, in this case, at the date of the coming into force of the Act, there was no appeal pending and therefore the decree was final.

The Full Bench delivered the following

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1. (1870) 5 M.H.C. R. 215.
2. (1882) 4 A. 376 (F. B.)
3. (1897) I.L.R. 24 C. 616.
4. (1909) A.C. 217 at p. 219.

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Chief Justice.

OPINIONS:—*Chief Justice.*—The question which has been referred to us is "where an appeal from a decree in ejectment passed under the old law is heard after the date of the commencement of Madras Act I of 1908, the defendant being a ryot in possession of ryoti land on such date, is he entitled to claim a right of occupancy under S. 6, Clause (1) of the Act notwithstanding the original decree?" The question really resolves itself into a very narrow one—the meaning of 'final decree' in S. 3 (7) of the Act. It is of course perfectly clear that the word 'now' in S. 6 (1) refers to the date of the commencement of the Act. Under S. 6 (1) a ryot who at the date of the commencement of the Act is in possession of ryoti land which is not old waste has a permanent right of occupancy. "Old waste" is defined in S. 3 (7). By the last paragraph of this sub-section a technical meaning is given to "old waste" as including ryoti land in respect of which before the passing of the Act the landholder had obtained a final decree of a competent civil court establishing that the ryot had no occupancy right. There seems no particular reason why land in respect of which such a decree had been obtained should be called "old waste," but the provision was probably introduced in the definition section in this way for convenience of drafting. One thing is clear, and that is that the the legislature intended to extend the class of lands which fell within the definition of "old waste," and by so doing to extend the class of lands which were excluded from the operation of S. 6, in the interest of the landholder. The question raised in the order of reference came before *Abdur Rahim,* J. and myself in *Raja of Venkatagiri* v. *Narasayya* A 174 and 197 of 1905 and we took the view that the word "final" in S. 3 (7) meant final with reference to the court which pronounced the decree, and that a decree was none the less final for the purposes of the section because an appeal was pending when the Act came into operation. It seemed to us unreasonable to hold, unless we were constrained to do so by the language used by the legislature, that the effect of a decree in the landowner's favour was overridden by the Act unless the decree was that of the court of final appeal, or unless, where the decree was not that of the court of final appeal, the time for appealing from the decree had expired at the date of the commencement of the Act. It is

clear that where a landlord obtains a decree in ejectment before the commencement of the Act and executes it before the commencement of the Act, the ryot could not claim the benefit of the first part of S. 6. And it seems anomalous that a question of title might turn on the more or less accidental circumstance of execution or non-execution of a decree in ejectment. But the intention of the legislature must of course be gathered from the language used by the legislature. Some meaning must be attached to the word "final" in S. 3 (7) and there is no doubt much force in the argument that, in a suit for ejectment, final decree of a Court does not mean final as distinguished from a preliminary or interlocutory decree of that Court in the sense in which these decrees are provided for in the Code of Civil Procedure.

I do not think we should be warranted in treating the word as surplusage and if it does not mean final as distinguished from preliminary or interlocutory as regards the Court which pronounced the decree, it is difficult to resist the argument that it means final in the sense that it cannot be appealed against. My learned brethren are of opinion that the word 'final' should be so construed. I confess to considerable doubt upon the point, but, after hearing the matter fully argued, I do not propose to dissent from this view. I would, therefore, answer the question which has been referred to us in the affirmative.

Krishnaswami Aiyar J. :—I have carefully reconsidered the question referred to the Full Bench in the light of the further arguments addressed to us by the learned pleader for the respondents. I have been strengthened in the conclusion indicated in the order of reference. I have no desire to repeat the arguments stated in the last paragraph of that order. The question is what is a "final decree of a competent civil court establishing that the ryot has no occupancy right." Does it include a decree which is under appeal? I attach no importance to the indefinite article "a" before "competent civil court" any more than in the phrase " a court of competent jurisdiction" in S. 2 of Act VIII of 1859. To my mind it does not mean "any." It would have been quite out of place to use the definite article "the" instead. I think that "a final decree establishing that the ryot has no occupancy right" is a decree that is not under appeal or liable to be set aside on appeal. It seems to me to be altogether incongruous to convert ryoti land into old waste by reason of the adjudication of one civil court and to retain it in the same category although that

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Krishnaswami Aiyar J.

adjudication may be set aside on appeal. It was pointed out that the last clause of Sub-S. 1 of S. 6 saves a permanent right of occupancy that may have been acquired in old waste. Ryoti land which is old waste only by reason of the adjudication of no occupancy right by one court must continue to be old waste though the very adjudication which brought it within that category is upset on appeal. I cannot think that such a result which necessarily flows from the contention of the respondent could have been intended by the legislature. It was conceded for the respondents that, if at the commencement of the Act there was an appellate decree declaring occupancy rights in reversal of an original decree against them, the landlord could not be said to have obtained a final decree negativing occupancy rights. It is difficult to reconcile this with the interpretation of "a final decree" as the last decree of any one court. Again S. 23 of the Act lays down that "when in any suit or proceeding it becomes necessary to determine whether any land is old waste or ryoti land other than old waste it shall be presumed to be ryoti land other than old waste until the contrary is proved." Now this presumption applies to all suits or appeals whether pending at the date of the commencement of the Act or instituted thereafter. Although a decree may have been passed by a civil court establishing that the ryot has no occupancy right, the appellate court will, under this section, be bound to presume in favour of such a right until the contrary is proved. It seems to me to be somewhat inconsistent to relegate ryoti land to the head of old waste by reason of the adjudication of one court that there is no occupancy right, and to presume in favour of occupancy in appeal despite the decision of the original court, for the fact of such a decision having been obtained cannot itself preclude the presumption. I am inclined to think that the final decree of a competent civil court referred to in the definition of old waste is a decree obtained in a proceeding independent of that in which the question of occupancy right is dealt with under S. 6 Cl. (1), or the presumption under S. 23 is made.

Mr. Ramesam argued that the words "final order or decision fixing the rent" in S. 177 were of no value in interpreting the phrase "final decree establishing that the ryot has no occupancy right," for according to him there was only one officer who had to make the final order or decision. This contention proceeds upon a misapprehension of the provisions

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of Chapter XI of the Act. Under S. 170 the preliminary record prepared under S. 169 has to be submitted to the confirming authority for sanction. The settlement of the rents comes into force upon such confirmation. Then under S. 171 an appeal lies to a superior revenue authority or other special officer determined by rule or empowered by the Local Government. Then S. 127 provides for revision by the Board of Revenue. Section 173 permits a regular suit in the civil court, within a time limited, by an aggrieved person. Clause 5 of S. 173 says "when a civil court has passed final orders or a decree, under this section, it shall notify the same to the Collector of the district." The final order or the decree under the section must certainly mean the decree passed on appeal in the suit in case an appeal has been preferred from the decree of the orginal court. Again S. 175 which empowers a revenue officer to correct a *bona fide* mistake in an order or decision under S. 168 or 169 requires him to stay his hand in case an appeal is pending against the order under S. 171, 173, or 179. The appeal under S. 173 from the Revenue Officer's order must certainly include an appeal from the decision of the Civil Court passed under that section. When we come next to S. 177 which speaks of the final order or decision fixing the rent which is not to be enhanced for a period of 20 years except on certain grounds, it seems to be abundantly clear that the finality here contemplated is not as regards a particular officer or court, but, where there has been an appeal or revision or suit, the decision of the authority of last resort. It seems to me that we should place a similar construction upon the phrase "final decree" in the definition of old waste in S. 3, Cl. 7. I adhere to the other reasons set out in the order of reference which led Mr. Justice *Miller* and myself to this conclusion. I am prepared to accept the exposition of the word "final" in the expression 'final decree' given by Mr. Justice *Holloway* in his very able judgment in *Arunachellathudayan* v. *Veludayam* and *A. P. Kunhi Perechan Kidavu* v. *Chembakat Kesava Paniker*[1]. My answer to the question referred is in the affirmative.

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1. (1870) 5 M. H. C. R. 215 at pp. 212, 223.

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Ayling J.

Ayling J.—It appears to me that some meaning must be attached to the word "final" as qualifying "decree" in Cl. (7) of S. 3 of the Madras Estates Land Act: and, that, in the connection in which it is used, it must be taken to indicate a decree which has ceased to be liable to be modified on appeal. I would answer the reference in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Narayana Chetty & another .. Plaintiffs*
(*Appellants*)

v.

Muthiah Servai & others .. Defendants
(*Respondents*).

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Registration Act Ss. 49, 17—"*In evidence of any transaction affecting such property*"—*Lease compulsorily registrable but unregistered—Not admissible in evidence in suit for specific performance.*

An agreement in writing to grant a lease which requires registration is a contract which affects immoveable property and cannot be received in evidence in a suit for specific performance of such agreement whether possession was given in pursuance of the agreement or not.

Second appeal from the decree of the District Court of Madura in A. S. No. 58 of 1906 presented against the decree of the District Munsif of Shivagunga in O. S. No. 315 of 1905.

S. Venkatachariar for appellants.

S. Soundararaja Aiyangar for *S. Srinivasa Aiyangar* for respondents.

This was a suit to compel specific performance of an agreement to give plaintiff a sub-lease. First defendant obtained a lease from the lessees of the Sivagunga Zemindary. He agreed to sub-lease the same by an agreement, Exh. *A*, dated 4th January 1905. Exh. *A* runs as follows:—" Receipt executed on 4th January 1905 to these * * * A sub-lease has been arranged and settled through this and fixing the rent of the said sub-lease at the rate of Rs. 280 per fasli. Rs. 280, the rent due for the current

* S. A. 7 of 1908. 3rd November 1910.

fasli, has been received by me in cash this day. In respect of this and in respect of my having delivered the arid tracts to you to be enjoyed from fasli 1314, this itself shall be a receipt. After the lessees have executed a lease-deed to me and get it registered according to the Rajinama stated above, I shall at your cost execute a lease-deed according to the terms of the said deed and get it registered. Until then this shall be in force. You shall keep this itself as a record." The courts below dismissed the suit holding that Exh. *A* was inadmissible in evidence and consequently the suit was not maintainable. Plaintiffs appealed.

C. S Venkatachariar for appellant:—The document is admissible in evidence. The cases *Srinivasa* v. *Venkataraju*[1] and the Full Bench case *Rajah of Venkatagiri* v. *Narayana Reddi*[2] support my contention. Section 49 of the Registration Act says "no document shall be received in evidence of any transaction affecting such property unless it has been registered." An agreement to lease does not create an interest in immoveable property. A lease does. Therefore an agreement to lease is admissible in evidence although not registered.

S. Soundararaja Aiyangar:—Under S. 2 of the Registration Act lease includes an agreement to lease. Exhibit *A* purports to be a receipt. It is in fact a demise. It is not a mere agreement to lease. *Srinivasa* v. *Venkataraju*[1] has been wrongly decided.

This case coming on for hearing in the first instance* before their Lordships *Benson* J. and *Krishnaswami Aiyar* J. the Court made the following

ORDER OF REFERENCE TO THE FULL BENCH:—

Benson J.—I am not at present satisfied that the decision in the case of *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju*[1] is not in accordance with the principle underlying the decision of the Full Bench in *Raja of Venkatagiri* v *Narayana Reddi*[2] and does not govern the present case. It is not, however, altogether easy to appreciate the grounds on which the Full Bench proceeded. The question before us is one of great importance and of considerable difficulty. I am, therefore, of opinion

* 8th February 1910.

1. (1907) 17 M. L. J. 218. 2. (1894) I.L.R. 17 M. 456 (F. B.).

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that a reference to the Full Bench in the terms proposed by my learned brother is desirable.

Krishnaswami Aiyar J.—The suit is to compel specific performance of an agreement to give the plaintiff a sub-lease. Exhibit *A*, which is called a receipt, is in terms a promise to execute a sub-lease and to get it registered on a future date. The document comes within the definition of a lease in S. 3 of the Registration Act and is compulsorily registrable under Clause (*d*) of S. 17. The courts below have dismissed the suit holding that the document was inadmissible in evidence and that the suit, therefore, was not maintainable. The appellant's vakil relies upon the Full Bench decision in *Raja of Venkatagiri* v. *NarayanaReddi*[1] and on the unreported case *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju*[2] (*Wallis* and *Boddam* JJ., not *Wallis* and *Benson* JJ. as incorrectly stated in the report). If the latter case is correctly decided the appellant is entitled to succeed. In *Raja of Venkatagiri* v. *Narayana Reddi*[1] the question was as to the admissibility of a Kabuliat executed by the lessee in proof of a contract on the part of the lessor to execute a cowle and to get the Kabuliat registered. The action itself was for damages " for the breach of contract on the part of the defendant in refusing to register the Kabuliat and to give the plaintiff a cowle and also in disturbing his possession." The contract to grant a cowle was not in writing. A draft cowle prepared by the plaintiff had not been executed by the defendant. The contract to grant a cowle and to register the Kabuliat could only be regarded as oral. No question could properly be raised with regard to the admissibility of the Kabuliat in evidence of such an oral contract. The Kabuliat which was in writing and came within the definition of lease required registration and was inadmissible under S 49 to prove a transaction affecting immoveable property. But it was apparently thought that there was nothing to prevent its admissibility to prove the perfectly valid oral agreement to grant a cowle and to register the Kabuliat. The decision of the Full Bench therefore in allowing the Kabuliat to be received in evidence of the contract to grant a cowle and to register the Kabuliat is not an authority for the position that an unregistered lease or agreement to grant a lease can be used in evidence for proving the

1. (1894) I.L.R. 17 M. 456 (F. B.) 2. (1904) 17 M.L.J. 218.

lease or the agreement to grant it; see, however, the judgment of *Subramania Aiyar* and *Miller* JJ. in S. A. No. 973 of 1904. It was argued that in a suit for specific performance the written agreement to grant the lease is not used as evidence of a transaction affecting immoveable property. It was also contended that it is only a lease that creates an interest in the property and not a mere agreement to give a lease, and in the absence of creation of any interest in the lessee we cannot speak of an agreement to grant a lease of immoveable property as affecting the immoveable property. It is difficult to accept this argument. Section 49 provides that a document required by S. 17 to be registered shall not affect the immoveable property comprised therein and further that it shall not be received as evidence of any transaction affecting such property. Can it be said that an agreement to grant a lease of immoveable property is not a transaction affecting the property? Such an agreement creates an equitable interest in favour of the promisee [see FRY on *Specific Performance* (4th Edition) page 589] and must therefore be regarded as a transaction affecting the property though it does not amount to the transfer of an interest under the Transfer of Property Act. Courts of Equity treat a tenant in possession under an instrument which would be specifically enforceable as in the same position as if a valid lease were in existence. See REDMAN'S *Landlord aud Tenant* page 130; and in the present case possession was given under Exhibit *A*. Section 17 of the Act requiring the registration of the agreement to lease, it is difficult to suppose that S. 49, which renders the unregistered document inadmissible, allows the admissibility of the document to prove the agreement on the ground that it does not affect the immovable property comprised in it. Why should registration of an agreement to lease be compulsory if the transaction can be proved by an unregistered instrument? It may be said that the provision for compulsory registration of an agreement to lease has sufficient scope for its operation in the fact that non-registration subjects the instrument to the risk of priority of a later instrument registered. But this is not a sufficient reason for including agreements to lease in S. 17 and not in S. 18. For the rule as to priority applies to optionally registrable instruments as well. It seems also proper to bear in mind that

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having specified in Clause (*b*) of S. 17 instruments creating a right in immoveable property of one hundred rupees and upwards the legislature has taken care to except from this clause "a document not itself creating such an interest but merely creating a right to obtain another document which will, when executed, create such an interest." The enactment of the exception is some evidence to show that but for it, a document, which is only an agreement to execute another, may be deemed to affect the property comprised in it.

As an agreement to grant a lease, however, falls within clause (*d*) and not within clauses (*b*) and (*c*) in respect of which the exception referred to has been enacted, it may well be considered that by the inclusion of the agreement to give a lease in the very definition of a lease and the separate specification of leases of immoveable property in clause (*d*) of S. 17 as requiring registration, that the legislature has indicated that agreements to lease immoveable property do create an interest in such property or at all events affect such property so as to render the unregistered agreement to lease inadmissible in evidence of the transaction.

It is worthy of remark that the Full Bench in *Raja of Venkatagiri* v. *Narayana Reddy*[1] did not dissent from the decision in *Hurjivan Virji* v. *Jamsetji Nowroji*,[2] where the suit was to compel the defendant to produce the document for registration or to execute another document and duly register the same or to recover damages for wrongfully preventing the registration of the document already executed, and the suit was dismissed on the ground that the document could not be received as evidence of the contract between the parties. The Full Bench merely observed that the High Court of Bombay had overlooked the prayer for damages for non-registration of the document. The authority of the Bombay decision as regards the non-admissibility of the document so for as the suit was for specific performance of the contract to give the lease is not rejected. But, if the case of *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju*[3] be correctly decided the appellant is entitled to judgment. That was a suit for specific performance of an agreement to grant a

1. (1894) I. L. R. 17 M. 456. 2. (1885) I. L. R. 9 B. 63.
3. (1907) 17 M. L. J. 218.

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lease. This court was of opinion that the Full Bench decision in *Raja of Vencatagiri* v. *Narayana Reddy*[1] was authority for the view " that the document embodying the agreement to lease does not require registration to be admissible in evidence where it is only used for the purpose of proving the contract for the breach of which the action is brought." The Full Bench did not use the unregistered Kabuliat to prove a written contract to grant the lease but to prove on oral agreement to grant a cowle (for the draft cowle had not been executed) and to register the Kabuliat. There appears therefore to have been a misapprehension in *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraju*[2] as to the true ground of decision in *Raja of Venkatagiri* v. *Narayana Reddi* [2]. If I have understood it aright I may add that we have found some difficulty in appreciating the grounds of that decision. As I entertain doubts about the correctness of the decision in *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju*[2] I think it desirable to refer to the Full Bench the following question:—

"Whether an agreement in writing to grant a lease which requires registration can be received in evidence in a suit for specific performance of such agreement, (1) where possession is given in pursuance of the agreement, (2) where it is not."

C. S. Venkatachari for appellant (plaintiff)—The question is whether in a suit for specific performance of an agreement to lease in writing not registered, the writing is admissible in evidence, when possession is given in pursuance of the agreement and when possession is not given. There is no distinction between the two cases referred to in the order of reference. Section 3 of the Registration Act III of 1877 defines a lease which includes an agreement to lease. Section 17, Cl. (*d*) and (*k*) referred to. Cl. (*k*) does not restrict sub-sec. (*d*) but only (*b*) and (*c*). Section 49 referred to. Corresponding section of the old Act of 1866 referred to. It is more stringent in terms than S. 49 of Act III of 1877. According to the former, the document is not to be admissible for any purpose in any civil proceeding. An agreement to lease is not a " transaction

1. (1894) I.L.R. 17 M. 456. (F.B.) 2. (1907) 17 M.L.J. 218.

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affecting immoveable property." '*Affecting*' refers to an interest in immoveable property. It is to be noted that the word used is not '*relating to*.' The agreement to lease affects only the parties to it. It does not affect immoveable property. An agreement to grant a lease since it does not operate as a present demise does not require registration. [*Krishnaswami Aiyar* J. —The order of reference assumes that an agreement to grant a lease requires registration. So the question should be argued on that footing.] The object of S. 49 is that all titles to immoveable property should be by registered instruments, and the penalty for not complying with S. 17 (*d*) is the inadmissibility of unregistered documents in transactions affecting immoveable property. *Srinivasa* v. *Venkataraju*[1] is directly in point. It is a case of specific performance of an agreement to grant a lease. This follows *Raja of Venkatagiri* v. *Narayana Reddi*[2]. The Full Bench case was one for damages on the contract in writing. [*Krishnaswami Aiyar* J.—Exh. VI in *Rajah of Venkatagiri* v. *Narayana Reddi* [2] has reference to some previous agreement to grant a lease which was not in writing.] The later cases have understood Ex. VI in *Rajah of Venkatagiri* v. *Narayana Reddi*[2] as an agreement to grant a lease—S. A. 973 of 1904. An agreement in writing to grant a lease is admissible to prove the agreement though it is not registered—*Gothmukkala Bangarayya* v. *Jogi Jagannadha Raju*[3]; *Satyendranath Bose* v. *Anilchandra Ghosh*[4] where *Rajah of Venkatagiri* v. *Narayan Reddi* [2] and *Srinivasa* v. *Venkataraju* [1] are considered and followed; Shepherd and Brown's Commentaries on the Transfer of Property Act, p. 487. A mere agreement to lease does not create an interest in immoveable property. *Hurjivan Virji* v. *Jamsetgi*[5], *Purmandas Jinandas* v. *Virji*[6] referred to.

S. Srinivasa Aiynagar for the respondents:—(1) Section 49 is wider in scope and imposes grater restrictions than S. 17. (2) An agreement to lease requires registration in all cases to prove the agreement except when the document is let in for collateral purposes. (3) Separate effect should be given to the various parts of S. 49. A suit for specific performance in the case of

1. (1907) 17 M.L.J. 218.
2. (1894) I.L.R. 17 M. 456 (F. B.)
3. (1907) 7 M.L.T. 278.
4. (1910) 14 C.W.N. 65.
5. (1885) I.L.R. 9 B. 63.
6. (1885) I.L.R. 10 B. 191.

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an agreement to grant a lease is not merely an action *in personam*; it affects immoveable property and is therefore of the nature of an action *in rem.* The doctrine of *lis pendens* will be applicable to a suit for specific performance—S. 52, T. P. A., "right to immoveable property directly and specifically in question." A suit for specific performance falls under S. 16, Cl. (*d*), of the Code of 1908. Section 91 of the Indian Trusts Act and S. 61 of the T. P. A. referred to. An agreement to lease is placed in a peculiar position by the Indian Stamp Act. Vide S. 2, sub. sec. 16. Art. 35 requires the same stamp for an agreement to lease as for the lease itself—*Rajah of Venkatagiri* v. *NarayanaReddi*[1] *Boyd* v. *Kreig*[2]. In *Purmandas Jinandas* v. *Virji*[3] the actual decision was that as the instrument in question operated as a present demise it required registration. Whatever purports to operate as a demise requires registration. S. A. 525 of 1903 is directly in my favour. The document in question in that was held admissible in a suit for damages but not in a suit for specific performance. This was not brought to their Lordships' notice in *Sreenivasa* v. *Venkataraju*[4] which does not the discuss the question. *Raja of Venkatagiri* v. *Narayana Reddi*[1] does not discuss or lay down any principle of law but proceeds upon the facts of the case. This is apparentfrom the order of reference in that case *Hurjivan virji* v. *Jamsetji Nowroji*[5] *Achoo Bayamma* v. *Dhanty Ram*[6] vide page 384 per *Scotland* C. J, (dissenting). There is no object in the Registration Act making agreements to lease compulsorily registrable and then permitting them to be produced without registration for the very purpose for which they were brought into existence. *Gathimukkula Bangarayya* v. *Jogi Jagannatha*[7] and S. A. 973 of 1904 proceeded upon a misconception of the decision in *Raja of Venkatagiri* v. *Narayan Reddi* [1] *Srinivasa* v. *Venkataraju*[4] is inconsistent with *Gothamukkala Bangarayya* v. *Jogi Jagannadha*[7] In 7 M.L.T. the document in question falls under S. 17 (*b*). This point does not arise. A suit for specific performance of a contract for sale is a transaction connected with immoveable property *Turmer* v. *Wright*[8]

1. (1894) I.L.R. 17 M. 456 (F. B.)
2. (1895) I.L.R. 17 C. 548.
3. (1885) I.L.R. 10 B. 101.
4. (1907) 17M.L. J. 218.
5. (1885) I.L.R. 9 B. 63, 74.
6. (1869) 4 M.H.C..R. 378.
7. (1907) 7 M.L.J. 278.
8. (1845) 49 E.R. p. 252.

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Hadley v. *The London Bank of Scotland Limited* [1] *Pranjivan Govardhana Doss* v. *Boju*[2] *Mati Lal Pal* v. *Preonath Mitra*[3]. A contract to sell affects immoveable property vide S. 40, T.P.A., and illustration thereto.

C. S. Venkatachari replied.

OPINION :—We answer the question referred in the negative. It is immaterial whether possession has passed or not in accordance with the agreement. It is clear that the decision of the Full Bench in *Raja of Venkatagiri* v. *Narayana Reddi*, [4] does not cover the point. As is explained in the order of reference what was held in *Raja of Venkatagiri* v. *Narayana Reddi*[4], was that a Kabuliat signed by the lessee but inadmissible to prove the lease for want of registration was admissible to prove the karar or the agreement to lease which preceded it. The decision in *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraju*[5] would seem to have proceeded upon a misapprehension of the Full Bench case. The learned Judges who decided it assumed that the Full Bench case was a suit for damages for the breach of an agreement in writing to let which was unregistered though compulsorily registrable. They held, and in our opinion rightly, that there was no distinction between a suit for specific performance of such an agreement and one for damages for the breach of it. The learned Judges merely applied, as we venture to think, erroneously, the decision of the Full Bench to the case before them. They did not discuss any provision of the Registration Act. Mr. Justice *Boddam* who was a party to this decision took the opposite view in second appeal No. 525 of 1903, sitting with Mr. Justice *Sankaran Nair*. The judgment of *Subramanya Aiyar* and *Miller*, JJ. in second appeal No. 973 of 1904, is open to the same observation as the decision in *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraju*[5]. Our attention was invited to the judgment of the learned *Chief Justice* and Mr. Jnstice *Miller* in Second appeal No. 979 of 1904 (*Bangarayya Garu* v. *P. Jaganna Raju Garu*[6]. The document in that case was not an agreement to lease. There the instrument recited a

1. (1841) 46 E. R. 562.
2. (1880) I.L.R. 4 B. 34.
3. (1908) 9 C.L.J. 96.
4. (1884) I.L.R. 17M. 456. (F.B.)
5. (1907) 17 M. L. J. 218.
6. (1907) 7. M. L. T. 278.

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request by the executant and an agreement by the other party to give certain lands to her and an actual grant of the same, and contained a promise to manage the lands and enjoy them subject to certain terms. The operative part of the instrument was held to require registration. The question was whether for want of registration it was inadmissible to prove the recital. The learned Judges held that the document was admissible to prove the recital, *i. e.*, the admission by the plantiff of the existence of an agreement to give some lands to the plaintiff which itself was not in writing or at all events did not require registration. But there are certain observations in their judgment which have been pressed upon us. After referring to *Raja of Venkatagiri* v. *Narayana Reddi* [1], and *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraju* [2] the learned Judges observe "that an agreement to lease immoveable property is not actually a transaction affecting land unless in cases where by the agreement itself a right in the land is created" and that "on that ground it *may* be held that evidence can be given of such an agreement by means of an unregistered document which is compulsorily registrable." We do not think this can be regarded as an adjudication on the question which has been referred to us. The decision in *Satyendra Nath Bose* v. *Anil Chandra Ghosh* [3] is that of a single judge sitting on the Original Side. He simply followed the decision in *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraju* [2]. As regards the suggestion made in that case that a lease is the sale of a limited interest and that an agreement to lease stands on the same footing as an agreement to sell *pro tanto*. The learned judge would seem to have overlooked the fact that the legal incidents of the two transactions are entirely different. An agreement to lease is expressly included in the definition of lease in the Registration Act while it cannot be suggested that an agreement to sell falls within any definition of sale. Cl (*h*) of S. 17 excludes an agreement to sell from the class of compulsorily registrable documents and S. 54 of the Transfer of Property Act provides that a contract to sell does not create an interest in the property. It is true that an agreement to lease may likewise not create an interest in

1. (1894) I.L.R. 17 M. 456 (F.B.) 2. (1907) 17 M. L. J. 218.
3. (1910) 14 C. W. N. 65.

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immoveable property though Cl. (*h*) of S. 17 has no application to it, and there is no statutory provision in India which says so. But Mr. S. Srinivasa Iyengar has in his able argument drawn our attention to the provisions of S. 40 of the Transfer of Property Act and S. 91 of the Trusts Act. The 1st of these provisions speaks of an obligation arising out of a contract and annexed to the ownership of immoveable property but not amounting to an interest therein or easement thereon being enforceable against a transferee with notice or a gratuitou transferee of the property *affected* thereby. This shows that a contract to sell or an agreement to lease immoveable property is a transaction which affects the property. In fact, the illustration to that section puts the case of an agreement to sell being enforceable against the transferee with notice, as he has taken property affected by the previous contract to sell it. S. 91 of the Trusts Act puts the same case of a person acquiring property with notice that another person has entered into an existing contract *affecting* that property of which specific performance could be enforced and consequently becoming liable to hold the property for the benefit of the other. When, therefore, S. 49 of the Registration Act declares that a document compulsorily registrable but remaining unregistered shall not be "received in evidence of a transaction affecting such property" or, as put by the Calcutta High Court, (see *Ulfatunnissa Elahijan Bibi* v. *Hossain Khan* [1]) "of a transaction so far as it affects such property" it would seem that the legislature meant to indicate that the instrument should not be received in evidence even where the transaction sought to be proved did not amount to a transfer of interest in immoveable property but only created on obligation to transfer the property.

S. 49 consists of two parts. It provides first "that no document required by S. 17 to be registered shall affect any immoveable property comprised therein, etc." The second part of section says that such a document "shall not be received as evidence of any transaction affecting such property," *i.e.*, as we take it, the immoveable property comprised therein. As regards immoveable property other than that comprised in the instrument or a transaction in respect thereof, the section

1. (1882) I.L.R. 9 C. 520.

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contains no prohibition against the admissibility of the instrument. We must assume that the two parts of the section deal with different subjects. See *Wilson* J. in the order of reference to the Full Bench in *Ulfatunnissa Elahijan Bibi* v. *Hossain Khan* [3]. The first part apparently presupposes that the document itself is the transaction or the mode in which it is carried out. The second part of the section seems to relate to cases where the document itself is not the transaction but is only a record of a transaction or being itself a transaction contains a reference to or a recital of another transaction which affects the immoveable property comprised therein. Even in the last case the document may be inadmissible to prove the other transacion provided it affects the immoveable property comprised therein. As the Registration Act deals only with written instruments, it may be doubted whether the transaction referred to in S. 49 can be merely oral. It is unnecessary to define the exact scope of this clause as to inabmissibility for proving a transaction affecting such property. It is enough for the purpose of this reference to say that a contract to lease immoveable property which is compulsorily registrable under S. 17, Cl. (*d*), affects the immoveable property (see *Green* J., in *Raju Babu* v. *Krishnarav Ramachandra*[1] and cannot if unregistered affect the property or be received in evidence to prove the contract. Suits for specific performance of a contract to sell were referred to in the course of the argument as suits affecting property. That is no doubt true as the relief asked for is the conveyance of property. The doctrine of *lis pendens* has been held to apply to a transfer of immoveable property pending a suit of for specific performance— *Turner* v. *Wright*[2] *Hadly* v. *The London Bank of Scotland* [3]; *Pranjivan Govardhan Das* v. *Baju* [4]; *Mati Lal Pal* v. *Preo Nath Mitra* [5]. If a transaction like a contract to sell or lease immoveable property does not affect it, it is difficult to see how a suit to enforce the transaction can be regarded as affecting it. A contract to sell immoveable property, in writing, though it may affect the property without passing an interest in it, is exempted from registration by Cl. (*h*) [now Cl. (2) v] of S. 17 of the Registration Act. But an agreement in writing to let falling within Cl. (*d*) of S. 17 is not. It cannot be therefore received in evidence of the transaction which affects the immoveable property comprised therein.

1. (1876) I.L.R. 2 B. 273.
2. (1845) 49 E. R. 252.
3. (1841) 46 E. R. 562.
4. (1880) I.L.R. 4 B. 34.
5. (1908) 9. C. L. J. 96.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Krishnaswami Aiyar.

Kolakott Kunhambu & others .. Appellants*

v.

Kottayath Kizhakke Kovilakath Kerala Varma Valia Rajah Avergal (died) and others .. Respondents.

Kunhambu v. Kerala Varma Valia Rajah.

Deed—Construction—Kanom—Saswatom right.

Held:—That the words "there will be no objection to the land being held by you and your Anandravans" followed by the qualifying words "as long as you and your Anandravans shall live," have not the effect of creating a *saswatom* right in the donees.

Second appeal from the decree of the Court of the District Judge of North Malabar in A. S. No. 368 of 1905, presented against the decree of the Court of the District Munsif of Kuttuparamba in O. S. No. 338 of 1905. (O. S. No. 93 of 1904 Tellicherry Munsif's Court).

J. L. Rosario for appellants.

T. Richmond for respondents.

The Court delivered the following

JUDGMENT:—The sentence which we are asked to construe as importing a permanent tenure is the following:—

"There will be no objection to the land being held by you and your Anandravans as long as you and your Anandravans shall live."

It might be difficult to refuse to accede to the contention that the phrase "you and your Anandravans" when used in deeds of transfer in Malabar ordinarily implies an absolute transfer, but here we have this phrase qualified by the limitation "as long as you and your Anandravans shall live' and we have not been shown any authority for holding that this qualifying phrase ought to be understood as equivalent to "as long as your tarwad exists." We are, therefore, unable to say that the lower Courts are wrong in refusing to admit a *saswatam* right in the defendants and we dismiss the appeal with costs. The time for redemption is extended to two months from this date.

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*S. A. No. 451 of 1906. 16th January, 1910.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Valeswara Iyer v. Muthukrishna Aiyar

Present:—Mr. Justice Miller and Mr. Justice Munro.

Valeswara Iyer & others .. .. Appellants *

v.

Muthukrishna Aiyar & others .. Respondents.

C. P. C., S. 13—"Court of competent jurisdiction" original court and not trial court—"Heard and decided"—Prior decision of same court based on a previous decision of inferior court, not "heard and decided."

The words "competent jurisdiction" in S. 13 of Act XIV of 1882 relate to the competency of the trial court, and the fact that the appellate court in the previous litigation would have been competent to try the subsequent suit does not make the previous adjudication *res judicata* if the original court in the prior litigation is not. S. 13, C. P. C., in terms requires for the bar a hearing as well as final decision by a court competent to try the later suit. A decision of a superior court in the second litigation in accordance with the decision of an inferior court in a previous litigation passed by reason of S. 13 is no *res judicata* in a third litigation which the original inferior court would not be competent to try by reason of the decision in the second litigation by the superior court, the matter not being "heard and decided" by it in the second litigation. The law of *res judicata* does not compel a court trying a later suit to hold that the decision in the earlier suit is correct. It merely estops the parties and their privies from showing that the prior decision was incorrect.

Appeal from the decree of the Subordinate Judge's Court of Madura, East, in O. S. No. 4 of 1903.

This was a suit for perpetual injunction to restrain defendants from acting as *purohits* to certain classes of pilgrims resorting to Rameswaram and for recovering Rs. 4,000 damages.

Plaintiffs alleged that they owned exclusively the *miras* right to administer *purohitam* to four classes of Brahmin pilgrims, namely, the Tamilians, Sri Vaishnavites, the Cholies and Siva Dwijas. It was said that plaintiffs' right had been established in certain decrees and that they were also in peaceful enjoyment till July, 1901, and that since then defendants wrongfully interfered.

Defendants pleaded that the suit was not of a civil nature, denied the plaintiffs' exclusive right and enjoyment, and added that the right sought to be established was against public policy. It was urged that no emoluments were attached to the exercise of the right; that the liberty of the pilgrims to choose one or the

* A. No. 34 of 1905. 1st December, 1909.

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other of the priests could not be interfered with; that the plaintiffs, being all of them of the Ashtasastra community, were incapable of ministering to the needs of the Samaka Brahmins; that the suit was bad for misjoinder of the plaintiffs and causes of action and was barred by limitation; that the decrees alleged to have been obtained in favour of their ancestors against the defendants' ancestors could not bind them as they were obtained by fraud and collusion and could not operate as *res judicata* against the defendants; that the alleged exclusive right of the plantiffs, if any, had been extinguished by adverse possession, defendants also having been in enjoyment of the same right from time immemorial; that the suit was not maintainable in the absence of a prayer for declaration of plaintiffs' title and for recovery of the office claimed; that no cause of action accrued on the date alleged in the plaint; that the plaintiffs were not entitled to the damages claimed and the injunction prayer for; that the amount claimed was excessive, and that plaintiffs were entitled to no relief whatever.

The following issues amongst others were framed:—

(1) Whether the plaintiffs' suit is of a civil nature and is cognizable by the court?

(2) Whether the plaintiffs have the exclusive hereditary right to administer *purohitam* to the 4 classes of Brahmins mentioned in paragraph 3 of the plaint?

(6) Whether the decisions referred to in paras 4 to 6 of the plaint operate as *res judicata* in favor of or against any of the parties to the suit?

On the 1st issue the Subordinate Judge held that the suit was not maintainable on the ground that it was not of a civil nature; on the 2nd, that the plaintiffs were not entitled to the exclusive right they claimed, and the 6th issue he found in the negative and did not decide upon the other issues framed as they were not material for the suit.

Paras 5 and 6 of the plaint alleged that the plaintiffs' right was established in O. S. 286 of 1853 on the file of the late Mufti Sadar Amin and by the judgments of the appellate court in O. S. 66 of 1871, Principal Sadar Amin's file, and it was urged that these judgments operated as *res judicata*.

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Para 4 of the plaint alleged that the plaintiffs' ancestors were undisputedly officiating as *purohits* to the pilgrims belonging to the said four castes and were enjoying the emoluments and that the said enjoyment was also established by the decision in the Magisterial proceedings in Appeal No. 13 of 1853 on the file of the District Magistrate's Court of Madura.

P. R. Sundara Aiyar, *K. Srinivasa Aiyangar*, *S. Srinivasa Aiyangar* and *A. Nilakanta Aiyar* for appellants.

The Advocate-General (*P. S. Sivaswami Aiyar*) and *L. Narayana Aiyar* for respondents.

P. R. Sundara Aiyar.—On all the three points decided by the Sub-Judge, I submit, he is wrong. The first point is whether the suit is of a civil nature. The right to administer *purohitam* is an office. This is abundantly clear from the authorities. At any rate, it is a franchise and a suit relating to it is cognizable by the Civil Courts—*Srinivasa Dikshitalu* v. *Ananthacharlu*[1]; *Srinivasa* v. *Thiruvengada*[2]; *Bheemacharyulu* v. *Ramanuja Charyulu*[3]; *Muhammad Yussub* v. *Sayad Ahmed*[4]; *Sitarambhat et Al* v. *Sitaram Ganesh*[5]; *Vithal Krishna Joshi* v. *Ananta Ramachandra*[6]; *Rajavalud Shimpa* v. *Krishnabhat*[7]; *Ananda Rao Shivaji Phadjee* v. *Shankar*[8]; *Sayad Hashim* v. *Husseinsha*[9]; *Simha Bin Krishna* v. *Rama Bin Pimplu*[10]; *Waman Jagannath Joshi* v. *Ralaji Kusaji Patil*[11]; *Gurusangayya* v. *Tamana*[12]; *Mamat Bayan* v. *Babu Ram*[13]; *Kalikanta Sarma* v. *Gouri Prasad Sarma*[14]; *Jagannath Churn* v. *Akali Dassia*[15]; *Dino Nath Chuckerbutty* v. *Protap Chandra Goswami*[16].

The case of *Ramasawmi Ayyar* v. *Venkatachari*[17] practically settles the question. Their Lordships go into the merits of the case and at p. 388 lay down that proof of a grant or of long usage would establish the right. The cases in *Krishna Ayyar* v. *Anantaraman*[18]; and *Ramakrishnan* v. *Ranga*[19];

1. (1869) 4 M.H.C. R. 349.
2. (1888) I.L.R. 11 M. 450.
3. (1907) 17 M.L.J. R. 453.
4. (1861) 1 B.H.C.R. Appx. 18.
5. (1869) 6 B.H. C.R. A.C. 250.
6. (1874) 11 B.H. C.R. 6.
7. (1879) I.L.R. 3 B. 232.
8. (1883) I.L.R. 7 B. 323.
9. (1888) I.L.R. 13 B. 429.
10. (1888) I.L.R. 13 B. 548.
11. (1889) I.L.R. 14 B. 167.
12. (1891) I.L.R. 16 B. 281.
13. (1887) I.L.R. 15 C. 159.
14. (1910) I.L.R. 17 C. 906.
15. (1893) I.L.R. 21 C. 463.
16. (1899) I.L.R. 27 C. 30.
17. (1863) 9 M. I. A. 344.
18. (1865) 2 M. H. C. R. 330.
19. (1884) I. L. R. 7 M. 424.

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relied on by the lower court are really in my favour. *Srinivasa Dikshithalu* v. *Ananthacharlu*[1] follows the case in *Ramasami Ayyar* v. *Venkatachari*[2] and says that the right can be acquired either by grant or by custom. The case of *Ramakrishna* v. *Ranga*[3] was against *yajmans* and not against rival claimants as here. According to the Bombay view a suit against the *yajman* himself is maintainable. Their Lordships, in *Ramakrishna* v. *Ranga*[3], depart from the Bombay view only to the extent of holding that here a suit against *yajman* will not lie.

The case of market, ferry, toll, pearl fishery, &c., are analogous to the right here claimed. In the case of a market a suit will not lie against the buyer though it will lie against the seller.

The fact that the payments made by the pilgrims are *voluntary* is immaterial—*Bheemacharyulu* v. *Ramanujacharyulu*[4]; *Srinivasa* v. *Thiruvengada*[5] and the Bombay and Calcutta cases above referred to.

The next point is that the Sub-Judge should have held that the decisions in the suits of 1853, 1863 and 1871 operate as *res judicata* and as conclusive evidence of the plaintiffs' right. The suit of 1853 was a representative suit. [*Miller* J.—There is nothing to show that it was.] The order of the Magistrate, Ex-*E*, which preceded the suit, I submit, shows that the suit was between the Ashtasahasra sect on the one side and the Brahacharana on the other. There are indications of the representative character of the suit in the judgment itself. The subsequent judgments also proceed upon that basis. Representative suits were recognised in this country even before the Code of 1877—*Shrikambi Narayanappa* v. *Indupuram Ramalingam*[6]; *Ananda Rau Bhibaji Phadke* v. *Shankar*[7].

Even if the former suits were not representative, the present plaintiffs and defendants are descendants of the plaintiffs and defendants in the suit of 1853 and are therefore bound by the adjudication therein. For the same reason they are bound by the decisions in the suit of 1863 and 1871. The argument that

1. (1869) 4 M. H. C. R. 330.
2. (1863) 9 M. I. A. 344.
3. (1884) I.L.R. 7 M. 424.
4. (1907) 17 M. L. J. 493.
5. (1888) I.L.R. 11 M. 450.
6. (1866) 3 M. H. C. R. 226.
7. (1883) I. L. R. 7 B. 323.

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there can be no *res judicata* on a question of law will not apply when the object-matter of the two suits is the same as in this case—*Parthasarathi* v. *Chinnakrishna*[1]; *Bhagwan Buthi Chowdhrani* v. *Forbes*[2]; *Bishnu Priya Chowdhurani* v. *Bhaha Sundari Debya*[3]; *Kaveri Ammal* v. *Sastri Ramier*[4]. The question here is one of mixed law and fact—*Koyyamma Chittamma* v. *Doosy Gouramma.*[5]

The next point is that the grant set up should have been held to be proved. The Judge ought not to have rejected the documents put in by us to prove the grant. The document marked Ex. *A* in our affidavit was put in along with the plaint. The document marked *B* was put in during the trial. The Judge is wrong in supposing that Ex. *B* was a copy of a copy. It is a certified copy of the original grant. As regards *A*, I submit, that too is not a copy of a copy. The correct legal view is that the copper plate is a duplicate and not a copy [*Munro*, J.—There is nothing to show when the copper plate was granted, and it expressly states that it was copied from the cadjan deed.] Even if the copper plate be regarded as a copy Ex. *A* is admissible as secondary evidence—*Latchman Singh* v *Puna.*[6]

As regards proof: I submit both Exhibits *A* and *B* ought to be presumed to be genuine under S. 90 of the Evidence Act. There is proof that the originals are not forthcoming—*Khetter Chunder Mukerjee* v. *Khetter Paul Sreerrutna*[7]; *Ishri Prasad Singh* v. *Lalli Jas Kunwar*[8]; A. S. 139 of 1903; WIGMORE on *Evidence*, Vol. III, S. 2143 (2).

Appathurai Pattar v. *Gopala Panikkar*[9] does not decide that the presumption cannot be raised on a copy being produced.

Then as regards usage. The judgments in the suits of 1853, 1863 and 1871, even if not *res judicata*, are very good evidence of custom—*Gurudayal Mal* v. *Jhandu*[10]; *Ramasami* v. *Appavu*[11]; *Latchman Rai* v. *Akbar*[12]; *Neill* v. *The Duke of Devonshire.*[13]

1. (1882) I. L. R. 5 M. 304, 309.
2. (1900) I. L. R. 28 C. 78.
3. (1901) I.L.R. 28 C. 318.
4. (1902) I.L.R. 26 M. 104.
5. (1905) I.L.R. 28 M. 225.
6. (1889) I.L.R. 16 C. 753.
7. (1880) I.L.R. 5 C. 886.
8. (1900) I.L.R. 22 A. 294.
9. (1901) I.L.R. 25 M. 674.
10. (1888) I. L. R. 10 A. 585.
11. (1887) I. L. R. 12 M. 9.
12. (1877) I. L. R. 1 A 440.
13. (1882) 8 A. C. 135.

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Exhibit *E* in 1853 states that the plaintiffs' ancestors "have customarily enjoyed the right of performing purohitam" to the 4 classes now in dispute.

There can be no doubt that such customs are reasonable—*Jones* v *Waters*[1] ; *The Mayor of Leicester* v. *Burgiss*[2] ; and the passage in 2 *Williams Saunders*,[3] p. 376.

The fact that the defendants have of late been administering purohitam to the pilgrims is immaterial. The right is not capable of being acquired by adverse user and cannot be lost by lapse of time—*Anandarav Bhikaji* v. *Shankar*[4] ; *Nitya Hari Roy* v. *Dunne*[5]; *Neill* v. *Duke of Devonshire.*[6]

The Advocate-General.—The suit is not of a civil nature. The right to administer purohitam is not an office. The conception of an office involves the conception of a duty and of a liability to be compelled to discharge the duties appertaining thereto. Further, the office must be exerciseable with reference to some particular locality and there must, as a rule, be emoluments attached to it. These elements are wanting in the present case. The plaintiffs cannot be compelled to administer purohitam and the pilgrims cannot be compelled to employ or pay plaintiffs. See the following cases—*Subbaraya Chetti* v. *Venkatanarasu Chetty*[7] ; *Tholappa Charlu* v. *Venkata*[8] ; *Mira Mohidin* v. *Asan Mohidin* [9] ; *Beharee Lal* v. *Babu*[10] ; *Husain Ali* v. *Matukman*[11] ; *The Municipal Board of Cawnpore* v. *Lallu*[12]; *Barsati* v. *Chamen*[13] ; *Murari* v. *Suba*[14] ; *Majja Pandaen* v. *Ramdayal* [15]; *Krishna Aiyar* v. *Ananta Narayana* [16] ; *Sri Sunkur Bharati Swami* v. *Sidha Lingayah Charanti* [17]; *Sanka* v. *Hanena* [18] ; *Rama Krishna* v. *Ranga* [19]. Madras Sadar Adaulat decisions from 1826 to 1847, p. 77; Do. p. 83.

1. (1835) 40 R.R. 694.
2. (1833) 39 R.R. 59.
3. 2 Wms. Saunders 376.
4. (1883) I. L. R. 7 B 323.
5. (1891) I. L. R. 18 C. 52.
6. (1882) 8 A. C. 135.
7. (1891) 2 M. L. J. R. 83.
8. (1875) I. L. R. 19 M. 62.
9. (1907) 17 M. L. J. R. 421.
10. (1867) 2 Agras 80.
11. (1883) I. L. R. 6 A 39.
12. (1878) I. L. R. 20 Al. 200.
13. (1907) I. L. R. 1226 A 638.
14. 1882) I. L. R. 6 B. 725.
15. (1871) 8 Ben L. R. 50.
16. (1865) 2 M. H. C. R. 330.
17. (1843) 3 M. I. A 198.
18. (1877) I. L. R. 2 B. 470.
19 (1884) I. L. R. 7 M. 424.

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The plaintiffs next claim that the right may be upheld as a franchise. That is a monopoly and is therefore illegal. In England, monopolies are illegal at Common Law. See also *Statute of Monopolies*, 1623, which expressly rendered the grant of monopolies by the Crown illegal—GOODEVE'S *Personal Property*, p. 220; 2 STEPHEN'S *Commentaries* (13th Edn.) p. 21; *Somu Pillai* v. *The Municipal Council, Mayavaram*[1]. Section 27 of the Contract Act shows the view of the Legislature in regard to monopolies.

It is a Common Law right of every citizen to pursue any calling he chooses. That being so, it is against public policy to allow any claim against this principle—*Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[2]; *Sadagopachariar* v. *Rama Rao*[3]; *Sadagopachariar* v. *Krishnamurthy Rao*[4]; (the same case reported in 11 C. W. N. 585, see per *Lord Macnaghten* in argument); *Mogul Steamship Co.* v. *MacGregor Gow & Co.*[5]; *Allen* v. *Flood*[6]; *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*[7]; Clerk & Lindsell on *Torts* (2nd Edn., pp. 19-24.)

When objection is taken on the ground of public policy the court must have reference not to the notions of a bygone age but to the conceptions existing at present—*Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[2]; *Sadagopachariar* v. *Rama Rao*[3].

The recognition of the right here claimed would be contrary to Hindu Law—Sacred Books of the East, *Apastamba*, p. 122, Pla. 4; Hunter's *Indian Empire*, p. 90; Sacred Books, Vol VII.

A franchise is distinguishable from a monopoly. See *Franchise* defined in *Stephen's Commentaries*, Vol. I, p. 468 (13th Edn.) A franchise cannot exist in respect of a general avocation such as administering purohitams. It is a personal right which no citizen can be deprived of. Further the definition of a 'franchise' implies that the King himself must be competent to exercise it. The

1. (1905) I. L. R. 28 M. 520 at 524.
2. (1894) A. C. 535 at 553.
3. (1902) I. L. R. 26 M. 376.
4. (1907) I. L. R. 30 M. 185.
5. (1889) 23 Q.B.D. 598 at 606.
6. (1898) A. C. 1 at 71, 175.
7. (1903) 2 K. B. 600.

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Marava Zemindar of Ramnad, the alleged grantor in the present case, could not have administered purohitam to Brahmin pilgrims.

Whether a custom is reasonable or unreasonable must be decided with reference to the state of things obtaining at present—12 *Am. Cyclopædia of Law and Procedure*, pp. 1047 and 1048; 4 *Encyclopædia of the Laws of England*, p. 275.

With reference to the case of *Jones* v. *Waters*[1] the town-crier there was appointed by the borough. There was a duty attached to the office. No such appointment and no such duty exist in the present case. See also remarks of SIR F. POLLOCK on this case in the preface. *The Mayor of Leicester* v. *Burgiss*[2] was merely a case on the construction of a certain statute.

No one can acquire a title by prescription against the public or against a large indefinite body—*Sundaram Aiyar* v. *Municipal Council of Madura*[3]; S. 28 of Limitation Act.

Now coming to the question of *res judicata*: The Mufti Sadar Amin would not be competent to entertain the present suit. The limit of his jurisdiction was Rs. 2,500—S. 4, Mad. Reg. 3 of 1833; *Sloan's Code*, p. 530; Act IX of 1844.

The amount of the claim in the present case is Rs. 6,000 Rs. 2,000 is the value of the injunction sought and Rs. 4,500 is claimed as damages I contend that these two claims cannot be separated. It cannot be said that the matter is *res judicata* as regards the claim for injunction though it is not as regards the claim for damages—*Misir Raghobardial* v. *Sheo Baksh Singh*[4]; *Run Bahadur Singh* v. *Lucho Koe*[5]; *Giriyachettiar* v. *Sabhapathy Mudaliar*[6]; *Ramdayal* v. *Jankidas*.[7]

The decision on a point of law cannot be *res judicata*. The decision in the former suits was that this was a suit cognizable by civil courts. This is a question of law. Such a decision cannot be *res judicata*—*Parthasarady* v. *Chinnakrishna*[8]; *Vanki* v. *Mahalinga*[9]; *Koyyana Chittamma* v. *Doosi Gavaramma*[10]; *Mangalathammal* v. *Narayanaswami Aiyar*[11]; *Gopu Kolandavelu*

1. (1865) 40 R. R. 694.
2. (1833) 39 R. R. 59.
3. (1901) I.L.R. 25 M. 635, at 641.
4. (1882) I. L. R. 9 C. 439 (P. C.)
5. (1884) I. L. R. 11 C. 301 (P. C)
6. (1905) I. L. R. 29 M. 65.
7. (1900) I. L. R. 24 B. 456.
8. (1882) I. L. R. 5 M. 304.
9. (1988) I. L. R. 11 M. 393.
10. (1905) I. L. R. 29 M. 225.
11. (1907) I. L. R. 30 M. 461.

v. *Sami Royar*[1]; *Alinumnissa Chowdrani* v. *Shama Charan Roy*[2].

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Again, the defendants in the present suit cannot be said to claim under the defendants in the former suit. The right involved is a personal right of every citizen to pursue any avocation he pleases. The privity requisite for the rule of *res judicata* is privity in interest. The person sought to be bound must be one who claims an interest in the subject affected through or under a party in the previous suit. The right to exercise any calling is inherent in every person and is not acquired by inheritance—2 Black, Ss. 118; 549; Hukm Chand's *Res-Judicata*, 184.

[*Miller* J.—The plaintiffs in the suit of 1853 claimed the office as theirs. The defendants said they were entitled to it. The present defendants are their descendants. They are, therefore, bound as their representatives.]

The present defendants do not claim as the descendants of the defendants in the suit of 1853. It is their Common Law right to pursue the calling that they allege.

As regards the suit being of a representative character [*Court.*—We are satisfied that the former suits were not representative suits; you need not address us on that question.]

My next objection to the plea of *res judicata* is that the subject-matter of the suit not being one cognizable by the civil courts the judgments in the former suits are mere nullities and cannot be *res judicata* even as against persons who were parties thereto. 1, Black on *Judgments*, S. 218; 2 Black, S. 513.

My next argument on this point is the enforcement of the former judgments would be contrary to public policy and therefore those judgments are void—*Lakshmanaswami Naidu* v. *Rangamma*[3].

As regards the suit of 1863, the suit was eventually dismissed, and therefore judgment therein cannot have the force of *res judicata* notwithstanding the finding that the plaintiffs have the right—*Anusuya Bai* v. *Sankharan Pandurang*[4]; *Govindasami Solinga Thevan* v. *Gopalaswami Sivaji*[5].

1. (1905) I. L. R. 28 M. 517.
2. (1905) I. L. R. 32 C. 749.
3. (1902) I. L. R. 26 M. 31.
4. (1883) I. L. R. 7 B. 464.
5. (1903) 14 M. L. J. 281 at 285.

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Coming to the question of grant : I submit *A* is a copy of a copy and as such is inadmissible—S. 63 of the Evidence Act and Illustration. *Luchman Singa* v. *Puna* [1] does not decide that a copy of a copy is admissible. It only decides that a copy is admissible.

As regards the presumption under S. 90, I submit it is contrary to the terms of that section to raise the presumption when a copy only and not the original is produced. No reasons are given for the decisions in *Khettar Chunder Mukerjee* v. *Khetter Paul Streeteruboo* [2] ; *Ishriprasad Singh* v. *Latt Jas Kunwar*[3].

The doubt suggested in *Appathura Pattar* v. *Gopala Panikkar*[4] is well founded.

There is no proof of loss of the original. The evidence does not establish the loss and the first court's discretion ought not to be interfered with—*Harripria Debi* v. *Rukmini Debi.*[5]

As regards usage : The usage is in the first place unreasonable. Evidence is insufficient to establish it. It has been clearly established that the defendants have been exercising the right ever since 1871 without reference to the plaintiffs.

I now come to the question of the remedy. The plaintiffs are not entitled either to an injunction or to damages—*Raja Valad Shiwapa* v. *Krishnabhat*[6]; *Dayaram* v. *Jethubhat*[7]; *Krishnaswami* v. *Krishnamacharyya*[8].

P. R. Sundara Aiyar in reply :—As regards the objection of want of jurisdiction the defect is one that does not appear on the face of the record. The question is at best one of doubt and in such cases the judgments cannot be said to be void and open to collateral attack—VAN FLEET on *Collateral Attack*, pp. 62 and 65 to 67 ; Black, S. 274.

In so far as the object-matter of the two suits is the same the decision would be *res-judicata* notwithstanding that the question decided is one of law—*Pathuma* v. *Salimamma* [9]; *Jamaitrunissa* v. *Lutufunissa* [10]; *Gopee Kolandavelu* v. *Sami Royar*[11]; *Koyanna* v. *Dossy Gavaramma*[12].

1. (1889) I. L. R. 16 C 753.
2. (1880) I. L. R. 5 C. 886.
3. (1900) I. L. R. 22 A. 294.
4. (1901) I. L. R. 25 M. 674.
5. (1892) I.L.R. 19 C. 438 (P.C.)
6. (1879) I L.R. 3 B. 232.
7. (1895) I. L. R. 20 B. 784
8. (1882) I. L. R. 5 M. 313.
9. (1884) I. L. R. 8 M. 83.
10. (1887) I. L. R. 7 A. 609.
11. (1905) I. L. R. 28 M. 517.
12. (1905) I. L. R. 29 M. 225.

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As regards the argument based on public policy see remark in *Janson* v. *Driefontein Consolidated Mines, Ltd*[1].

I submit that whether or not the usage is reasonable must be decided with reference not to the state of things that obtain at present.

As to our being entitled to the reliefs that we claim—*Srinivasa* v. *Thiruvengada*[2] gave an injunction *Bheemacharyulu* v. *Ramanujacharyulu*[3] *Vithal Krishna Joshi* v. *Ananta Ramakrishna*[4] and *Dino Nath Chuckerbuthy* v. *Pratap Chandra Goswami*[5] gave damages.

We are entitled to both injunction and damages.

The Court delivered the following

JUDGMENTS :—*Miller* J.—This case has been argued at great length and with great ability, but I do not find it necessary to deal with all the points which counsel on either side have had to lay before us.

I shall first dispose of the question of *res judicata* which lies at the threshold of the case, and the ground on which I hold that there is no bar may be stated in a very few words. The suit of 1853 was heard and decided by a Mufti Sadar Amin, the pecuniary limit of whose jurisdiction would have precluded him from trying the present suit. His decision cannot, therefore, debar us from trying the questions which he decided. Mr. Sundara Aiyar contended that it is not open to us to interfere with the injunction issued by the Sadar Amin, but it is not necessary to decide how far that contention is sound because no party to the present suit is within the prohibition of that injunction: the only defendant who was a party to the suit of 1853 is dead. It is then contended that in as much as the civil judge, on appeal from the Principal Sadir Amin, a judge who could have tried the present suit, decided in a suit of 1871 that the decision of the Mufti Sadar Amin was a bar to the trial of the suit before him, we are bound to hold that the questions now in suit were heard and finally decided between the parties in the suit of 1871. To accept this contention would, it seems to me, strike at the

1. (1902) A.C. at 491.
2. (1888) 11 M. 450.
3. (1907) 17 M.L.J. 493.
4. (1874) 11 B.H.C.R. 6.
5. (1899) I. L. R. 27 C. 30.

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root of the rule which requires that the earlier should, if the decision is to be a bar to further proceedings, be tried by a court which is competent to try the later suit.

That rule is obviously enacted to save the jurisdiction of the superior courts, to enable them to investigate questions when they arise in a suit of such value and importance that it is not entrusted to the inferior court even though these questions have been decided by the inferior court in another proceeding of less value and importance—though between the same parties.

Now if, as the civil judge decided, (Exhibit H 2) the Principal Sadar Amin was bound in the suit of 1871 to accept the decision of the Mufti Sadar Amin, he was unable to try the questions decided by the latter officer, and consequently those questions have never been heard and decided by a court competent to try the present suit.

It would, to my mind, obviously defeat the intention of the legislature if in this way a party could be debarred from pursuing in the superior court a claim not cognizable by the inferior court. And the effect would be to create a bar where the law says there is no bar, for S. 13 of the Civil Procedure Code of 1882 in terms requires for the bar a hearing as well as a final decision by a court competent to try the later suit.

The suit before the Principal Sadar Amin was one which the Mufti Sadar Amin could have tried, a suit for damages for Rs. 1,050, and, apart from any question as to identity of parties, or privies of parties, the civil judge's decision was apparently right, but that decision only refused to hear and finally decide the questions raised by the plaintiffs.

Mr. Sundara Aiyar was driven to contend that the questions must be held to have been 'heard' by the civil judge on the ground that the judgment of the Mufti Sadar Amin is made by law to operate as conclusive proof that the questions therein decided were rightly decided. But this contention is illogical: the law of evidence makes no distinction between one court and another; what is conclusive proof for the Principal Sadar Amin must be conclusive proof for the Subordinate Judge; and Mr. Sundara Aiyar did not deny that, but for the intervention of the suit of 1871 the judgment of the Mufti Sadar Amin would not

bind the Subordinate Judge in this suit. The law does not compel the court trying the later suit to hold, without trial, that the decision in the earlier suit was correct: it merely estops the parties to the earlier suit and their privies from showing that it is incorrect. The judge trying the later suit must give effect to the decision, but he is not bound to hold that it is right.

I am, for these reasons, of opinion that the trial of the present suit by the Subordinate Judge was not barred by S. 13 of the Code of 1882, and it is unnecessary to consider whether the reasoning which led the Subordinate Judge to the same conclusion is sound or not.

Assuming, then, that the suit is cognizable by the civil courts, a question on which I find it unnecessary to express an opinion, it remains to be seen whether the plaintiffs have established the right which they claim. As the Subordinate Judge says, they must, to do this, prove a grant or such long uninterrupted user as would give rise to the presumption of a legal origin, and I agree with the Subordinate Judge that they have done neither.

I assume that the documents rejected by the Subordinate Judge are genuine, and admissible in evidence; it is then for the plaintiffs to show by strict proof that they are lineal descendants of the grantees of the monopoly; this they one and all have entirely failed to do. The judgments in 1835 and 1853 are appealed to in their support, but neither of them deals with the question: in 1835 no evidence was given on their behalf; and in 1853, four witnesses gave hearsay evidence, but the Mufti Sadar Amin does not appear to have thought it necessary to give a finding, nor can it be said that the matter was then beyond doubt; had that been so the claims of the plaintiffs would not have been ignored by the contesting parties to the suit of 1835, and in 1853 their grants were denied, though the defendants, apparently finding themselves unable to prove the negative, did not appear at the final hearing. The fact that they produced the documents in 1835 is not sufficient to show that any one of them was lineally descended from any one of the original grantees. It is not stated (Exhibit *F*) who were the twenty Tamil Brahmins who produced the documents and two of the families of the grantees are, it is said, extinct. The evidence to which our attention was

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invited in the present suit is altogether worthless, and, in my opinion, the plaintiffs have entirely failed to prove their claim to be descendants of the grantees of 1670.

I also agree with the Subordinate Judge that they have failed to make out any claim based on long user or custom. In 1835 there can hardly have been a long established custom in their favour, or it would not have been ignored by the parties to the suit. In the judgment in the suit of 1834, Exhibit *F*, no question of custom is considered: the grants are found to be genuine, and that fact and the fact that the plaintiffs in the suit were in any event non-suited, are stated as reasons for the order in favour of the ancestors of the present plaintiffs. That order was afterwards set aside as made without jurisdiction, but that does not affect the question. In 1853 the Mufti Sadar Amin does not expressly find that a custom was established, and his judgment is of little help to us. He bases his judgment on certain documents, none of which, so far as we know their contents, establishes the alleged custom of exclusive enjoyment and on the depositions of four witnesses; but, as we do not know what the witnesses said, their evidence as to custom cannot be regarded as of much value to us. The judgment, as a whole, does not appear to me to be valuable for its conclusions.

Since 1853 it is clear that the plaintiffs have not been allowed to exercise their alleged monopoly without interruption: we have unimpeachable evidence that the defendants were, since 1864 at any rate, serving as purohits to pilgrims of the four classes to which the plaintiffs claim the exclusive right of ministration, and I concur with the Subordinate Judge in his conclusion that the evidence of the plaintiffs that such service was done with their permission is untrustworthy : it is remarkably vague and unsatisfactory. No doubt the plaintiffs in 1871 succeeded on the ground of *res judicata* in procuring a reaffirmance of the decision of 1853, and a decree for damages (Exhibit H 2). Whether the damages were paid or not does not appear. I may assume that they were : but clearly the defendants continued to enjoy the profits of ministration to the four classes, and the plaintiffs never ventured to make any attempt to enforce the injunction of 1853 or obtain a new one.

Valeswara Iyer v. Muthukrishna Aiyar.

Miller J.

The strongest evidence on the plaintiffs' side is, to my mind, Exhibit *J*, an agreement of 1880 in which the *purohits* agree to divide between them the gifts made by the pilgrims of seventeen classes, but do not include the four classes to which the plaintiffs' claim relates, but the agreement is inconclusive on the question whether the four classes were left to the plaintiffs exclusively, and we find that the defendants continued in 1880 and the following years their ministrations to those classes.

It is suggested that the plaintiffs' inaction after the suit of 1871 and the agreement, Exhibit *J*, afford strong evidence in favour of the allegations of the plaintiffs that the defendants' ministrations were licensed by themselves (the plaintiffs), but I do not think it possible that if it were true that the plaintiffs had for 30 years and more been licensing the exercise of the purohitam by the defendants, that fact would not have been stated in the plaint, or made the subject of an issue. I am certainly not prepared to hold that the decree of 1871 or the agreement of 1880 are sufficient to establish the plaintiffs' case of permissive exercise of the right in question.

Holding that the plaintiffs have failed to show title under a grant or by custom or uninterrupted user, I find it unnecessary to deal with the other questions argued. I would dismiss the appeal with costs.

Munro J.:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

The King-Emperor .. Appellant*

v.

Sunku Seethaiah & others .. Accused

(1, 4, 7 8, 10, 11 12, *and* 13 *in C. C. No.* 129 *of* 1909 *on the file of the Stationary Sub-Magistrate of Penukonda.*)

The King-Emperor v. Seethaiah.

Penal Code, S. 296—*Conviction—Essentials—Disturbance of religious worship.*

It is not necessary for the purpose of S. 296, I. P. C., that the accused should have had an active intention to disturb religious worship. It is enough, if, knowing

*Cr. A. No. 856 of 1909. 22nd March, 1910.

The King-Emperor v. Seethaiah.

that they were likely to disturb it by their music, they took the risk and did actually cause the disturbance.

Appeal under S. 417, Criminal Procedure Code, against the following order of acquittal passed on the appellants in Cr. A. No. 56 of 1909, by the Head Assistant Magistrate of Penukonda, reversing the conviction and sentence passed on the 1st, 4th, 7th, 8th, 10th, 11th, 12th and 13th accused in C. C. No. 120 of 1902 on the file of the Stationary Sub-Magistrate of Penukonda:—

ORDER.

"In the opinion of the District Magistrate it is reasonable for the Mahomedans to ask that music should not be performed by temple or religious processions when passing along the bazaar road in Hindupur town near the mosque during the hours of worship, that is during the following hours: 5 A. M.-6 A. M., 1 P. M.-2 P. M., 4 P. M.-5-30 P. M, 6-7 P. M., and 8 P. M.–9.30 P. M, and it cannot be said to be any hardship for the Hindus to have to refrain from performing music in their processions during these hours for the very brief period in which the mosque is being passed."

The Public Prosecutor (*C. F. Napier*) for the Crown.

S. Swaminadhan for accused.

The Court delivered the following

JUDGMENT:—We think it is satisfactorily proved in this case that certain hours, which are not attacked as unreasonable, were, to the knowledge of the accused, fixed for public worship in the mosque and notified by the District Magistrate; that the hour between 6 P. M. and 7 P. M. is one of those hours; that the accused passed in procession before the mosque with music between 6 P.M. and 7 P.M. while public religious worship was going on, and that the accused by their action disturbed the worship. The charge against the accused is under S. 296 of the Indian Penal Code. Under that section it is an offence voluntarily to cause disturbance to any assembly lawfully engaged in the performance of religious worship. A person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew, or had reason to believe, to be likely to cause it (see S. 39, Indian Penal Code). It is not, therefore, necessary for the purpose of S. 296, Indian Penal Code, that the accused should have had an active intention to disturb religious worship. It is

sufficient if, knowing they were likely to disturb it by their music they took the risk and did actually cause the disturbance. According to the decisions of this Court in *Muthialu Chetty* v. *Bapun Sahib*[1] and *Sundaram* v. *The Queen* and *Ponnusami* v. *The Queen*[2] the accused had no right to pass the mosque with music so as to disturb religious worship going on in the mosque during the hours which had been notified as the hours in which religious workship would be carried on. The Head Assistant Magistrate was, therefore, wrong in holding that the accused were protected by S. 19, Indian Penal Code. We find the accused Nos. 1, 4, 7, 8, 10, 11, 12 and 13 guilty under S. 296, Indian Penal Code. The 1st accused is fined Rs. 30 with three weeks' simple imprisonment in default. Accused Nos. 4, 7, 8, 10, 11, 12 and 13 are fined Rs. 5 each with one week's simple imprisonment in default.

The King Emperor v. Seethaiah.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Munro.

T. S. Ayirantha Chetty .. .. Appellant *
v. (*Plaintiff*)
Aramanathochi & others .. .. Respondents
(*Defendants*).

Life tenant and remainderman—Mortgage by life tenant for purposes of discharging previous holder's debts—Not binding on the remainderman.

Ayirantha Chetty v. Aramanathochi.

A testator devised his property to his widow for life with remainder to his foster son. The widow was not made an executor nor guardian under the will. The widow mortgaged portion of the testator's properties to meet chiefly the funeral expenses of the testator and discharge the debts of the testator. *Held:*—That the foster son's interest could not be affected by the alienation.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 1375 of 1905 presented against the decree of the District Munsif of Valangiman in O. S. No. 353 of 1904.

Plaintiff, a mortgagee, sued the defendants for the recovery of money due on a bond. The bond had been executed by the 1st defendant for herself and for the minor second defendant as guardian. The consideration purported to be in payment of the debts due from the deceased husband of the 1st defendant,

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* S. A. No. 999 of 1906. 6th April, 1910.

1. (1880) I. L. R. 2 M. 140. 2. (1883) I. L. R. 6 M. 203.

Ayirantha Chetty *v.* Aramanathochi.

debts incurred by the 1st defendant from the plaintiff for the expenses of the funeral obsequies of the 1st defendant's husband, and cash received for the expenses of the contemplated marriage of the 2nd defendant and for the expenses of a litigation in respect of the will under which the 1st and 2nd defendants derived title. The husband of the 1st defendant had left a will by which he gave his widow a life interest in his immoveable property, giving the remainder to the 2nd defendant whom he called his foster-son. He directed that the widow should spend out of his "Aiveji" Rs. 500 for his funeral. After directing that certain charities should be performed, &c., the will provided that the widow might dispose of the moveables as she liked. The second defendant had property which he derived from his father which was under the control of his mother who had also taken out succession certificate as guardian of the minor. But it had been found by both the Courts below that the 2nd defendant was residing mainly with the 1st defendant but they held that though she purported to act as guardian, she was not entitled so to act and on that ground dismissed the suit, holding at the same time that a substantial portion of the consideration was for the purposes recited in the bond. The plaintiff appealed.

T. Rangachariar and *Muthia Mudaliar* for appellant.

P. R. Sundara Aiyar and *B. Sitarama Row* for respondents.

T. Rangachariar for appellant contended:—(i) that the 1st defendant was an executor by implication and therefore entitled under the Probate and Administration Act to sell or mortgage the property and the purchaser was protected—*In the goods of Punchard*;[1] (ii) that she was a guardian *de facto* acting on behalf of the minor, having acted twice as guardian *ad litem*; (iii) that in respect of the expenses of litigation, it being to save the estate of both, the expenses were in the nature of salvage and 2nd defendant was bound to contribute, and (iv) that her rights as widow had not been taken away by the will and she was entitled to act—*Appacooty* v. *Muthukumarappa*.[2]

P. R. Sundara Aiyar, for respondent, contended:—(i) that "Aiveji" meant only "the cash"; that the 1st defendant was not an executor by implication as she was not charged with all the

1. (1872) L.R. 2 P. & D. 369. 2. (1906) I.L.R. 30 M. 191.

Ayirantha Chetty v. Aramanathochi.

duties of an executor in the collection of assets and disbursement of assets, citing *Appacooty Mudalli* v. *Muthukumarappa*[1] and *Ameerchund* v. *Mohamed Bibi*[2]; (ii) that the only way she could bind the minor was by taking out Letters of Administration; that it is a rule of construction that when a person is directed to pay, the presumption is that he is directed to pay out of the funds under his control (*Story*, S. 1247) and that, therefore, the funeral expenses should come out of the cash and moveables in her hands; (iii) that the specific legacy—the immoveable property—should be proceeded against only in the last instance, and (iv) that she was not guardian either testamentary or natural, and the only property of the minor being the remainder, she could not even be regarded as *de facto* guardian.

T. Rangachariar, in reply, contended that as tenant for life she was entitled to mortgage the estate for the debts. He conceded that there was no authority in his favour.

The Court delivered the following

JUDGMENT:—The only question is whether the 1st defendant had authority to mortgage the interest of the 2nd defendant. It is contended that she had such authority because she was executor under the will; because she was the guardian of the 2nd defendant, and because she was in possession as life-tenant.

The will does not expressly appoint the 1st defendant executor, nor does the language of the will justify us in holding that she is an executor by implication. There is no direction to her to perform the most important duties of an executor, *viz.*, to realize the debts due to the testator and to pay the debts due by him. The 1st defendant is not the natural or testamentary guardian of the 2nd defendant, nor has she been appointed his guardian by the Court. Further she is not in possession of the property as the 2nd defendant's guardian, but in her capacity as life-tenant under the will. The proposition that as life-tenant the 1st defendant had the power to mortgage the 2nd defendant's interest is not supported by any authority and does not commend itself to us.

The second appeal is dismissed with costs.

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1 (1906) I. L. R. 30 M. 191.

2. (1907) 6 C. L. J. 453

IN THE HIGH COURT OF JUDICATURE AT MADRAS.*

[FULL BENCH.]

Present :—Mr. Justice Wallis, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

In the Matter of a Vakil of the High Court.

In re a Vakil.

Professional misconduct—Vakil—Unfounded allegations against judge in the exercise of his office.

A vakil will be guilty of professional misconduct if he makes unfounded allegations involving a reflection on the conduct of a judge in the exercise of his office and seeks to put them on record.

The vakil in the case presented a petition to the Sessions Judge on the day after the summing up to the assessors and before judgment was delivered, in which he alleged, without any foundation for the allegation, that the Judge, before the arguments were over, came to Court with a draft judgment, and that the said draft was for conviction.

Held, that the vakil was guilty of professional misconduct for which he must be reprimanded.

In this case a Vakil was asked to show cause why he should not be dealt with under the Legal Practitioners' Act for his having sent to the Sessions Judge a petition after the close of the arguments and the summing up of the Judge to the assessors but before judgment was delivered, the petition containing the following charges.

The two charges which the Vakil made against the Judge were (1) that the Judge made up his mind before the arguments were over, and (2) that the Judge wrote a judgment even before summing up the case to the assessors and that the summing up was one for conviction.

The Advocate-General (P. S. Sivaswami Aiyar) for the Court.

L. A. Govindaraghava Aiyar for the Vakil.

The Advocate-General referred to various sections of the Cr. P. Code to show that even in a case tried with assessors there is nothing in the Criminal Procedure Code to prevent a judge from summing up the case to the assessors—*Queen* v. *Amiruddin*[1]; *Thadulla Howladar* v. *Empress*[2]. As for the second allegation the

* 1st November 1910.

1. (1871) 7 B. L. R. 63, 167. 2. (1883) I. L. R 9 C. 875, 876.

Judge denies it *in toto.* If the allegations are false in fact and have been made recklessly without any regard for their being true or false, then the conduct of the vakil constitutes a contempt of court. *In re* a Vakil,

L. A. Govindaraghava Aiyar for the vakil.—[*V. K. Aiyar* J.—If we understand that the paras 4 and 5 of your client's accusation mean that the judge had written *the* judgment beforehand then do you justify your conduct?] No. But the paras do not mean that; the word "judgment" was not happy there; what was meant to be written in the petition was *draft notes.* If your Lordships think that the words *the judgment* were wrong, then my client regrets that those words have been inserted by mistake and he unreservedly withdraws them. But the circumstances under which the petition was filed justify in a measure the petition. [*Court*:—How do you say that the procedure of the Judge in summing up to the assessors was unauthorised ?] The procedure is wrong. The Judge should not express any opinion on any question of fact. See observations of *Bhashyam Aiyangar* J. in *King-Emperor* v. *Tirumala Reddi*[1]. [*V. K. Aiyar* J.—I do not know that I should agree with that observation, but it seems to me to be an advice to the lower Court rather than an interpretation of the section.] Anyhow this is the view now prevailing; therefore my client was justified in calling it an unqualified procedure. [*Court.*—What is your ground for saying that the notes were *the judgment*?] For that I said my client expressed regret and withdraws them. What was meant to be written was 'draft notes.' [*V. K. Aiyar* J.—If you substitute these words for the words '*the judgment*', then your client would not have cared to file the petition, for then there would be nothing worth mentioning to the Judge so as to make him withdraw from the conclusions he is said to have formed?] The petition was put in the interests of the clients who wanted to file such a petition. The object was to make the Judge preserve the draft notes and the short-hand judgment. There was no intention to intimidate or insult. [*V. K. Aiyar* J.—Supposing your client had said, in short, to the Court that the Judge has prejudged the case?] Then it would have been proper if made for a proper purpose, *e.g.*, transfer. I refer to *Ex parte Pater*[2] as to what insults

1. (1901) I. L. R. 24 M. 523, 537. 2. (1864) 9 Cox Cr. C. 554.

In re a Vakil, constitute contempt of Court ; *In the Matter of R. Cruise*[1]. [*V. K. Aiyar* J. referred to *In the Matter of a First Grade Pleader*[2].]

The Court delivered the following

JUDGMENT :—In this case a vakil of the High Court presented a petition to the Sessions Judge on the day after the summing up to the assessors and before judgment had been delivered, in which he alleged, in paragraph 4, that the judge, before the arguments in the case were over, came to the court with a draft judgment, and added, in paragraph 5 : "Not only that, but the draft judgment was the judgment for conviction." These allegations were quite unfounded and there was no justification for making them. This has not been seriouly contested by Mr. Govindaraghava Aiyar. We think that in making unfounded allegations of this kind which involve a reflection on the conduct of the judge in the exercise of his office and in seeking to put them on record the vakil was guilty of professional misconduct for which he must be reprimanded and ordered to pay the costs of these proceedings.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller.

Ranganatha Rao .. Petitioner*
.. (*2nd Deft., Judgment-debtor*)

v.

Ananda Chariar .. Respondent
.. (*Plaintiff, Decree-holder*).

Ranganatha Rao *v.* Ananda ar.

Insolvency Act, Ss. 7, 27—Salary of insolvent, vesting of—Rights of creditor.

The salary of an insolvent vests in the Official Assignee, but he cannot get rid of it until the court makes an order under S. 27 of the Insolvency Act.

The insolvent has a right to object to the attachment of his salary by any creditor of his on the ground that salary was not his, but became vested in the Official Assignee.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Subordinate Judge's Court of Kumbakonam dated 7th April 1909 in E. P. No. 299 of 1909 in S. C. S. No.329 of 1902.

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* C. R. P. No. 391 of 1909. 8th March, 1910.

1. (1870) 14 W. R. Cr. R. p. 53. 2. (1900) I.L. R. 24 M. 17.

Ranganatha Rao v. Ananda Chariar.

P. Nagabhushanam for appellant.

R. Sadagopachariar for respondent.

The Court delivered the following

JUDGMENT :—In this case it is stated on behalf of the petitioner that the order as it stands is not made against his brother, but that the Subordinate Judge intended to make it against him and that it was applied for against him though he was wrongly styled 1st defendant in his application instead of 2nd defendant. I have not rejected his petition as premature, because it appears that this mistake has been made and that all that is necessary is for the Subordinate Judge to have the necessary amendments made ; and the respondent did not ask me to refuse the petitioner a hearing. It seems more satisfactory that I should dispose of the matter, both parties being willing, because if I hold the Subordinate Judge right, he can get the amendment made and review his order so as to correct the mistake, while if I hold him wrong it may be that no further proceedings will be necessary in the matter.

The petitioner is drawing a salary of Rs. 60 a month. Some years ago a vesting order was made against him under S. 7 of the Indian Insolvency Act and he has since obtained his personal discharge under S. 48. The respondent is a creditor who prior to the insolvency proceedings had obtained a decree against the petitioner and was among the creditors whose claims were entered in the schedule. He now attaches the petitioner's salary in execution of his decree and the petitioner objects.

It seems to me that the view of *Farran* J. in *In the Matter* of *C. M. F. Doughee*[1] where he holds that salary vests in the Officiae Assignee under S. 7 is correct, and that the effect of S. 27 is not to cut down S. 7 but to require the Official Assignee, before he can obtain payment of the salary, to obtain the order of the court as to the amount which is necessary for the maintenance of the insolvent. In *In re Roberts*[2] the Court of Appeal held that after bankruptcy and before discharge whatever property a bankrupt acquires belongs to his trustee save only what is necessary for his support. That was a case of personal earnings, but for this purpose there seems to be no material difference between personal earnings and salary and there is nothing in

1. (1894) I. L. R. 19 B. 232. 2. (1900) 1 Q. B. 122.

Ranganatha Rao v. Ananda Chariar.

S. 7 to suggest a contrary view in this country. The salary, as I understand the matter, vests in the Official Assignee, but he cannot get any of it until the court makes an order under S. 27. It was argued that the debtor has no right to object to the attachment, but no authority was cited in support of the contention and I do not know of any good reason why a debtor should not be allowed to show, if he can, that property which was attached as his, does not belong to him but to some one else.

It remains to be considered what is the proper order to be made under the circumstances. The decree is a decree of 902 and the insolvent was, according to his affidavit, discharged under S. 48 of the Indian Insolvency Act. It is, therefore, not improbable that other creditors are still unsatisfied, and I think the Official Assignee should have an opportunity of obtaining on their behalf an order under S. 27 before the Subordinate Judge's order of attachment is carried into effect. My order will therefore be that the execution be suspended under S. 49 of the Indian Insolvency Act until the further order of the Subordinate Judge, leaving it to the respondent to take such steps as he may be advised in order to bring the matter to the notice of the Official Assignee.

Paragraph 3 of the petitioner's affidavit, which is not denied, shows that the respondent had the necessary notice of the insolvency proceedings. The respondent must, therefore, under S. 49, pay the petitioner's costs here and below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Krishnaswami Aiyar.

Chandana Venkatadri .. .. Appellant*

v.

M. Lakshminarasimha Rao & others .. Respondents.

Venkatadri v. Lakshminarasimha Rao.

Negotiable Instruments—Assignment otherwise than by indorsement—Writing if necessary.

A negotiable promissory note can be assigned otherwise than by endorsement; [*Muhammed Khumar Ali* v. *Ranga Row*[1] followed] ; and it is enough that the transfer is evidenced by a partition list, as in this case, even if writing be necessary to satisfy the requirements of S. 130, T. P. A.

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* S. A. 1007 of 1910. 13th September, 1910.

1. (1901) I. L. R. 24 M. 654, 656.

Semble :—S 130, T. P. A., does not apply to assignments of negotiable instruments. [*Arunachala Reddi* v. *Subba Reddi*[1] doubted.]

Venkatadri v. Lakshmi-narasimha.

Second appeal from the decree of the Disrtrict Court of Kristna at Masulipatam in A. S. No. 173 of 1908 presented against the decree of the Court of the Principal District Munsif of Masulipatam in O. S. No. 389 of 1907.

Rajagopala Aiyangar for *K. Srinivasa Aiyangar* for appellant.

T. Ramachandra Rao for respondents.

Rajagopala Aiyangar contended, on the authority of *Arunachala Reddi* v. *Subba Reddi*, [1] that negotiable promissory notes are not assignable usually without an instrument in writing as contemplated by S. 130, Transfer of Property Act. S. 137 should be confined to negotiable instruments transferred *as such*.

T. Ramachandra Rao contended that the partition list which is signed by the payee of the pro-note is sufficient compliance with the requirements of S. 130, special words being necessary for the transfer of a negotiable instrument—*Rama Aiyar* v. *Venkatachellam*[2]. He also contended that *Arunachala Reddi* v. *Subba Reddi*[1] does not take note of the words of S. 137 which do not confine the operation of that section to transfers of negotiable instrument as such.

The Court delivered the following

JUDGMENT :—A negotiable promissory note executed in favour of the 3rd defendant as manager of his family fell in a partition of the joint family property to the share of the 1st plaintiff and his son. There is no endorsement on the note, and it is, therefore, contended that the plaintiffs cannot sue on the note. Though there is no endorsement on the note it is clear that the note could be transferred otherwise than by endorsement—*Muhammad Ummar Ali* v. *Ranga Rao*[3]. It is contended, relying on S. 130 of the Transfer of Property Act, that the transfer must be evidenced by an assignment in writing. S. 130 of the Transfer of Property Act, however, does not, in our opinion, apply in view of S. 137 of the Act which declares that S. 130 among other sections does not apply to instruments which

1. (1907) 17 M. L. J. 393.
2. (1906) I. L. R. 30 M. 75.
3. (1901) I.L.R. 24 M. 652.

Venkatadri v. Lakshminarasimha.

are for the time being, by law or custom, negotiable. At the time of the alleged transfer in this case the promissory note was certainly negotiable. It was no doubt held in *Arunachala Reddi* v. *Subba Reddi*[1] that S. 130 of the Transfer of Property Act applies when the claim is made under an assignment and not by reason of an endorsement, the reason given being that when suing, the plaintiff cannot be regarded as suing on a negotiable instrument. Such a view would require the importation of words into S. 137 of the Transfer of Property Act which are not to be found in it. However this may be, there is a writing in the case, *viz*., a partition list, which is sufficient, if necessary, to satisfy the requirements of S. 130 of the Transfer of Property Act.

The second appeal is dismised with costs of the plaintiff.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Gutta Bapineedu .. .. .. Appellant* (*Plaintiff*)

v.

Gutta Venkayya .. .. .. Respondent (*2nd Defendant*).

Bapineedu v. Venkayya.

C. P. C. (Act XIV of 1882), S. 276—Private alienation—Sale in pursuance of contract prior to attachment—Validity.

An attachment of property in pursuance of a contract to convey entered into prior to the attachment is a private alienation within the meaning of S. 76, C.P.C. of 1882.

A sale in pursuance of a contract anterior to the attachment is not void against claims under the attachment and not enforceable against the prior contract to sell.

Second appeal from the decree of the Subordinate Judge's Court of Kristna at Ellore in A. S. No. 37 of 1908 presented against the decree of the Court of the District Munsif of Ellore in O. S. No. 333 of 1907.

T. Prakasam for appellant.

T. Prakasam, for appellant, contended that the sale being in pursuance of a previous agreement for sale had priority over the attachment. The sale in pursuance of the attachment could

1. (1907) 17 M.L.J. 393.

* S. A. No. 1763 of 1908. 1st April 1910.

Bapineedu v. Venkayya.

convey only the right, title and interest of the judgment-debtor, *i. e.*, subject to the right of the appellant to have his contract specifically enforced. Anyhow, there is the other contention that the decree is fraudulent, if collusive; if so, attachment in pursuance of it could not bind the purchaser.

The respondent was unrepresented.

The Court delivered the following

JUDGMENT :—We regret we have not had the advantage of an argument on behalf of the respondent. But on the best consideration we could bestow on the case, we think the courts below are wrong.

It is alleged in the plaint that the first defendant entered into an agreement with the plaintiff in 1902 to sell certain property to him and placed the plaintiff in possession of it. The 2nd defendant obtained a decree for money against the first defendant and attached the suit property in execution. The plaintiff preferred a claim which was dismissed. But during the subsistence of the defendant's attachment the 1st defendant executed a registered conveyance on the 5th November, 1907. The plaintiff asks for a declaration of his right to the property. The plaintiff also charges that the 2nd defendant's decree against the 1st defendant was collusive. The courts below have dismissed the suit on the preliminary ground that there was no right to sue on the allegations contained in the plaint. S. 276 of the Civil Procedure Code of 1882 declares a private alienation of property attached during the continuance of the attachment void against all claims enforceable under the attachment. The two questions to be determined are : (1) whether the sale to the plaintiff was a private alienation, and (2) whether the 2nd defendant's claim is enforceable under the attachment. The title of the plaintiff is based upon the sale deed executed by the 1st defendant. It must, therefore, be treated as a private alienation within the meaning of the section. It is true that the alienation was in pursuance of a prior obligation. But from the mere fact of there being an obligation to convey it, it is impossible to contend that the alienation by which the property was conveyed was not a private alienation. See *Dinendranath Sannyal* v. *Ramcoomar Ghose*[1]. Suppose, however, at the time of attachment a decree

1. (1881) I. L. R. 7 C. 107 (P. C.).

Bapineedu v. Venkayya.

for specific performance had been made in a suit upon the agreement to convey : a subsequent conveyance in execution of that decree, though an act *inter partes*, may not be treated as a private alienation, pure and simple.

In *Gurban* v. *Ashruf Ali*[1] the Full Bench of the Allahabad High Court held that a conveyance in pursuance of an award directing a transfer of property by way of sale subsequent to an attachment made after the award and before the decree was passed in terms of the award was no private alienation within the meaning of S. 276 of the Code and, therefore, not void under the section against a claim enforceable under the attachment. The alienation, though strictly an act of parties, was deemed to be not a private alienation because it was in performance of a direction of the court. But where there is no such direction the mere fact of there being an agreement which obliges a party to carry it out by the execution of a conveyance cannot render the alienation other than private.

The second question, however, remains whether the 2nd defendant has a claim enforceable under the attachment. This brings into view the further problem as to the effect of an agreement to convey upon the rights of the purchaser under a subsequent attachment. Clause (*b*) of S. 276 of the Specific Relief Act provides that a contract may be enforced against "any other person claiming under him (either party thereto) by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract."

The exception here appears to refer to the private purchaser without notice. A purchaser in court sale who takes the property subject to all the liabilities in the hands of the judgment-debtor himself is, except where the decree-holder is enabled to give a larger title, amongst the 'other persons' against whom a contract may be specifically enforced. In *Brunton* v. *Neale*,[2] *A* entered into an agreement for the purchase of an estate and paid a deposit and entered into possession but did not pay the remainder of the purchase money. Afterwards a creditor of the vendor obtained a judgment against him, sued out an *elegit*, and brought an action of ejectment against *A*. *A* filed a bill against

1. (1882) I. L.R. 4 A. 219. 2. (1844) 14. L. J. Ch. p. 8.

the vendor and the judgment-creditor from proceeding in the action against him. It was held by the Lord Chancellor that he was entitled to the injunction. In Dart's *Vendors and Purchasers*, 7th Edn., Vol. II, p. 1030, the learned author says: "Equity will enforce specific performance of the contract for sale against the vendor himself and also his trustee in bankruptcy or committee in lunacy or voluntary alienees or judgment creditors," etc.

If the plaintiff, therefore, would have specific performance against the attaching creditor, the 2nd defendant, his claim under the attachment is not enforceable against the sale which is performance of the contract to convey. It appears, therefore, to follow from the plaintiff's sale being in pursuance of a contract anterior to the attachment, that it is not void against claims under the attachment which are not enforceable against a prior contract to sell. But the plaintiff went on to allege in his plaint that the 2nd defendant's decree was collusive. If the decree itself was brought about with a view to defraud a person who has contracted to purchase the property of the 1st defendant, the plaintiff's purchase of the property must be unaffected by proceedings under a collusive decree.

We must reverse the decrees of the courts below and remand the case to the District Munsif for disposal according to law. The costs hitherto incurred will be provided for in the final decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis.

Adapala Adivaramma .. *Plaintiff**

v.

Rabala Ramachandra Reddy .. *Defendant.*

Defamation—Privilege—Witnesses—Affidavit—Evidence.

Witnesses cannot be sued in a civil court for damages in respect of evidence given by them upon oath in a judicial proceeding whether the evidence be one given in the box or on affidavit; and relevancy is no measure of the extent of the privilege, at any rate, in civil actions.

Suit on the Original Side of the High Court.

T. V. Seshagiri Aiyar for plaintiff.

V. Purushothama Naidu for defendant.

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*C. S. No. 63 of 1909. 8th December, 1909.

Adivaramma v. Ramachandra Reddy.

The Court delivered the following

JUDGMENT :—This is an action for damages. The plaintiff was appointed guardian of the person, and the defendant guardian of the property, of the minor. Subsequently on the plaintiff's application the defendant was removed from the guardianship of the property. He then preferred an appeal to this court and applied for stay of execution and filed an affidavit in support of that application. In answer to that affidavit, the plaintiff filed a counter-affidavit and in answer to the counter-affidavit the defendant filed a reply affidavit in which he made statements reflecting on the character of the plaintiff which, unless privileged, were undoubtedly defamatory, and which, for the purpose of this judgment, must be taken to have been made both falsely and maliciously. Even so, I am of opinion that no civil action will lie. It is laid down by the Privy Council in *Ganesh Dutt Singh* v. *Mugneeram Chowdry*[1] that "witnesses cannot be sued in a civil court for damages, in respect of evidence given by them upon oath in a judicial proceeding." Now there is no difference in this respect, in my opinion, between evidence given in the box and the evidence on affidavit. This doctrine of absolute privilege applies to affidavits as well as to oral evidence as stated by Chief Baron Willy in the House of Lords—*Dawkins* v. *Lord Rokeby*[2] and *Seaman* v. *Netherclift*[3]. It is laid down that it is almost impossible to conceive a statement in an affidavit which should not be privileged. It is further well settled that in order to protect the statement made by witnesses it is not necessary that they should be absolutely relevant. It may be that witnesses who tender defamatory statements in the box which have no earthly connection with the case may not be privileged. But it cannot be said that statements made in an affidavit, which was in answer to an affidavit made by the plaintiff, reflecting upon the character of the defendant, were utterly irrelevant to the proceeding. There has no doubt been a difference of view, in the courts in India more especially, with regard to the question whether the statements by witnesses are absolutely privileged in a prosecution for defamation under the Penal Code. But the

1. (1872) 11 B.L.R. 321, 328. 2. (1875) L. R. 7 H. L. 744.
3. (1876) L. R. 1. C. P. D. 510 at 545.

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balance of authority in this court appears to be that they are: and in any case, there is a very strong body of authority in this court going to show that witnesses must be held absolutely privileged in civil actions for defamation. I may refer to the judgment of Mr. Justice *Shephard* in *Mangayya* v. *Sesha Chetty*[1] which recites and follows the decision of the Privy Council in *Ganesh Dutt Singh* v. *Mugneeram Chowdry*[2]. I may also refer to the judgment of Mr Justice *Subrahmanya Aiyar* in the case which is reported in Weir's Crl. Rulings, Vol. 1, p. 561, though I think that was a criminal case. Mr. Seshagiri Iyer has also called our attention to the fact that this case is brought on the original side of this court, and in the Presidency town, where in a matter of this sort the Common Law prevails. Apart from this, I think there is abundant authority that this suit is not maintainable and it must be accordingly dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Chelakote Rama Kurup .. Appellant*

v.

Chelakote Shekara Kurup & others .. Respondents.

Rama Kurup v. Shekara Kurup.

Malabar Law—Karnavan—Prior suit by Anandaravans—Karnavan colluding with defendants for possession of property—Decree—Second suit by Karnavan for possession on the basis of the prior decree—Res judicata.

A suit by a Karnavan, claiming right to possession under a decree in a former suit by the Anandaravans, as the only person entitled to represent the Tarwad, is maintainable and not barred by *res judicata*, though it may be, that in the prior suit by the Anandaravans, he opposed the claim which the decree recognized.

A Karnavan does not cease to be a Karnavan or lose his right to possession by the mere fact that he was unwilling to prosecute a suit and that the Anandaravans consequently happened to combine to bring a suit for possession on behalf of the Tarwad and obtained a decree.

Second Appeal from the decree of the District Court of South Malabar in A. S. No. 396 of 1907 presented against the decree of the Court of the District Munsif of Parapanangadi in O. S. No. 306 of 1906.

S. Swaminadhan for appellant.

V. Ryru Nambiyar for respondents.

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* S. A. No. 816 of 1908. 1st March, 1910.

1. (1888) I.L.R. 11 M. 477. 2. (1872) 11 B.L.R. 321, 328.

Rama Kurup v. Shekara Kurup.

The Court delivered the following

JUDGMENT:—The suit is to eject defendants Nos. 7 to 9 from possession. They hold the properties sued for, under a mortgage with possession granted by defendants Nos. 1 to 5. Defendants Nos 1 to 5 are members of the same Tarwad as the plaintiff, and he is the Karnavan. In a former suit, defendants Nos. 1 to 5 and other members of the Tarwad sued as plaintiffs to recover the same properties that are now sued for, from the members of a Tavazhi on the ground that the alienation to the Tavazhi was invalid. The present plaintiff, as the 13th defendant, supported the Tavazhi and also raised the contention that Anandravans could not sue for possession. The claim of the Tavazhi was negatived. The contention that the Anandravans could not claim possession was also overruled. A decree was passed that the plaintiffs were to get possession on behalf of the Tarwad. The plaintiff, who was the 13th defendant in the former suit, bases his suit on the former decree and claims possession as the only person entitled to represent the Tarwad until legally removed by the former decree-holders. It is argued that this claim is *res judicata.* No question was raised in the former suit as to whether the Karnavan had forfeited his right to possession. It would be anomalous to hold that certain members of a Tarwad, who chanced to combine in a suit for possession because the Karnavan would not sue, and obtained a decree for the Tarwad, could thereby permanently acquire the right to possession on behalf of the Tarwad against the Karnavan who is not removed from his office. We do not feel bound to construe the former decree as practically removing the Karnavan from his position as regards the suit properties. The present suit, therefore, practically based on the right created by the former decree cannot fail.

But the plaintiff says defendants Nos. 7 to 9 claim to be mortgagees with possession from defendants Nos. 1 to 5. It is not alleged that the right to possession under it has terminated. We are unable to hold that a mortgage with possession granted by or on behalf of the successful decree-holders in the former suit is altogether invalid. They were entitled to hold possession of, and deal with, the properties in the customary way until the plaintiff claimed possession from them. It appears to us, therefore, that the plaintiff cannot eject defendants Nos. 7 to 9 from possession. We dismiss the second appeal with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON THREE CONSOLIDATED APPEALS FROM THE COURT OF THE JUDICIAL COMMISSIONER OF SIND.]

Present:—Lord Macnaghten, Lord Mersey, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Musammat Bachi and others .. Appellants*

v.

Bikhchand Jiomal and another .. Respondents.

Musammat Bachi v. Bikhchand Jiomal.

(Bombay) Dekkan Agriculturists' Relief Act (XVII of 1879)—Suit for redemption—Form and reality of the suit—Special relief.

Special relief under the Dekkan Agriculturists' Relief Act (XVII of 1879) could not be granted in a suit, which was in form a suit for redemption, but in reality was a suit to recover property of which the rightful owner had been deprived by fraud.

Three appeals, which were consolidated, from three decrees of the Court of the Judicial Commissioner of Sind (July 5, 1907) reversing a decree of the District Court of Sakkar Larkana (November 20, 1905).

The question for determination was whether the appellants or any of them were, under the Dekkan Agriculturists' Relief Act (XVII of 1879), entitled to special relief to redeem a mortgage executed on September 27, 1892, by three persons, named Saindino, Mitho and Sachedino, in favour of two of the respondents, *viz.*, Bikhchand and Dipchand. The property mortgaged was 500 acres of land to secure a sum of Rs. 1,700. For inteiest on Rs. 1,000 of that amount the mortgagees were to receive the produce of a part of the land, the interest on the remaining Rs. 700 was compounded for Rs. 300, and Rs. 2,000, principal and interest, was to be paid by annual insalments extending to January 25, 1900.

By a deed of sale, dated the 9th June 1894, Mitho and his brother Mirzan sold 122 acres out of the 500 acres comprised in the mortgage to Bikhchand and Dipchand, the mortgagees. The deed of sale set out that the consideration for the sale was the sum of Rs. 2,000 due on the mortgage, which was expressed to be cancelled. Saindino attested the deed of sale as a witness, and

* 1910, November 17.

Musammat Bachi v. Bikhchand Jiomal.

the mortgagors obtained possession of the remainder of the 500 acres mortgaged. On September 8, 1896, Bikhchand and Dipchand sold the said 122 acres of land to the first respondent Kherajmal, who had ever since been in possession as owner.

Sachedino died in 1896, and Saindino in 1898, and their respective heirs, as plaintiffs, instituted the present suit on January 31, 1905, against Kherajmal, the purchaser of the said 122 acres, and Bikhcand and Dipchand, the mortgagors under the deed of September 27, 1892, as defendants. The plaint alleged (*inter alia*) that the plaintiffs were not bound by the sale of June 9, 1894; that Sachedino, Saindino, and Mitho and others, as heirs of a common ancestor, named Mitho, held the landed property of the family jointly, and, notwithstanding the ostensible title, the said three mortgagors were each entitled to a third share in the lands recorded in the name of each of them; and that the mortgage of 1892 must be regarded as subsisting in regard to the 122 acres sold in 1894. The relief sought was the redemption of a two-thirds share of the said 122 acres after the taking of accounts and the grant of special relief under the Dekkan Agriculturists' Relief Act.

Bikhchand and Dipchand did not enter any defence. Kherajmal pleaded that the plaintiffs never had any right to the property in suit; that he (the defendant) knew nothing of the mortgage of September 27, 1892; that the deed of sale of June 9, 1894, was executed with the knowledge and consent of Sachedino and Saindino and their heirs; that no objection was taken to it, and the plaintiffs were, therefore, bound by it; that the effect of that deed of sale was to redeem the said mortgage, with a result that there was no mortgage to redeem; and that the Dekkan Agriculturists' Relief Act did not apply to the suit.

The District Judge held that the land in suit was held jointly by the heirs of the common ancestor, Mitho; that Sachedino's and Saindino's heirs were respectively entitled to one-third of the same, and Mitho and his brother Mirzan to the remaining third, that Sanidino was bound by the deed of sale as consenting thereto and by taking advantage of its terms, and his heirs were, therefore, equally bound by it, but that the consent of Sachedino had not been proved; that Kherajmal had notice of the

mortgage when he bought the land in suit and must be treated as a mortgagee; that the property in Kherajmal's hands was subject to the rights of Sachedino's heirs, who were entitled to redeem; and that the Dekkan Agriculturists' Relief Act was applicable to the case. In the result he made a decree granting relief on terms to the heirs of Sachedino alone.

Against that decree three appeals were filed in the Court of the Judicial Commissioner of Sind, one by Kherajmal, the second by Bikhchan and Dipchand, and the third by the plaintiffs. They were disposed of by one judgment. That Court held (*inter alia*) that the deed of sale of June, 1894, was a regular and business-like document, under which a small share of the property was sold in return for the remainder being released from the mortgage; that its effect was that the mortgage of September 27, 1892, was extinguished, and that Bikhchand and Dipchand became absolute owners of 122 acres conveyed thereby, and the balance of the 500 acres mortgaged was held by the mortgagors free of the mortgage; and that as no mortgage existed at the date of the suit there could be no right of redemption and no suit for redemption would lie. In the result three decrees were made allowing the appeals of the purchaser and the mortgagees, and dismissing the appeal of the plaintiffs, who, thereupon, appealed to His Majesty in Council against all the three decrees.

J. M. Ashbury, K. C., and *E. U. Eddis*, for the appellants, contended that none of the plaintiffs were bound by the deed of sale of June 9, 1894; that nothing done by Sachedino or Saindino at the time of or after the deed of sale estopped them or their heirs or representatives from bringing the suit; that the deed of sale could not and did not operate to extinguish the mortgage of September 27, 1892, or to deprive any of the plaintiffs of their right to redeem; that so far as the plaintiffs were concerned that mortgage remained in force at the date of filing the suit; and that the plaintiffs were entitled to special relief under the Dekkan Agriculturists' Relief Act (XVII of 1879), Ss. 12 and 13 (*d*). [The Dekkan Agriculturists' Relief Act (VI of 1895) S. 7, was referred to by Lord Macnaghten.]

De Gruyther, K. C., and *L. Chuharnal*, for the respondents, were not heard.

Musammat Bachi v. Bikhchand Jiomal.

The Judgment of their Lordships was delivered by

Lord Macnaghten :—The Dekkan Agriculturists' Relief Act gives extraordinary relief in certain cases. The cases are specified in the Act. The list includes a suit for redemption. The only question is—Is this suit one in which special relief can be granted ? In their Lordships' opinion it is not. In form it is a suit for redemption. In reality it is nothing of the kind. It is a suit to recover property of which the rightful owner has been deprived by fraud. That settles the case.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed, and the appellants must pay the costs.

Appellant's Solicitors :—*Sanderson, Adkin, Lee and Eddis.*

Respondents' Solicitors :—*T. L. & Wilson Co.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF BENGAL.]

Present:—Lord Macnaghten, Lord Mersey, Lord Robson. Sir Arthur Wilson and Mr. Ameer Ali.

Roy Jatindra Nath Chowdhry & another .. Appellants*

v.

Prasanna Kumar Bannerji & others .. Respondents.

Jatindra Nath Chowdhry v. Prasanna Kumar Bannerji.

Bengal Tenancy Act (VIII of 1885) Ss. 188, 30 and 7 (1)—"Acting together" Suit for enhancement of rent—Joint landlords—Plaintiffs.

The Bengal Tenancy Act (VIII of 1885) prohibts one or some of two or more joint landlords from suing to enhance the rent unless both or all of the "fractional landlords" join in the suit as co-plaintiffs. [*Raja Pramada Nath Roy* v. *Raja Ramani Kanta Roy*[1] *distinguished.*]

If a person is made a defendant because he is unwilling to act together" with the plaintiff, he cannot be deemed to be "acting together" with the plaintiff within the meaning of S 188 of the Act by his being placed on the record as defendant.

Obiter :—A suit for recovery of rent does not require the authority of the Bengal Tenancy Act and, consequently, stands on a different footing.

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* 1910, Nov. 1, 2 & 15.

1. (1907) L.R. 35 I.A. 73.

Jatindra Nath Chowdhry *v.* Prasanna Kumar Bannerji.

Five consolidated appeals from decrees of the High Court at Calcutta, dated the 18th July, 1st August and 18th August, 1904, on appeals from the judgments and decrees of the District Judge of Alipore, dated the 8th February, 1904, delivered and made upon a remand order of the High Court, dated the 25th August, 1903, dismissing a portion of the plaintiffs-appellants' claim in their suits, with costs.

The five appeals arose out of five different suits instituted by the appellants, Nos. 23, 24, 25, 26 and 38, in the Court of the 1st Munsif at Sealdah, and the points for determination were common to them all.

Suit No. 38 of 1904, was filed by the appellants on the 14th March, 1895, in the said court against the first defendant therein, a respondent, being a tenant of theirs, for the enhancement of his rent. The remaining respondents to the appeal arising out of that suit were subsequently added by the court as parties, *pro forma* defendants, on the ground that they were co-sharers of the appellants of the lands in respect of which the rent was claimed to be enhanced.

The other four suits, Nos. 23, 24, 25 and 26 of 1895, were also filed against tenants of the appellants for the recovery of certain arrears of rent, as well as for the enhancement of their rents, and similarly in them also, the alleged co-sharers of the appellants were added as parties, *pro forma* defendants.

In so far as the claims for the arrears of rent were concerned the appellants obtained decrees therefor, and the only question which arose in their consolidated appeals was as to the appellants' right to obtain decrees for enhancement of rents in the said suits, as framed against their tenants, the defendants, respondents.

The question was raised upon a preliminary objection taken by the original defendants, the tenants, and it had been decided against the appellants.

The facts on which the appellants based their claim were shortly as follows :—

They were the sole proprietors of a zemindari estate separately assessed to Government revenue, and consisting of two

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mahals, numbered respectively 166 and 166/1 in the Collectorate register.

The original defendants in the said suits were tenants of the appellants of lands forming a part of his said zemindari, and were liable as such to pay a fixed and definite sum as rent to the appellants alone.

The *pro forma* defendants, added by the court as parties as aforesaid, were the owners of certain other zemindari estates separately assessed to Government revenue, and numbered respectively as Mahals Nos. 136, 163, 168 and 222 in the Collectorate register.

The lands of the villages Dakshineswar and Khosalpore formed part of the said six mahals.

The tenants-defendants as tenure-holders of the said villages were at the time of the institution of the suits, paying, and had for years past paid, to the respective owners of each of the said separately assessed Mahals, a fixed sum as the rent for their holding under each separate zemindar.

Thus the appellants had, as the owners of Mahals Nos. 166 and 166/1, received from each of their said respective tenants, the defendants, respondents, fixed separate sums in respect of the rents due to them. The said rents were much below the proper rates, and were liable to enhancement.

On the 15th May, 1897, the five suits came on for hearing before the Munsif of Sealdah, who on a preliminary objection taken by the defendants that the suits for enhancement were not maintainable by the appellants alone, dismissed them with costs. He held that the lands being undivided, the appellants and their co-sharers were joint landlords, and that having regard to S. 188 of the Bengal Tenancy Act (VIII of 1885), the suits could not be maintained by the former alone.

The appellants appealed to the Court of the Subordinate Judge of the 24 Pergunnahs, who, by his judgment of the 5th January, 1898, set aside the said decrees and remanded all the five suits with directions that as regards the question of enhancement it should be decided whether the appellants were co-parceners with others, as they were alleged by the defendants to be, and if they were found so to be, the co-parceners should

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be made parties to the suits, and that the issue as to arrears of rent should be determined.

On the 21st December, 1898, the Munsif of Sealdah, at a hearing of the five suits after the said remand, held that the *pro forma* defendants were co-sharers with the appellants of the said lands, and ordered them to be added as parties, defendants.

On the 18th February, 1899, appeals by the appellants against the last mentioned order were dismissed by the District Judge of the 24 Pergunnahs.

On the 28th June, 1899, the Munsif of Sealdah continued the rehearing of the suits after remand, and held that the appellants as "fractional landlords," could not maintain a suit for enhancement of rent, that the *pro forma* defendants, as co-sharers, did not join with the appellants in their claim, and in fact contested it, and he, therefore, dismissed the suit No. 38 of 1895, with costs; and he also dismissed so much of the other four suits as related to the claim for enhancement.

On the 24th July, 1899, and 23rd August, 1899, the Munsif made decrees in favour of the appellants against the tenants, defendants, for the arrears of rent due to them in the four other suits Nos. 23, 24, 25 and 26 of 1895.

The appellants appealed against the said judgments and decrees dismissing their claim for enhancement of rent, and on the 12th May, 1900, the District Judge of the 24 Pergunnahs dismissed the said appeals with costs. His reasons for so deciding were—(*a*) that he considered that by the judgment of the 18th February, 1899, the then District Judge of the 24 Pergunnahs had decided that the co-sharer landlords must be added as parties, plaintiffs, in order to make such a suit maintainable; (*b*) that having only been joined as defendants the said judgment was not complied with; (*c*) that the said judgment constituted *res judicata* upon the whole question; and (*d*) that to decree the appeals would be to overrule that judgment which he had no power to do.

Against the said decree the appellants appealed to the High Court at Calcutta, which court, on the 25th August, 1903, ordered that all the decrees of the lower courts should be set

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aside, and the cases remanded to ascertain upon further information whether there had been any partition, not by metes and bounds, but of one estate into six separate estates with a proportionate allotment of rents to such separate estates and dealt with accordingly.

The cases came on remand before the District Judge of the 24 Pergunnahs, who, on the 8th February, 1904, held that the appellants were not entitled to adduce any evidence upon the said question, or to be allowed any time for making the necessary inquiries, and that there appeared to have been no such partition, and dismissed the appellants' suits.

The appellants again filed appeals against the said decrees which the High Court, on the 18th July, and 1st and 18th August, 1904, respectively, dismissed summarily under S. 551 read with S. 587 of the Code of Civil Procedure (Act XIV of 1882).

The High Court refused to grant leave to appeal to His Majesty in Council, but the appellants obtained special leave to appeal. The five appeals were ordered to be consolidated and heard together on one printed record.

De Gruyther, K. C., and *A. M. Dunne*, for the appellants:—The tenant-respondents might be either occupancy raiyats or tenure holders, and the Bengal Tenancy Act (VIII of 1885) provides for the enhancement of their rents in both cases; in the former, under S. 7, and in the latter, under S. 30. It is submitted that the suit is rightly framed. The appellants are separate proprietors, and their estate is a separate estate within the meaning of those expressions in S. 3. Mahals No. 166 and 166/1 formed separate estates in as much as they were entered separately in the register of the Collector, bore separate towzi numbers, had a separate assessment for Government revenue payable in respect thereof, and had separate rental payable by the tenants thereof. The facts found and admitted raised an inference in law that the appellants were separate and divided owners of Mahals No. 166 and 166/1, and entitled, as such, to collect their rents separately and to enhance them when necessary—*Hem Chunder Chowdhry* v. *Kali Prasanna Bhaduri*[1]. It

1. (1899) I. L. R. 26 C. 832.

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has been held that the appellants were entitled to decrees against the tenants respondents for arrears of rent due to them separately, and it follows in law that they are entitled to enhance those rents separately and to maintain a suit for that purpose. A suit to enhance rent stands on the same fooling as a suit for arrears of rent, and this appeal, where all the alleged co-sharers have been made defendants, is governed by the principle laid down in the case of *Pramada Nath Roy* v. *Ramani Kanta Roy*,[1] that a suit for arrears of rent may be brought by one joint landlord making the other joint landlords defendants.

Neither of the repealed Acts (X of 1859 and VIII of 1869, B.C.) contained any provision in the smallest degree resembling that contained in S. 188 of Act VIII of 1885. The general principle is that a sharer, whose co-sharers refuse to join him as plaintiffs, can bring them into the suit as defendants *Pramada Nath Roy* v. *Ramani Kanti Roy*[2]. S. 188 of Act VIII of 1885 is not intended to alter in this respect the general law as it stood prior to the passing of that Act.

[*Lord Macnaghten* referred to the following *dictum* of *Lord Herschell* reported in the *Bank of England* v. *Vagliano Brothers*[3]:—"I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which is intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."]

[*Lord Robson.*—There is nothing in the Act enabling a joint landlord to compel his dissentient joint landlords to join him in the suit.] There is nothing.

[*Lord Macnaghten.*—Is there any such provision in the Act in the case of a suit for arrears of rent ?]

1. (1907) 35 I. A. 73. 2. (1907) 35 I. A. 73 at p. 77.
3. (1891) A. C. 107 at pp. 144 and 145.

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After a reference to Act VIII of 1855, Ss. 53, 54, 58, 65, 66, 68, 143, 148, 159, 162 and 184, and Sch. III, it was submitted that every suit for arrears of rent was a suit brought under that Act. The words in S. 188 are "anything which the landlord is under this Act required or authorized to do." The Act does not authorize the landlord to raise the rent. Enhancement of rent is the act of the court. A suit for enhancement of rent does not come within the meaning of S. 188, but is governed by the general principle of legal procedure as regards the joinder of parties—Bengal Tenancy (Amendment) Act (I of 1907, B. C.) S. 58 contemplates a suit like the present one in spite of S. 188 of Act VIII of 1885. Reference was also made to the Estates Partition Act (V of 1897, B. C.) Ss. 3 (5), 4 and 81. In the case of *Baidya Nath De Sarkar* v. *Ilim*[1] relied upon by the courts in India, there was no evidence to show that the plaintiff had a separate estate.

It was not necessary for the High Court to remand the case. But assuming that there was such a necessity the appellants ought to have been allowed time to obtain the information required.

G. E. A. Ross, for the respondent Prasanna Kumar Banerji.—Whether the appellants are joint landlords with others or otherwise it has been decided by every court in India that they are joint landlords. Under S. 188 of Act VIII of 1885 all joint landlords must join as plaintiffs to maintain a suit for enhancement of rent. The order of remand by the High Court was a legal and proper one, and the appellants failed to prove the partition, which they attempted to set up before that court. After referring to Act VIII of 1885, Ss. 30 and 86, he submitted that the appeal ought to be dismissed on the authority of *Baidya Nath De Sarkar* v. *Ilim*[2]; *Guni Mahomed* v. *Moran and Doorga Proshad Mytee* v. *Joy Narain Hazra*[3]; *Beni Madhub Roy* v. *Jaod Ali Sircar*[4]; *Moheeb Ali alias Dummer* v. *Ameer Rai*[5] *Gopal Chunder Das* v. *Umesh Narain Chowdhry*[6]; *and Haldhar Saha* v. *Rhidoy Sundri*[7]. The case of *Pramada Nath Roy* v.

1. (1897) I. L. R. 25 C. 917.
2. (1897) I. L. R. 25 Cal. 917.
3. (1878) I. L. R. 4 Cal. 96.
4. (1890) I. L. R. 17 Cal. 390.
5. (1890) I. L. R. 17 Cal. 538.
6. (1890) I. L. R. 17 Cal. 695.
7. (1892) I. L. R. 19 Cal. 593.

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Ramani Kanta Roy[1] relied upon by the other side, was a case based upon a contract, and is, therefore, distinguishable.

DeGruyther, K. C. replied.

The Judgment of their Lordships was delivered by

Lord Macnaghten :—This litigation which is the outcome of five different suits, has lasted for the period of fifteen years. It is not necessary to explain its origin or to trace its course which has certainly been leisurely and somewhat devious. Nothing now remains to be determined but a question of general importance :—

Does the Bengal Tenancy Act, 1885, prohibit one or some of two or more joint landlords from suing to enhance the rent unless both or all of the "fractional landlords," as they are sometimes called, join in the suit as co-plaintiffs?

S. 188 declares that "where two or more persons are joint landlords, anything which the landlord is under this Act required or authorised to do must be done * * * by both or all those persons acting together * * "

The question therefore divides itself into two branches : (1) Is the institution of a suit to enhance rent a thing which the landlord is under the Act authorised to do? And (2) What is the meaning of the words "acting together"?

To take that expression first, it seems to their Lordships that it means just what it says. In order to comply with the Act the persons referred to must take common action. It was argued that it is enough if one of the joint landlords sues as plaintiff and makes those who do not concur with him defendants. In plain words the proposition is that if a person is made a defendant because he is unwilling to act together with the plaintiff he is to be deemed to be acting together with the plaintiff when once he is placed on the record as defendant. It is enough to state the proposition to dispose of it.

Then comes the question : Is a suit to enhance rent a thing authorised under the Act? It is so plainly in the case of an occupancy raiyat. The authority is given expressly in S. 30. It is so also in the case of tenure-holders though the language is not so explicit. S. 7 (1) provides that in the cases where

1. (1907) L. R. 35 I. A. 73.

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the rent of a tenure-holder is liable to be enhanced (subject to any contract between the parties) up to a certain specified limit. Now rent can only be enhanced by instituting a suit for that purpose; and therefore it seems tolerably clear that the institution of a suit for enhancement of rent is a thing authorised by the Act in the case of tenure-holders as well as in the case of occupancy-raiyats.

It was argued that a suit to enhance rent stands on the same footing, and as a suit for arrears of rent may be brought by one joint landlord making the other joint landlords defendants [as was decided in the case of *Raja Pramada Nath Roy* v. *Raja Ramani Kanti Roy* [1]] a similar course may be adopted in a suit to enhance rent. But the answer is that the bringing of a suit for arrears of rent is not a thing which the landlord is under the Act either required or authorised to do. Rent in arrear is a debt. The right to recover a debt arises under the general law. A suit for recovery of rent does not require the authority of the Bengal Tenancy Act, nor does the Act purport to authorise such a suit, though on a decree being obtained consequences may follow which result from the provisions of the Act and from those provisions alone.

Their Lordships therefore think that the judgment of the High Court dismissing these suits was quite right, and they will humbly advise His Majesty accordingly.

The appellants will pay the costs of the appeal.

Solicitors:—Messrs *T. L. Wilson & Co.* for the appellants.

Solicitors:—Mr. *D. Grant* for the respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Present:—Lord Macnaghten, Lord Mersey, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Bur Singh and others .. Appellants*

v.

Uttam Singh and others .. Respondents.

Will—Evidence—Testamentary capacity—Illness and intemperance of the testator—Undue influence—Persons propounding the will benefitting by it.

1. (1907) L. R. 35 I. A. 73.

*1910 Nov. 3 & 4, and Dec. 2.

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The onus of proving the testamentary capacity of a testator lies on those by whom the will is propounded, and the evidence held to discharge that obligation is not displaced by the mere proof of serious illness and of general intemperance of the testator.

Evidence of circumstances of the character that there was motive and opportunity for the exercise of undue influence by the persons propounding a will, and that some of them in fact benefitted by the will to the exclusion of other relatives of equal or nearer degree, may suggest suspicion and would certainly lead the court to scrutinize with special care the evidence of those who propound the will, but is not by itself sufficient to set the will aside on the ground of undue influence.

In order to set aside a will on the ground of undue influence there must be clear evidence that such influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.

Appeal from a judgment and decree of the Chief Court of the Punjab (June 17, 1907), which reversed a judgment and decree of the Court of the District Judge, Hoshiarpur (December 16, 1902).

The main question in the appeal was as to the validity of a will.

On March 26, 1901, the plaintiffs (respondents) instituted the suit. In their plaint they alleged, *inter alia*, that one Shib Singh, a Hindu Jat, who owned certain immovable property, died sonless on June 23, 1898, leaving him surviving his widow Musammat Charan Kuar (defendant No. 1); that on the death of Shib Singh, mutation of names in respect of the property left by him was effected in favour of his widow; that in February 1899, Harbans Singh (defendant No. 4), under the guardianship of his father, Jawala Singh, brought a suit for possession of certain of the properties left by Shib Singh, against his widow, Charan Kuar, on the ground that he was entitled to the same under a will, dated the 11th June, 1898, and made by Shib Singh in favour of Bur Singh (defendant No. 2), Tara Singh (defendant No. 3) and himself; that on October 16, 1900, the parties to that suit compromised it in fraud of the rights of the plaintiffs, agreed to divide the whole of the property left by Shib Singh in three equal shares, one of which was to go to Harbans Singh, the other to Charan Kuar, and the third to Bur Singh and Tara Singh, who were brothers; that the plaintiffs and Bur Singh and Tara Singh were the reversionary heirs of Shib Singh; that "at the time Shib Singh is alleged to have executed

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"the said will, he was seriously ill, weak, nearly at death's door, "and not in possession of his right senses and intellectual "powers, and was under the undue influence of Jawala Singh, "father of defendant No. 4 and Bur Singh, No. 3. He then "was unable to understand the effect and contents of the will. "The will was executed in presence, and under the undue pres-"sure of Jawala Singh and Bur Singh;" and that the immovable property comprised in the will was ancestral property, which the testator had no power to devise. They prayed that a decree "for declaration of rights may be passed in favour of the plain-"tiffs against the defendants, to the effect that the will, dated "the 11th June, 1898, shall not affect the plaitiff's rights after the "death of Musammat Charan Kuar, who has a life interest in "the property; and that the plaintiffs and defendants, No. 2 and "3, shall be entitled to get the immovable property mentioned "in the will in proportion to the ancestral shares after the death "of Musammat Charan Kuar."

Harbans Singh, in defence, denied the allegations in the plaint, relied on the will of June 11, 1898, and pleaded that Shib Singh, who was his mother's brother, brought him up as his own son from the day of his birth in 1887, and appointed and constituted him as his (Shib Singh's) heir. Bur Singh and Tara Singh also denied the allegations in the plaint, relied on the will in question and pleaded that the bequest to them was made in recognition of services rendered by their ancestors and themselves to Shib Singh.

On December 16, 1902, the District Judge made a decree dismissing the suit with costs. He found that the will in dispute was voluntarily executed by Shib Singh while in his proper senses; that no undue influence was proved; that the greater part of the property in question was self-acquired, not ancestral; that Shib Singh adopted Harbans Singh as his son and heir in 1887; and that the will was valid by custom whether the property, which it disposed of, was ancestral or self-acquired.

On appeal the Chief Court decided that the adoption or appointment of Harbans Singh was not established; that the will in question was not executed by Shib Singh of his own free accord; and that Bur Singh and Jawala Singh had forced

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or induced (it matters not which) him to execute it for their own benefit. In the result the plaintiff's suit was decreed with costs.

The defendants, thereupon, appealed to His Majesty in Council.

Sir *Henry Erle Richards*, K. C., and *S. G. Singh*, for the appellants:—There are two questions for determination, *viz.*, whether the will was obtained by the undue influence of Bur Sing and Jawala Singh, and whether Harbans Singh was adopted by Shib Singh. In the first case the onus lies on the respondents. Both courts have held that the will was executed by Shib Singh while he was in his proper senses. In order to impeach the will on the ground of undue influence the respondents must establish that the will of Shib Singh, the testator, was coerced into doing that which he did not desire to do.—*Boyse* v. *Rossborough*[1] and *Baudains* v. *Richardson*[2]. [*Lord Macnaghten* referred to *Wingrove* v. *Wingrove*[3].] It is submitted that the evidence produced by respondents does not discharge the onus that lies on them. If this question is decided in favour of the appellants, it would be necessary to argue the question of the adoption of Harbans Singh, and also the question as to the shares of certain parties in case there is an intestacy.

Their Lordships stopped Sir *H. E. Richards* and called upon

De Gruyther, K. C., and *B. Dube*, for the respondents:— The action is brought under S. 42 of the Specific Relief Act (I of 1877). The sole beneficiaries under the will are Bur Singh and Tara Singh, testator's reversionary heirs, Harbans Singh, testator's sister's son, and the testator's widow, who has got an allowance for maintenance.

In the Punjab, under the usual circumstances, a widow gets only a life interest, and a sister may possibly succeed, but a sister's son never succeeds to the estate of her deceased brother— *Digest of Customary Law*, by Sir W. H. Rattigan, Ss. 11, 23 and 24, p.p. 19, 27 and 34. The respondents' claim to succeed

1. (1857) 6 H. of L. C. 2, at pp. 48, 49.
2. (1905) A.C. 169; 22 I.A. 333.
3. (1885) 11 P.D. 81.

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cannot, therefore, be upheld unless the will or adoption is established. The transaction is not righteous. Those who take a benefit under a will, and have been instrumental in preparing and obtaining it, as the respondents have been in this case, have thrown upon them the onus of showing the righteousness of the transaction, and there is no unyielding rule of law that when it has been proved that the testator, competent in mind, as it is held in this case, has had a will read over to him, and has thereupon executed it, all further inquiry is shut out—*Fulton* v. *Andrew*[1]. It is submitted that the beneficiaries, the appellants, have failed to discharge the onus that lies upon them. The evidence shows that the deceased was very ill, weak, and of intemperate habits. His bodily disease had rendered his mind incapable of exerting the faculties essential to a sound and disposing mind and memory. Under all the circumstances of this case it is submitted that the Chief Court came to a right conclusion. Reference was made to *Barry* v. *Butlin* [2] and *Harwood* v. *Baker*[3].

Assuming that the will could be upheld, it is submitted that it is not valid as regards the ancestral property disposed of thereby. As to what is ancestral property, see *Digest of Customary Law*, by Sir W. H. Rattigan, S. 59, p. 94, and *Nasha Singh* v *Harnam Singh.*[4]

Sir *H. E. Richards*:—I argued the case on the footing that the property is acquired in view of the admissions made by the respondents in the Chief Court.

[*Lord Macnaghten* :—It is purely a question of fact, and the finding of the two courts is against the respondents.]

De. Gruyther was not allowed to raise this question.

Their Lordships did not call upon Sir *H. E. Richards* to reply.

The Judgment of their Lordships was delivered by

Lord Robson:—The main question in this appeal is as to the validity of the will of one Shib Singh, who was a Hindu Jat, residing at Garhdiwala in the District of Hoshiarpur in the Punjab.

1. (1875) L. R. 7 E. and I. 448.
2. (1838) 2 M. P. C. C. 480.
3. (1840) 3 M.P.C. C. 283
4. (1894) 29 P.R. 86 (No. 31 of 1894).

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There is a further point as to whether a portion of the land comprised in the will is ancestral property or not. That question is substantially one of fact. Both the courts below are agreed in finding that the property in dispute was acquired, and no reason has been shown to their Lordships which would justify them in coming to a different conclusion.

Shib Singh fell seriously ill in May, 1898. The will in dispute was made by him on the 11th June, 1898, and he died on the 23rd of the same month. It is alleged by the respondents in their plaint that the will was executed when "he was seriously ill, weak—really at death's door—and not in possession of his right senses and intellectual powers, and was under the undue influence of Jawala Singh, father of the defendant, Harbans Singh and Bur Singh."

None of the judges had the advantage of seeing the witnesses as the evidence was taken wholly on deposition before the trial. There was very little conflict of evidence on the particular facts alleged, so far as those facts were material to the making of the will or the condition of the testator, and the only question for the courts was whether, on such facts, the charges of testamentary incapacity and undue influence had been established.

Shib Sing was brought from Garhdiwala to Hoshiarpur for medical treatment on the advice of Mr. Chatterji, a mission teacher with whom he was acquainted, and was placed under the care of two doctors. He was accompanied by his relative, the defendant Bur Singh, and his brother-in-law, Jawala Singh. His physical condition became, no doubt, rapidly worse, and he, or some one about him, sent for his lawyer, Pandit Jagan Nath, in order to take instructions for his will. This gentleman gave evidence for the appellants. He was an old friend and school-fellow of the testator, and had been his counsel in practically all his litigation. He took his instructions from Shib Singh himself, and visited him for that purpose on several occasions before the day on which the will was executed. It cannot be said that, so far as the relationship of the beneficiaries to the testator is concerned, there was anything unnatural or unusual in the will. An allowance for maintenance was made

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to the wife; certain property was left to the defendants, Bur Singh and Tara Singh, who were relatives, and whose grandfather is stated to have had care of Shib Singh when the latter was a boy and to have rendered him important services. The remainder of the property went to his nephew, Harbans Singh, who had been born in Shib Singh's house and brought up by him, he himself being childless.

The will was dictated by the Pandit Tagan Nath (in the presence of Shib Singh) to a petition-writer, Madho Ram, who knew Shib Singh. Dr. Datta and several zemindars were also present. While the dictation was going on Shib Singh made various observations on the clauses, and some alterations were made at his suggestion in the draft; for instance he increased the provision for his wife. Dr. Datta afterwards read the completed document over to him and satisfied himself by questions that he understood it, and it was duly signed. Jagan Nath had previously sent for the Registrar to have the will registered, but the Sub-Registrar had come and gone before the will was signed, and in the course of conversation on this subject Shib Singh said he was under the treatment of doctors and he would have it signed by them. On the following day, therefore, both doctors signed it, and, according to the custom of their profession in India in such cases, they added a statement of their opinion that the testator, though ill, was in his senses. Dr. Datta gave evidence at the trial in favour of the will, but Dr. Dunichand had in the meantime died.

It would be difficult to have a stronger *prima facie* case in favour of the will, and it was fully accepted by the District Judge. The Chief Court also say that they "see no reason to doubt the evidence of the Rev. Mr. Chatterji and Dr. Datta that on the day when the testator signed the will he was in his senses, or in other words, that he was not unconscious or wandering in his mind," but they are of opinion that he was "in a condition which rendered him powerless to withstand the influence of [the defendants] Bur Singh and Jawala Sing," who were in close attendance upon him, and in whose hands the Chief Court think that "he was merely a tool." They add that in their opinion, those defendants "took advantage of the testator's

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helplessness to force or induce him to execute it for their benefit." Their Lordships are unable to find any evidence on the record which would justify this conclusion.

The testator had been a man of intemperate habits, and was within 12 days of his death when the will was made; but there is no evidence to indicate that he was not sober, or not of a sound disposing mind when he was transacting the business of his will on the 11th June. Nor is there any evidence whatever that the defendants, Bur Singh and Jawala Singh, used the undue influence which is alleged, beyond the bare fact that they were the relatives who accompained Shib Singh to Hoshiarpur, and were selected by him for benefits under the will.

It is stated that up to 1896 Bur Singh and Shib Singh were at enmity, and that there were open quarrels and litigation between them. That does not appear, however, to have prevented the testator from afterwards employing Bur Singh in the management of his lands, or from sharing his table with him. The District Judge finds that Bur Singh's services to the testator are proved both from documents and from the oral evidence of very respectable witnesses. These old family quarrels do not therefore, of themselves, show that Bur Singh could not have been a person whom the testator desired to benefit.

It was alleged on the part of the defendants that Harbans Singh had been duly adopted by Shib Singh as his son, and the District Judge found this adoption proved. The Chief Court differed from him on this point, and drew some inferences unfavourable to the defendant's case generally from the fact that the allegation had been put forward. It is unnecessary for their Lordships to decide the question of adoption, bnt they are of opinion that the evidence given in relation to that question gives rise to no material reflection on the evidence of the independent witnesses in support of the will. The Chief Court treat the evidence of Jagan Nath as not quite "beyond criticism," because, in their opinion, he acted in the matter of the will as though he were ignorant of facts disclosed in previous proceedings relating to the position of Harbans Singh and Bur Singh which it was thought probable he would remember, but they do not go so far as to reject or discredit his testimony. Indeed Jagan Nath was

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not cross-examined on these points, and there is really nothing in them which is not susceptible of explanation without reflecting in any way on his independence and good faith as a witness.

With regard to the Rev. Mr. Chatterji it was suggested apparently as a circumstance of suspicion against him that he had at one time bought a piece of land for his Mission from Shib Singh; but there is nothing to show that the transaction was not a normal and perfectly proper matter of business.

No suggestion is made against the good faith of the doctors or of Mahdo Ram.

The onus of proving the testamentary capacity of Shib Singh of course lies on those by whom the will is propounded and in their Lordships' opinion they have discharged that obligation by the evidence indicated above. Such evidence is not displaced by mere proof of serious illness and of general intemperance, and yet that is as far as the evidence of the respondents can fairly be said to go. So far as the charge of undue influence is concerned, all that is shown on the part of those attacking the will is that there was motive and opportunity for the exercise of such influence by the defendants, and that some of them in fact benefited by the will to the exclusion of other relatives of equal or nearer degree. Circumstances of that character may sometimes suggest suspicion and would certainly lead the court in the present case to scrutinise with special care the evidence of those who propound the will; but in order to set it aside there must be clear evidence that the undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.

Such evidence is not only lacking in this case, but, in the opinion of their Lordships, the circumstances attending the making and execution of the will are not reasonably consistent with it.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed with costs, and the judgment of the Chief Court set aside and that of the District Court restored with costs in both courts.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE JUDICIAL COMMISSIONER'S COURT, OUDH.]

Present :—Lord Macnaghten, Lord Mersey, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Mahomed Bakar and another .. Appellants*

v.

Nawab Mirza Muhammad Bakar Ali Khan and another .. Respondents.

Mahomed Bakar *v.* Mirza Muhammad Bakar.

Law of Oudh—Settlement—Obligation to release the property settled—Trust—Adverse possession.

At the time of the first settlement of Oudh in 1859 a lady applied as *malik* for settlement of the villages in suit. Her claim was opposed by a Nawab, who was in possession, on the ground that he was entitled to remain in possession until certain monies, which he had disbursed on her account, were paid off. That objection was upheld and the settlement was made with the Nawab "in accordance with possession," and the lady was directed to proceed by a separate application to get the property released by payment of the money due by her. In 1867, when the regular settlement of the Province was in progress, the lady's application for settlement of the villages with her was again resisted by the Nawab on the ground that they were included in the *Sanad* granted by Government to him, and dismissed on the 31st October, 1868. The suit was instituted in 1905 to recover possession of a half share in the villages, and it was contended that the proccedings in 1859 constituted the Nawab a trustee on behalf of the body :

Held, that the co-relative obligation that lay on the Nawab to release the property on payment of the money did neither create a trust nor constitute the Nawab a trustee for the lady ; that in 1867, when the lady applied for the regular settlement, an adverse title was distinctly set up by the Nawab, and from the 31st October, 1868, the date of the dismissal of her application, the Nawab's possession was adverse to the lady ; and that the suit was, therefore clearly barred.

[*Hasan Jafar* v. *Mahammad Askari*[1] distinguished.]

Appeal from a decree of the Court of the Judicial Commissioner of Oudh (hereinafter called the " Appellate Court "), dated the 22nd July, 1907, which set aside a decree of the Subordinate Judge of Tahsil Biswan, in the District of Sitapur, in Oudh, dated the 29th, August, 1905, and dismissed the suit of the plaintiffs, the present appellants, with costs.

The suit, which was decreed by the Subordinate Judge, was brought by the appellants againt the respondents, Nawab Bakar Ali Khan and another, for possession of a half share in six villages in the plaint, and the main question for determina-

* 1910 Nov. 9, 10 & Dec. 2.

1. (1899) L R. 26 I. A. 229.

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tion in the appeal was the effect of the re-settlement of the Province of Oudh after the confiscation of all proprietary rights in the year 1858. The appellants' case, as made out in their plaint, was as follows:—

They were the representatives in interest of one Kazi Muhammad Azhar. The respondents were the representatives in interest of one Nawab Manauwar-ud-daulah, hereinafter called the "Nawab."

In the year 1849 Musammat Wazir-un-nisa, the wife of Kazi Mahammad Azhar, above mentioned, was the proprietor of six villages named—(1) Rakhnapur, (2) Lalpur, (3) Dingarpur, (4) Kuli Muhammadpur, (5) Patti Danialpur & Gharmalpur, and (6) Nagai Mallanpur, and in that year they were, at her instance, included in the Kabuliat of the Nawab, *i. e.*, the Nawab paid the Government revenue to the King of Oudh leaving unaffected the zemindari title and possession of the lady.

The first summary settlement in the year 1856 was made with the Nawab. At the time of the 2nd summary settlement in the year 1858 various claims to settlement of these villages were advanced. On the 2nd January, 1859, the widow of Kazi Mahomed Azhar lodged her petition for settlement, basing her claim on her rights as owner. During the course of the proceedings the statement of her agent, Husain Khan, was recorded, as also statements of Syed Ali Husain, the Nawab's agent, and of the Ganungo of the Perganah. The Ganungo proved the proprietary title of the said lady, and Syed Ali Husain asserted that the villages had been included in the Nawab's *ilaka* since 1849, and that the settlement of 1856 had been made with the Nawab because of the consent of the original zemindar. He asked for settlement on the ground that eight years' arrears were due to his client, and added that whenever the original zemindar paid off the money he would get the village released.

On the 19th February, 1859, the Extra Assistant Commissioner of Sitapur made an order in terms set out in their Lordships' judgment.

On the 24th February, 1859, the Settlement Officer confirmed the said order.

At the Regular Settlement claims to the proprietary interest in the said villages were dismissed on the ground that they were included in the *Sanad* granted to the Nawab.

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On the 15th Mareh, 1871, the Settlement Officer refused to decree the said lady an under-proprietary right in the whole of the said villages, but on the 31st August, 1871, she was granted a decree for under-proprietary rights of a limited character.

On the death of Musammat Wazir-un-nisa, her daughter's sons, the second respondent and his brother, Muhammad Taki, became her heirs. Mahammad Taki died in March, 1902, and the appellants, who were his son and daughter, became his heirs.

The plaint concluded with a prayer that a decree should be passed for possession of one-half of the said villages in dispute upon payment into court of Rs. 1,651, or such other sum as the court should determine, upon a day to be named by the court, and that all necessary directions in that behalf should also be given.

The first defendant denied the existence of any trust or mortgage, and resisted the claim on the grounds, *inter alia*, that the suit was barred by time as the defendant and his predecessors in title had been in adverse and proprietary possession of the property in dispute for a long time; and that the effect of the settlement proceedings was to confer a proprietary title on the first defendant and his predecessors in title.

The Subordinate Judge framed eleven issues for trial, of which only the first, third, sixth and seventh are now material.

They were settled as follows:—

(1) Was the proprietary right in the villages in the suit conferred on Musammat Wazir-un-nisa after the confiscation of the proprietary rights in land as stated in paragraphs 9 and 10 of the plaint?

(3) Is the status of Munauwar-ud-daulah that of lien-holder or mortgagee in respect of the villages in suit as alleged?

(6) Has the defendant No. 1 been in adverse possession of the villages in suit for more than twelve years before this suit?

(7) Is the suit barred by the period of the limitation?

The Subordinate Judge found that the proprietary title of the villages in dispute was conferred upon Musammat Wazir-un-nisa and the settlement was made with the Nawab as a mortgagee or lien-holder; that the Nawab was a lien-holder; that the first defendant was not in adverse possession of the villages in suit for more than twelve years; and that the suit was not barred by

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limitation. He held that the plaintiffs were entitled to a decree for possession of the property in suit on payment of Rs. 1,651 less the cost of the suit, and he ordered that if the plaintiffs failed to pay the amount on or before the end of January, 1906, they should be debarred from redeeming the property in suit, and their suit should stand dismissed with costs. A decree was accordingly made.

On appeal the Court of the Judicial Commissioner decided that the proprietary interest was in the Nawab, and that nothing in the settlement or otherwise imposed on him any obligation to restore possession of the said villages to the appellants; and also ruled that their suit was barred (1) by the failure of their predecessors to set up a case of trust in 1867 and 1870, and (2) by limitation. The suit was accordingly dismissed with costs.

The appellants, thereupon, appealed to His Majesty in Council.

De Gruyther, K. C., and *Ross* for the appellants:—It is contended that by virtue of the Governor-General's letter of 10th October 1859, and S. 3 of the Oudh Estates Act (I of 1859) a permanent and absolute title was conferred upon the contesting respondent. But it has been held that a person who has been registered as a taluqdar under that Act, and has thereby acquired a taluqdari right in the whole property, may nevertheless have made himself trustee of a portion of the beneficial interest in lands comprised with the taluka for another—*Thakur Hardeo Bux* v. *Thakur Jawahir Singh*[1] and *Hasan Jafar* v. *Muhammad Askari*[2]. The order dated the 9th January 1859, in this case creates an implied trust and the settlement was made under that order on the predecessor of the contesting respondent as a trustee. The suit is, therefore, not barred by Art. 144 of the Limitation Act, 1877. The only question is whether a person in possession under that order would be in adverse possession from the date of that order. It is submitted that as the matter stands on record there was never any adverse possession. In 1867 the Revenue Officers having regard to their instructions had no jurisdiction to entertain the appellants' claim to a regular settlement—Oudh Parliamentary Papers (1865), paras 17 and 21, pp. 53 and 55. It cannot, therefore, be contended that there was, at the time of the regular settlement, a settlement on the

1. (1877) I. L. R. 4 I. A. 178, at p. 192 *et seq.*, and at p. 197.
2. (1899) L. R. 26 I A. 229 at p. 232.

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predecessor of the contesting respondent as a proprietor. Settlement was made on him as a trustee.

[*Lord Macnaghten.*—There is no trust here. The lady had only an option, which she did not exercise.]

Reference was also made to the Oudh Estates Act (I of 1869) S. 5, and Compendium of Oudh Taluqdari Law, by J. G. W. Sykes, pp. 13, 64, 161, 168 and 285.

Sir Robert Finlay, K.C., and *B. Dube* for the first respondent, were not heard.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali:—This appeal arises out of a suit brought by the plaintiffs to recover possession of a half share in certain villages in the District of Sitapur, in Oudh. The villages in question belonged originally to one Kazi Muhammad Azhar, but some years prior to the annexation, either for convenience in the payment of Government demands or from motives of greater security, they appear to have been included, with the consent of Muhammad Azhar's widow Wazir-un-nissa, in the *ilaka* or estate of Nawab Munauwar-ud-daula, the ancestor of the principal defendant in the case. Thus in 1859, when the first settlement of the province was carried out, the villages were found to be in the possesssion of Munauwar-ud-daula. On that occasion Wazir-un-nissa applied as malik or owner for settlement of the villages. The claim was resisted by the Nawab's agent and was ultimately dismissed. It is upon the orders passed by the Extra Assistant Commissioner in the settlement proceeding, coupled with certain statements made by the Nawab's agent, that the present action is based. On the 21st of January 1859, in answer to a question by the settlement officer as to his ground of objection to Wazir-un-nissa's claim, he stated as follows:—

"A.—This village has been included in our (my client's) : Ilaka for the last seven or eight years it neither being mortgaged nor sold. But the arrears for eight (not clear in the original) years regarding this village are still due to us (my client). Whenever the original Zamindar, *i.e.*, the claimant, will pay off our (my client's) money he will get the village released There is no other objection."

"*Q.*—Who mortgaged this village to you (your client)?

"*A.*—We (my client) got this village from the wife of Kazi Mahammad Azhar. We know nothing about the claim of Karmat-ul-lah,"

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—

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And on the 19th of February 1859 the Extra-Assistant Commissioner made the following order:—

"The objection of the Agent of Nawab Munauwar-ud-daula is that she at her own instance got the villages included into his Taluk, hence she can get the villages released on payment of the arrears and takavi. As the facts of the case have been recorded in detail, therefore it is ordered that the kabuliat shall remain as usual in accordance with possession in the name of the Agent of Nawab Munauwar-ud-daula. The claim of the Thakurs who have been out of possession for 100 years, is dismissed. The Zamindari right of the wife of Kazi Muhammad Azhar appears to be correct. She should file a separate application to have the money due to the Agent to Nawab Muauwar-ud-daula settled by arbitration and have her villages released. Whenever the villages, on payment of the money due to Nawab Munauwar-ud-daula, are released, the mortgagees shall be at liberty to put forward their claim. Let the file be submitted to the Deputy Commissioner for perusal and approval."

As the proceedings related to a number of villages similar orders appear to have been recorded on other dates.

On the 24th of February, 1859, the Deputy Commissioner, to whom the matter was submitted for approval, confirmed the settlement with Munauwar-ud-daula and dismissed Wazir-un-nissa's claim.

For the next eight years no action seems to have been taken in respect of the property in suit, but in 1867 when what is called the regular settlement of the province was in progress, Wazir-un-nissa, in conjunction with her daughter Kutb-un-nisa, applied that the villages might be settled with her. Her claim was again resisted on the ground that they were included in the *Sanad* granted by Government to the Nawab. Her application for settlement was accordingly dismissed on the 31st October, 1868. Two years later the two ladies applied for sub-settlement in respect of the villages in question, but as they could not prove possession within the period prescribed by law, their application was rejected on the 30th of August, 1871. Their rights, however, to *naukar* allowance and other dues were admitted and affirmed in proceedings taken about the same time.

In 1873 Wazir-un-nissa and Kutb-un-nisa transferred by a deed of gift their right and interest in the said villages to defendant No. 2 who is the son of another daughter of Muhammad Azhar. In 1898 the defendant No. 2 instituted a suit against the defendant Bakar Ali Khan to recover possession of those

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villages. His claim was dismissed by the first court, but was compromised on appeal.

The present action is brought by the son and daughter of a brother of defendant No. 2, who claim to be entitled to a half share in the property in suit. Their contention is that the proceedings in 1859 constituted the ancestor of Bakar Ali Khan either a mortgagee or trustee on behalf of Muhammad Azhar's widow. The latter position was abandoned in the first court where the case was tried, on the basis that the Nawab was a mortgagee or lien-holder. The Subordinate Judge upheld the plaintiff's contention, and made a decree in their favour under S. 92 of the Indian Transfer of Property Act (IV of 1882) for "redemption" on payment of a sum specified.

On appeal by the defendant Bakar Ali Khan, the Judicial Commissioners have held the suggestion that Government settled the properties with the Nawab as trustee for Wazir-un-nissa, or that he undertook to hold the same as trustee for her, to be untenable. On the question whether the plaintiffs were entitled to any relief on the hypothesis that he was a mortgagee, they held that S. 6 of Act I of 1869 was a bar to the action. They accordingly dismissed the suit.

The plaintiffs have appealed to His Majesty in Council. It is conceded on their behalf that, having regard to the provisions of S. 6 of Act I of 1869, their claim for redemption cannot be sustained. But it is contended that as the settlement with the Nawab was made subject to the rights of Wazir-un-nissa, who was declared entitled to recover possession of the villages on payment of the money due from her, the present suit comes strictly within the principle enunciated by this Board in *Husan Jafar* v. *Muhammad Askari* [1]. Their Lordships agree with the Judicial Commissioners in holding that the facts of two cases are not at all analogous. In *Hasan Jafar* v. *Muhammad Askari* [1] the settlement was effected with the person who took it on a distinct understanding which, in their Lordships' judgment, constituted him a trustee for his co-sharers who were not present at the time.

1. (1899) I. L. R. 26 C. 879.

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In the present case, the Settlement Officer's proceedings can bear no such meaning. The Nawab was in possession of the villages by virtue of some arrangement regarding the exact nature of which there is no evidence. At the time of settlement he or his agent opposed the claim of Wazir-un-nissa to have the properties settled with her, on the ground that he was entitled to remain in possession until the moneys he had disbursed on her account were paid off. That objection was upheld, and settlement was made with the Nawab "in accordance with possession," and the lady was directed to proceed by separate application to get her property released by payment of the money due by her. In their Lordships' judgment there is no warrant for the contention that the correlative obligation that lay on the Nawab to release the property on payment of the money created a trust or constituted him a trustee for Wazir-un-nissa. No step appears to have been taken by her in compliance with the directions of the settlement officer; and the Nawab was allowed to remain in possession of the property without any attempt on her part to get it released. In 1867, when she applied for the regular settlement of the village an adverse title was distinctly set up on his behalf. From the date of the dismissal of her application in 1868 on the ground that they were included in his talukdari *sanad* the Nawab's possession was adverse to her. The present suit was not instituted until 1905 and is thus clearly barred. The appeal, therefore, fails and must be dismissed with costs. And their Lordships will humbly advise His Majesty accordingly.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON CONSOLIDATED APPEALS FROM THE HIGH COURT OF BENGAL].

Present:—Lord Macnaghten, Lord Mersey, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Kumar Chandra Kishore Roy .. Appellant*

v.

Prasanna Kumar Dasi .. Respondent.

1910, Nov. 2 and 3, and Dec. 2.

Indian Succession Act (X of 1865) *S. S.* 3. *and* 187—*Will—Construction—Bequest in a clause standing by itself—Marriage—Uncertain or future event—Suit to recieve arrears of maintenance under a will—Probate—Grant of Letters of Administration with the will annexed—Subsequent limitation of the grant by the High Court, effect of—Fomal alteration of the original grant—Probate subsequent to the institution of the suit but before decree.*

Kumar Chandra Kishore Roy *v.* Prasanna Kumar Dasi.

A testator, who died in 1879, made provision for his two daughters in his will in a clause set out in their Lordships' judgment. One of the two daughters married in 1888 and the other in 1889, and they went to live in separate houses. It was contended that in view of S. 111 of the Indian Succession Act (X of 1865) the bequest in the said clause never took effect in as much as the bequests to the daughters were given only in the uncertain event of marriage, which did not happen in the lifetime of the testator:

Held, that the will dealt with the maintenance allowance for the daughters in a clause which stood by itself and which must be read by itself; that (on the construction) the clause contained no reference to marriage or any other future event, and the payment of the maintenance was, therefore, not made contingent on the marriage of the daughters; and that, as a consequence, S. 111 of Act X of 1865 did not apply.

The plaintiff brought the suit to recover arrears of maintenance alleged to be due to her under her father's will in September, 1900, when no letters of administration had been granted. In October, 1901, the testator's widow obtained from the District Judge a grant of letters of administration with the will annexed. On appeal that grant was modified by the High Court in February, 1903, by limiting it to the realisation of the maintenance provided for the widow by the will. The letters granted by the District Judge were never formally altered in conformity with the order of the High Court on account of the death of the widow. The plaintiff's suit was decreed in December, 1903. It was contended that S. 187 of the Indian Succession Act (X of 1865) was a bar to the suit:

Held, that "probate" as defined in S. 3 of the Indian Succession Act (X of 1865) was in fact obtained from the District Judge, and the provisions of S. 187 of that Act were, therefore, strictly complied with; that the subsequent limitation by the High Court, even if right, was immaterial; and that the court was competent to deal with the case as the provisions of S. 187 of Act X of 1865 were complied with before it decreed the suit.

Two consolidated appeals from a judgment and two decrees of the High Court at Calcutta, dated the 29th May 1906, affirming a judgment and two decrees of the District Judge of Rungpore, dated the 23rd April, 1904, which said last-mentioned decrees had affirmed a judgment and two decrees (except as to a small portion of the interest payable) of the Subordinate Judge of Rungpore, dated the 23rd December, 1903, granting each of the plaintiffs money decrees as prayed for in their espective suits.

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Kumar Shyam Kishore Roy, father of the parties, died on the 3rd Sraban, 1286 (=18th July, 1879), leaving him surviving the following amongst other persons :—

i. Rani Pran Kishori, first wife.

ii. Rani Basanta Kumari, third wife.

iii. Prasanna Kumari Dasi and } daughters by his third wife, the respondents respectively, in the present consolidated appeals.

iv. Srimati Sarat Kumari Dasi }

The will, dated the 10th Magh, 1284 (28th January, 1878) of the said Kumar Shyam Kishore Roy contained amongst others, the following provisions :—

i. Rules for the exercise of permission previously granted to his said two wives by two registered deeds, dated Chaitra, 1281 (=March-April, 1875) to adopt sons. (Paragraph 1).

ii. The maintenance allowance to be paid, amongst others to the said two daughters, and the conditions which were to govern the amount of such allowance. (Paragraphs 9 and 6.)

After the death of the testator, Rani Pran Kishori, in accordance with the provisions of that will, adopted the appellant.

During the minority of the appellant the estate was managed by the Court of Wards.

After the marriages of the said two daughters, which took place respectively in Phlalgan, 1294 (March, 1888) and in Assar, 1296 (July, 1889) they each lived in a separate house and each received, in accordance with the terms of the will, a maintenance allowance of Rs. 50 *per mensem* from the Court of Wards.

The appellant received possession of the estate from the Court of Wards on the 6th May 1896, after which date only a small portion of the said allowance had been paid.

In consequence the said daughters, on the 17th September, 1900, filed separate suits in the Court of the Subordinate Judge of Rungpore setting out the above facts and claiming the arrears of maintenance due together with interest.

The appellant, by his pleas, filed on the 2nd January, 1901, contended (*inter alia*)—

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(1) That as no probate or letters of administration with the will annexed had been granted to any one, the claims were not maintainable.

(2) That on a true construction of the will the bequests regarding the maintenance allowances were bad in law, in as much as the allowances were dependent upon the happening of a specific uncertain event, *viz.*, marriage, which said event happened after the death of the testator.

While the daughters' suits were pending Rani Pran Kishori applied to, and obtained from, the District Judge of Rungpore a grant of letters of administration with the will annexed. The High Court, on appeal, by its order, dated the 24th February, 1903, modified the said grant "by limiting it to the realisation of the maintenance allowance provided for her by the will." Before the District Judge could recall and alter the said letters granted by him so as to bring them into conformity with the said order of the High Court, the said Rani died.

Thereafter the appellant raised a further contention, *viz.*, that as the effect of the said order of the High Court, dated the 24th February, 1903, was to cancel the said letters of administration granted by the District Judge, and as no other letters had been or could be issued, the suit was not maintainable, having regard to S. 187 of Act X of 1865. Clauses 6 and 9 of the will were in the following terms:—

"6. As long as the sons will remain minors, the first wife, "until that time, will get a monthly allowance of Rs. 50 from "month to month on account of maintenance, and if she has a "minor son, such son will get Rs. 25, and my daughter, Srimati "Raj Lakmi, if she remain joint in food with my first wife, "will get Rs. 15 on account of her maintenance, in all Rs. 90, "and the third wife will get a monthly allowance of Rs. 50 for "her maintenance, and if she has a minor son, such minor son "will get an allowance of Rs. 25, and the four daughters born "of her womb will get an allowance of Rs. 60, at the rate of "Rs. 15 for each daughter as long as they remain joint in food "with their mother, in all Rs. 135. They will be able to realise "the amount of monthly allowance fixed by me, and the executor "will be personally liable for the loss and damage on account of

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"suit for the same. Except getting the fixed monthly allowance "the two wives will not be able to interfere with my property "moveable and immoveable."

"9. Srimati Rajlakhi is the daughter born of the womb of "my second wife, Brajangana, deceased, and there are four "daughters born of the womb of my third wife, Basanta Kumari, "being in all 5 daughters, who are alive, out of them, Rajlakhi, "the daughter of the second wife, Rajkumari, the daughter born "of the womb of the third wife, have been married. If they "desire to live in separate houses, and when the remaining three "daughters will be married and if they desire to live in separate "houses, the person in whose management my movable and "immovable property will be at that time, will make 5 separate "houses for the daughters in the vicinity of my house, from the "income of my moveable and immoveable property. For the "maintenance of my daughters I fix an allowance of Rs. 1,200 a "year for srimati Rajlakhi, Rs. 600 a year for Srimati Raj "Kumari, Rs. 600 a year for Srimati Hara Kumari, Rs. 600 a "year for Srimati Prasanna Kumari, and Rs. 600 a year for "Srimati Surat Kumari. As long as the daughters will live in "the separate houses in this place, they will get the fixed "allowances respectively. The executor appointed for my "property or my heirs and successors or the executor will not be "able to make any objection, and even if they make objection, "the same will not be granted. But if the daughters do not "live in this place they will get at the rate of Rs. 10. In "default of daughters and daughters' sons no other heirs of "them will get the allowance. If the daughters die childless "and if the sons-in-law live in this place, each of them will get "a monthly allowance at the rate of Rs. 25 during their life-"time. After his death no other heir will get the said "allowance."

The Subordinate Judge of Rungpore delivered, on the 23rd December, 1903, judgment granting the said two daughters decrees as prayed.

Against the said decrees the appellant appealed to the District Judge of Rungpore, who upheld the said decrees (except as to a small partion of the interest claimed), and on the 22nd April, 1904, dimissed the said appeals with costs.

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The appellant, thereupon, lodged second appeals in the High Court at Calcutta. The said appeals were dismissed, and the said decrees of the District Judge upheld by the said High Court's judgment and decrees, dated the 29th May, 1906.

The appellant then appealed to His Majesty in Council.

Sir Robert Finlay K. C., and *E. U. Eddis* for the appellant :—The bequests to the respondents are given in the event of marriage, but the happening of marriage is an uncertain event, and unless it happens during the lifetime of the testator, the bequests do not take effect—Indian Succession Act (X of 1865), S. 111. Here the testator died in 1879 and one of the respondents married in 1888 and the other in 1889. They cannot, therefore, succeed in their claim.

[*Lord Macnaghten* :—What do you say as to S. 107 of that Act?]

The illustrations to that section show that there must be a definite time stated in the will within which the uncertain event must happen.

Again, the District Judge granted letters of administration with the will annexed to one of the widows, but on appeal the High Court limited that grant to the realisation of her maintenance allowance under the will. The widow died thereafter, and the letters of administration in conformity with the Order of the High Court have never been granted. The claim of the respondents is, therefore, barred under S. 187 of the Indian Succession Act (X of 1865). In any case no letters of administration were obtained before the institution of the suit, which on that ground alone fails under the said S. 187. Reference was also made to the Indian Succession Act (X of 1865) Ss. 26, 119, 125, 130, 180 and 181.

D. Gruyther, K. C, and *O' Gorman*, for the respondents :—Provison for maintenance is not dependent upon marriage as contended. The only condition is that the respondents should live in separate houses to entitle them to Rs. 600 per year. This condition has already been satisfied, and the claim is good. S. 111 of Act X of 1865 does not apply.

The whole of the Indian Succession Act, 1865, is not applicable to the Hindus, but only the sections specified in S. 2 of the

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Hindu Wills Act(XXI of 1870), are applicable to them. S. 187 of the Indian Succession Act was made applicable to the Hindus in 1881 by S. 154 of the Probate and Administration Act (V of 1881) The will was proved in 1879 and probate was obtained in that year. S. 187 of the Indian succession Act, therefore, does not apply to the present case. Again, one of the widows applied for letters of administration under S. 23 of Act V of 1881 and such letters were granted to her with the will annexed. The word "probate" in S. 187 of Act X of 1865 is defined in S. 3 of that Act, and it is submitted that the requirement of S. 187 is here satisfied according to that definition of "probate." It is contended that after the order of the HighCourt limiting the grant was made, the letters of adminstration were not formally altered and, therefore, the suit is barred. That means that the suit is barred because the formal paper, called the probate, is not taken out. But in India "probate" has a statutory meaning as defined in S. 3 of Act X. Probate is conclusive as to the validity and the contents of a will :—*Bal Gangadhar Tilak* v. *Sakwarbai*[1]. It is enough if the probate is granted before passing the decree. The judgment of the High Court is right. Reference was made to the Indian Succession Act (X of 1865), Ss. 181, 184, 196 and 197.

Eddis, in reply, as to the meaning of word the "probate", referred to *Mohamidu Mohideen Hadjiar* v. *Pitchey*[2]

The judgment of their Lordships was delivered by

Lord Mersey :—These are two appeals from the judgment and decrees of the High Court at Fort William, in Bengal, dated the 26th May, 1906, confirming a decree of the District Judge of Rungpur dated the 22nd April, 1904, which confirmed a decree of the Subordinate Judge of Rungpur, dated 23rd December, 1903. The suits were brought by two Hindu ladies, daughters f one Kumar Shyam Kishore Roy, deceased, against the appellant who is adopted son of the deceased, to recover arrears of maintenance alleged to be due to them under their father's will. The appellant denied that the respondents were entitled to any maintenance under the terms of the will, and further objected that they were not competent to maintain their suits inasmuch

1. (1902) I. L. R. 26 B. 792 at p. 797. 2. (1894) A. C. 437 at p. 442.

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as they had not obtained letters of adminstration to their father's estate.

The facts, so far as they relate to the first point are as follows:—On the 18th July 1879 Kumar Shyam Kishore Roy died, He left no son, but he left two of his wives, namely, Rani Pran Kishori and Rani Basanta Kumari, surviving him. By the latter wife he had had two daughters who are the present respondents. He had made a will, dated the 28th January, 1878. This will, together with certain deeds previously executed by the testator, granted permission to the wives to adopt sons, and in accordance with this permission the widow Rani Pran Kishori adopted the appellant. At this time the appellant was a minor. The will makes provision for the wives and for the two daughters. The clause in the will relating to the two daughters, omitting irrelevant words, is as follows:—

"When they will be married and if they desire to live in separate houses the person in whose management my property will be at the time will make separate houses for them in the vicinity of my house from the income of my property. For the maintenance of my daughters I fix an allowance of Rs. 600 a year for Srimati Sarat. As long as the daughters will live in the separate houses in this place they will get the fixed allowances respectively ; but if the daughters do not live in this place they will get Rs. 10."

The two daughters married ; the one in 1888 and the othe in 1889 ; and they went to live in separate houses The estate was at this time under the management of the Court of Wards, the appellant being still a minor. The Court, after the respective marriages, paid to each of the ladies the Rs. 600 per annum as provided by the will. The appellant came of age in 1896 and then entered into possession. He has refused to make the allowance to the ladies, alleging that the clause in the will providing for the allowance is void by reason of the provisions contained in S. 111 of the Indian Succession Act (Act X of 1865). Hence these two suits. Section 111 of the Succession Act is as follows :—

"Where a legacy is given, if a specified uncertain event shall happen, and no time is mentioned in the will for the occur-

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rence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable."

It is contended on behalf of the appellant that the bequests to the daughters were given only in the uncertain event of marriage, and that as that event did not happen in the lifetime of the testator the bequests never took effect. Their Lordships are of opinion that this contention is not well-founded.

The payment of the maintenance is not made contingent on the marriage of the ladies. The will deals with the maintenance in a clause which stands by itself and which must be read by itself. The clause contains no reference to marriage or to any other future event. Section 111, therefore, has no bearing on the construction to be put on the bequest.

The facts relating to the second point are as follows. At the time when these suits were instituted (September 1900) no letters of administration had been granted ; but while the suits were pending, namely, on the 7th October 1901, the widow Rani Pran Kishori obtained from the District Judge of Rungpur a grant of letters of administration with the will annexed. This grant was subsequently modified by a judgment of the High Court, dated the 24th February 1903, by limiting it to the realisation of the maintenance allowance provided for the widow by the will. Before the District Judge could recall and alter the said letters so as to bring them into conformity with the judgment of the High Court the widow died. Thus the said letters never were formally altered. Upon these facts the appellant contended that, having regard to S. 187 of the Indian Succession Act, the court was not competent to grant the relief prayed for. Sec. 187 is as follows:—

" No right as executor or legatee can be established in any Court of Justice unless a court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the 180th section."

The 180th section here referred to relates exclusively to wills proved elsewhere than within the province and provides for grants of letters of administration upon the production of

authenticated copies of such wills; the section has no relevancy to the case now under consideration, for here the letters of administration were granted within the province. The question therefore turns entirely on the effect of the first part of S. 187 which requires that before the right of a legatee can be established, probate of the will shall have been granted by a court of competent jurisdiction, within the province. By Cl. 3 of the Act "probate" is defined as meaning "the copy of a will certified under the seal of a court of competetent jurisdiction, with a grant of administration to the estate of the testator." Their Lordships are of opinion that "probate" as here defined was in fact obtained. The will was proved before a court of competent jurisdiction within the province and that court duly issued to the widow a certified copy of the will under the seal of the court with a grant of administration to the estate of the testator. The provisions of the section were, therefore, strictly complied with. The subsequent limitation of the grant to so much of the estate of the deceased as might be sufficient to satisfy the widow's claim, even if right, appears to their Lordships to be immaterial. It is then said that even if the provisions of S. 187 were complied with, the compliance was after suit commenced, and was therefore too late. Their Lordships, however, are of opinion that, as the compliance was before decree, the court was fully competent to deal with the case. Their Lordships will humbly advise His Majesty that the appeal should be dismissed and with costs.

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Lord Mersey.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Parker.

Srinivasaiengar *alias* Seshaiengar .. Appellant* in Nos. 1, 2, and 3 (*Respondent in No.* 28.)

v.

Sivasubramaniam Pillai, Minor, by his mother and guardian Vallimayilammal and another .. Appellant in No. 28 (*Respondent in No.* 1.)

Inam—Land revenue in kind granted as inam—Effect of Government commutation of revenue into cash, on inam—Agreement to accept revenue at 'olugu' rate by inamdar, effect of—Reversion to revenue in kind.

*S. A. Nos. 1, 2, 3 and 28 of 1887. 2nd August, 1887.

Srinivasiengar *v.* Sivasubramaniam Pillai.

Where an inam was the *tirva* in kind or the right to receive a share in the produce which the Government would be entitled to receive, it does not necessarily follow that because the Government has for a long term of years commuted its right to a share in the produce for a money payment that the inamdar is bound to do the same.

Even if the inamdars once agreed to accept the revenue, at the *olugu* rate prevailing in the village it is open to them to revert either to a division of the produce or to commutation at an altered rate.

Second appeals from the decree of the Subordinate Judge's Court at Tinnevelly in A. S. Nos. 68, 70, and 21 of 1885, presented against the decrees of the Court of the District Munsif of Tinnevelly in O. S. Nos. 55, 57 and 56 of 1883.

S. Subramaniam and *R. Sadagopa Chariar* for apellants in S. A. Nos. 1, 2 & 3 of 1887.

C. Ramachandra Rao Sahib for respondent in S. A. Nos. 1, 2, & 3 of 1887.

C. Ramachandra Row Sahib for appellant in S. A. No. 28 of 18

S. Subramaniam and *R. Sadagopa Chariar* for respondent in S. A. No. 28 of 1887.

These second appeals coming on for hearing, the Court made the following

† ORDER :—The three ladies sold the land but reserved the Inam, and the plaintiff is the present Inamdar. The Subordinate Judge has treated the plautiff's claim as if he only succeeded as the heir to the ladies, but has not considered the further question as to whether he is not entitled to succeed to the full right of the Inamdar. The Inam was not enfranchised at the date of sale. The plaintiff is entitled to receive from the defendants the *tirva* which the Government would be entitled to receive, but it does not necessarily follow because the Government has for a long term of years commuted its right to a share in the produce for a money payment that the Inamdar is bound to do the same. (See Special Appeals 201—214 of 1877 from Regular Appeal 151—157 of 1876 on the file of the Subordinate Court of Tinnevelly). It is clear from Exhibit I itself that the Inam originally was the right to receive a share in the produce and the vendors agreed to the commutation of this at the *olungu* rate of the village. But the *olungu* rate may itself be liable to vary according to fluctuation in the price of grain, and that the *olungu* rate of

† 20th February, 1888.

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1863 was not looked upon as fixed for all time is shown by the succeeding clause relating to *taram* rates.

The plaintiff does not object to tendering a patta with rate payable in money provided that market rates are entered, but if the *olugu* rates are still binding on the parties, it is possible that the value of the grain has so much risen since 1863 as to entitle plaintiff to revert either to a division of the produce or to commutation at an altered rate. We must set aside the decrees and ask the present Subordinate Judge to determine the proper terms of the Patta with reference to the above observations.

The second appeals coming on again for hearing on return to the order of the 20th February 1888 the Court delivered the following final

JUDGMENTS:—In Second Appeals Nos. 1, 2 and 28 of 1887:—The memorandom of objections is not pressed.

The defendant will accept the patta in accordance with the terms found by the Subordinate Judge. Each party will pay his own costs in these appeals.

In second appeal 3 of 1887:—Exhibit *G.* shows that the memorandom of objections is not sustainable, as it is provided that if an excess crop is raised on single crop land besides the single crop, the *tirva* thereof shall be paid to the circar.

The defendant will accept the Patta as decreed by the Subordinate Judge. Each party to bear his own costs.

IN THE HIGH COURT OF JUDCATURE AT MADRAS.

Present:—Mr. Justice Miller, Mr. Justice Munro and Mr. Justice Abdur Rahim.

The Official Assignee of Madras .. Appellant*
v. (*Counter-Petitioner*).
U. Krishna Bhatta .. Respondent
(*Petitioner*).

Banker and customer—Fiduciary relationship—Demand and promise to pay, effect of.

A creditor cannot transform his debtor into a trustee by merely demanding payment.

A simple demand and promise to pay the money does not amount to an agreement to hold the money due for a special purpose.

Appeal under S. 15 of the Letters Patent against the judgment of Mr. Justice *Munro* in O. S. A. No. 29 of 1908 presented

* L. P. A. No. 141 of 1909. 16th March, 1910.

The Official Assignee v. Krishna Bhatta.

against the order of the Court of the Insolvency Commissioner in Petition No. 181 of 1906.

D. M. Downing and Messrs. *King and Partridge* for appellant.

K. Ramanath Shenai and *Vijiaraghavalu Naidu* for respondent.

The Court delivered the following

JUDGMENT:—*Miller* J.—Krishna Bhatta had Rs. 1500 on fixed deposit with Messrs. Arbuthnot and Co. from the 17th October 1905 to the 17th October 1906; no interest should be payable unless the deposit was renewed. He sent up his deposit receipt in due course for repayment of the money but before repayment was made Messrs. Arbuthnot and Co. failed. It is argued on behalf of Krishna Bhatta that from and after the 17th October 1906 the money was held by Messrs. Arbuthnot & Co. in a fiduciary capacity. I am unable to find anything in the contract as disclosed by the evidence to indicate that the relation of banker and customer came to an end on the 17th October 1906. As I understand it, after that date the money remained as a deposit but bearing no interest till renewal, the reason being that the bankers were not willing to pay interest at 5 p.c. on loans repayable by them on demand though they would do so on loans for a fixed term. And I cannot see that the demand for repayment makes any difference. Messrs. Arbuthnot & Co. were, doubtless, bound to repay and failed to do so, but a creditor cannot, it seems to me, transform his debtor into a trustee by demanding repayment of the debt. It is true that the creditor might have directed the bankers from a certain date to hold the money due from them for a special purpose on his behalf, and they might have agreed to do so, but a simple demand and promise to repay the money does not amount to an agreement of that kind.

I agree with *Abdur Rahim* J. that cases like *Ex parte Ward In re Coustan*[1] have no bearing on the present case, if only for the reason that here the money belonged to the bankers; they were not the reputed owners but the real owners thereof.

I think this appeal should be allowed and the application dismissed with costs.

Munro J:—I am now satisfied that the view I formerly took in this case is erroneous and that a mere demand for payment, as in this case, could not have the effect of changing the pre-existing relationship of debtor and creditor. I therefore agree to the proposed order.

Abdur Rahim J.—I agree, and have nothing to add to what I have already said on the point.

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1. (1873) 8 Ch. Ap. 144.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Munro.

Srimath Deivasikamani Pandara Sannadhi *alias* Nataraja Desikar .. Appellant* (*Defendant*)

v.

E. K. Karutha Ravuthan (died), and others .. Respondents (*Plaintiff and his legal representatives*).

Nataraja Desikar v. Karutha Ravuthan.

Religious Endowments—Mutt, heads of—Power to pledge credit of mutt —Necessaries and financial necessity.

The head of a mutt cannot have any larger authority to incur debts than the heads of other religious institutions or the guardian of an infant heir. He can pledge the credit of the mutt only for necessary purposes, and that too, only in cases of financial necessity. The conduct of festivals usually conducted in the mutt is a necessary purpose. [*Saminadha Pandara* v. *Sellappa Chetty*[1] explained; *Prosunna Kumari Debya* v. *Golabchand*[2], referred to.]

Second appeal from the decree of the District Court of Madura in No. A. S. 402 of 1904, presented against the decree of the Court of the Subordinate Judge of Madura (East) in O. S. No. 35 of 1903.

P. R. Sundara Aiyar and *S. Srinivasa Aiyangar* for appellant.

T. V. Seshagiri Aiyar for 3rd, 5th and 6th respondents.

K. N. Aiya for 3rd respondent.

The Court delivered the following

JUDGMENT :—The plantiff sues the Pandara Sannadhi of the Tiruvannamalai Mutt to recover, with interest, the amount due to him in respect of certain dealings with the late Pandara Sannadhi. The dealings mainly consisted in the supply of goods and payments for goods supplied by others and are alleged to have been entered into for the purpose of certain festivals celebrated in the mutt. It is found by the lower appellate court that the late Pandara Sannadhi kept a running account with the plaintiff for mutt purposes, either because he found it inconvenient to pay cash down for everything he purchased for the mutt or because he had not sufficient ready money, as some of

* S. A. No. 867 of 1905. 13th December, 1910.

1. (1879) I. L. R. 2 M. 175. 2. (1877) 2 I. A. 145 at 151.

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the plaintiff's witnesses say, to pay cash down, and that, be that as it may, it was not improper for him to have such an account. The District Judge has allowed the whole of the plaintiff's claim with the exception of a claim for Rs. 50 advanced for the purchase of a carriage which he finds was not required for the purposes of the institution. The District Judge considered that the late Pandara Sannadhi had power to pledge the credit of the mutt for debts contracted for purposes connected with the mutt and in furtherance of the objects of the institution and that it was not necessary to show that there was any necessity for contracting the debts. He therefore omitted to find whether there was any necessity for contracting the debts now sued on. The District Judge relies on *Saminatha Pandara* v. *Sellappa Chetti*[1], but on examination, the case does not support his view. In that case the debt had been contracted by the late Pandara Sannadhi for the purchase of cloths for distribution at a festival. The suit was contested on the ground that the debt was not contracted for the purposes of the mutt, that there was no authority to contract it, and that it was not binding on the mutt. In answer to these contentions the court observed that acting for the whole institution the head of a mutt may contract debts for the purposes of the mutt, and debts so contracted may be recovered from the mutt property and will devolve, as a liability, on his successor to the extent of the assets received by him. But the rest of the judgment, in our opinion, clearly shows that the court did not intend to lay down in this passage that the head of a mutt could pledge the credit of the mutt for debts contracted for mutt purposes without necessity and without reference to the question whether they should have been met from current income. In the last paragraph of the judgment, the learned judges point out that though the mutt was in debt, its financial position was not so bad as to make it improper to incur debts for the purchase of the cloths in question; and that there was no suggestion that the funds of the mutt had been used for other than mutt purposes. They then proceed: "We find that the debt was incurred by the late Pandara Sannadhi for proper purposes and we consequently hold that it can be enforced against the appellant to the extent of the assets

1. (1879) I. L. R. 2 M. 175.

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which have come to his hands." The head of a mutt cannot have any larger authority to incur debts than the heads of other religious institutions as to which the Privy Council has held that their power to incur debts for the purposes of the institutions must be measured by the existing necessity for incurring them, and that their authority is analogous to that of the manager for an infant heir—*Prosunno Kumari Debya* v. *Golab Chand Baboo* [1]. In *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*[2], *Bhashyam Aiyangar* J. observes: "Over the *corpus* of the endowment, however, his power of disposition is very limited, *as in the case of managers of temples and devastanams.*" The learned judge thus expressly states that as regards his power of charging mutt property, the head of a mutt is restricted in the same way as managers of temples and devastanams, that is to say (applying the rule in *Prosunno Kumari Debya* v. *Golab Chand Baboo*[1]) that he can only bind the mutt in cases of necessity and that his authority is analogous to that of the manager for an infant heir. The learned judges *Subrahmanya Aiyar* and *Bhashyam Aiyangar* JJ. both point out that the expenditure must be for purposes really necessary for the maintenance of the institution; and that it is not enough to show that the expenditure was such as the head of a mutt might properly and appropriately incur out of current income if available. It may be doubted whether these learned judges would have found the expenditure for the purchase of cloths for distribution to be a necessary expenditure or one binding on the mutt, as held in *Saminada Pandara* v. *Sellappa Chetty*,[3] and their reservations with regard to this decision were intended, we think, to make it clear that it was only for really necessary purposes that the head of a mutt could pledge the credit of the mutt, and that in other respects he ought to go without what he could not afford to pay for. Necessary purposes must not, we think, be construed too strictly and in a recent unreported case relating to this very mutt (Appeal No. 87 of 1904) *Subrahmanya Aiyar* and *Miller* JJ. held that the debts incurred for the expenses of *Gurupuja* and *Mahesvarapuja* were incurred for necessary purposes as these were ceremonies the head of the mutt was bound to perform, and this decision so far governs the

1. (1877) 2. I. A. 145 at p. 151. 2. (1904) I. L. R. 27 M. 435.
3. (1879) I. L. R. 2 M. 175.

present case, in which the debts were incurred for similar purposes.

In the present case the debts were, we think, incurred for necessary purposes, and the only question is, whether there was any financial necessity to incur them. Before disposing of the present case, we must ask the District Judge to return a finding on this point, on the evidence on record, within six weeks from this date. Seven days will be allowed for filing objections.

[The finding was that there was no financial necessity for the mutt to contract the debts in question.—ED.]

The Court delivered the following

JUDGMENT :—We accept the finding that there was no financial necessity and dismiss the suit with costs throughout. The guardian *ad litem* for the respondents Nos. 9 to 11 appeared in person.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Ayling.

Subramania Pillai and another .. Appellants* (*Plaintiffs Nos.* 1 *and* 4).

v.

The Secretary of State for India in Council, represented by the Collec- of Tinnevelly. .. Respondent (*Defendant*).

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Madras Acts—Forest Act XIV of 1882,*—Ss.* 25, 16, 17*—Proviso to S.* 25*—Extinguishment of rights—Prior order of reservation, if necessary.*

S. 25 of the Madras Forest Act is a drastic enactment. A notification under S. 25 operates in exactly the same manner as one under S. 16 to which S. 17 is a mere corollary.

It is purely discretionery with the Government to make an enquiry before issuing a notification which has the effect of extinguishing private rights. S. 25 gives legislative sanction to forest reservation made before the Act in all cases in which the Government thinks fit to take action under S. 25. The fact that the whole of the land reserved by the notification under S. 25 was included in the notification before the Act is a good defence to the objection that the original reservation was bad in that it included lands not at the disposal of Government before the Madras Forest Act.

Where Government contemplated the issue of a further notification in respect of certain area in 1879, but did not so issue, but proceeded to issue a notification under S. 25 after the passing of the Madras Forest Act :

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* A. Nos. 146 & 153 of 1906. 18th November, 1910.

Held:—That the reservation was not bad for want of a final order prior to the passing of the Act and that there was no legal obligation on Government to issue a further and final notification of reservation before the Act and that an order of the Government in 1881 directing demarcation and survey in accordance with the earlier order of 1879 without adding anything regarding the issue of any further notification operated as a prior reservation for the purposes of S. 25.

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Appeals from the decree of the Subordinate Judge's Court of Tinnevelly, dated the 17th March 1906 in O. S. No. 52 of 1902.

P. R. Sundara Aiyar and *S. Srinivasa Aiyar* for appellants and respondents in A. 146 & 153 respectively.

C. F. Napier (Government Pleader) for respondents and appellants in A. 153 and 146 respectively.

The Court delivered the following

JUDGMENT:—The plaintiffs in the suit out of which these appeals arise are the trustses of the Kuthalanathaswami temple of Courtallam, the defendant being the Secrtary of State for India. The plaintiffs sue to establish their title to about three acres of land lying immediately to the south of what are admittedly the temple premises, demarcated as S. No. 482 of Courtallam village. The land sued for is valueless for cultivation purposes but its importance lies in the fact that it contains the famous Courtallum water-fall and bathing pool, and sundry mantapams and sacred sites adjacent thereto. The plaintiffs claim the site in virtue of immemorial possession as part of the temple precincts and also by adverse possession for more than the statutory period. The defendant denies that there has been any exclusive or adverse possession of any portion of the disputed site on the part of the plaintiffs, and further pleads that by virtue of its inclusion in block No. III of the Tenkasi reserved forest in 1883 all pre-existing rights which may have existed have become extinguished.

The learned Subordinate Judge has found that only a portion of the disputed site falls within the reserved forest. The excluded portion contains the bathing pool, the lower portion of the hill-side immediately above it and the various mantapams; and in his decree, he recgnizes the temple's title to the following:—

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A. The whole of the site below the pool including the Sandhyavandana Mantapam and the site of the Kasilingaswami shrine destroyed by flood in 1891 (Nos. 5 and 4 on the plan, Exhibit P.)

B. The bridge (No. 10).

C. The Tirthavari Mantapam and its verandahs on the eastern side (Nos. 6 and 7.)

D. The site of the foot of the water-fall.

E. The pool itself (No. 2).

F. The rock above the falls on which the Sivalingams are cut.

He also recognizes its right to carry on the customary puja at the falls and at the Tirthavari Mantapam and the necessary right of way from the bridge to the foot of the falls and to the pool called Pongumakadul half way up the hill. The rest of the plaintiff's claim is dismissed and the decree further declares that the water-fall itself, the remainder of the hill-slopes, and the river bed belong to Government subject to the bathing rights of the European community and high-caste public, conformably to the rights of the temple to carry on customary worship.

Against this decree both parties appeal.

It is convenient first to consider the question of the right of the parties without reference to the reservation under the Forest Act, and then to determine the manner and extent to which they are affected by the Act. This is also the procedure followed by the learned Subordinate Judge.

In connection with the first question, some preliminary remarks are necessary. The learned vakil for the plaintiffs has argued with considerable force that his client's claim should be considered not so much as an attempt to prove a title as against Government by 60 years' adverse possession, as to establish exclusive possession as owner for a sufficiently long period to give rise to the presumption of a "lost grant." As far as the decision of this case goes, however, this is distinction without a difference. The Subordinate Judge has not rejected any portion of the plaintiffs' claim on the ground that the *period* of their proved enjoyment was deficient nor do we see any reason to do so. The vital point is as to the *nature* of the enjoyment. Whether enjoyment is set up as the basis of a title by prescription

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or as evidence on which a lost grant should be presumed, the same characteristics will be necessary. The plaintiffs relied upon the decisions of the House of Lords in *Lord Advocate* v. *Lord Blantyre*,[1] and *Lord Advocate* v. *Young*[2], but we do not think the evidence in the present case brings it within the principle of these decisions.

In the second place, it must be observed that it is impossible to treat the area covered by the plaint claim as a single unit. The plaintiffs' claim must be separately considered with reference to each portion of the property sued for. As explained in *Sivasubramanya* v. *Secretary of State for India* [3], on pages 304 and 305, acts done on parts of a tract of land will only be evidence of possession of the whole where the said tract of land possesses a defined boundary. That is not the case here, unless we accept the plaintiffs' theory of the position of the reserved forest boundary, in which case the plaint land might be regarded as enclosed between the revenue survey line on the north and the reserved forest boundary on the south. But for reasons which will appear later, we find the reserved forest boundary to be conterminous with the revenue survey line in the locality in question and in consequence it is impossible to treat the plaint land as possessed of a defined boundary to the south or to deal with it as a unit.

Before dealing with the evidence of enjoyment of the different items of the suit property, reference may be made to such old official records as are forthcoming. These are extremely meagre. The plaintiffs produce an extract from a Hinduvi Inam Chitta prepared in 1844 (Exhibit C); while on the defendant's side we have an extract from the Paimash Olugu Chitta (Exhibit X), 8 years earlier in date, and the revenue survey plan and settlement register (Exhibts VIII and VIII *a*) prepared in 1863 and 1874 respectively. The boundaries given in Exhibits C and X are, as might be expected, very loosely expressed. Exhibit C describes the temple boundaries thus: " west of the Adivettipari bridge, north of Aruvi Kari Malai, east of Sitharuvi Malai and south of Kuthala Nangai Amman temple." Both the northern and eastern boundaries, it will be noted, are points

1. (1879) 4 A. C. 770. 2. (1887) 12 A. C. 544.
3. (1885) I. L. R. 9 M. 285.

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and not lines. Accepting the southern boundary (Aruvi Karai Malai) literally, it would give the temple the pool, bridge and mantapams (items Nos. 2, 10, 4, 5 and 6 as marked in Exhibit P) with the intermediate spaces, but not the slopes of the hill, or the Ponguma Kadal or the land lying above the head of the waterfall. Exhibit X gives these boundaries: "north of the river, east of the western slope, south of the Padinettampadi tower gate and west of the river." These would give the temple the Sandhyavandana Mantapam (No. 5) and the ruined site (No. 4) with the surrounding rock, and absolutely nothing else.

These old records are not devoid of value, but it is impossible to place much reliance on them in determining boundaries to a matter of a few yards. The remarks of the Subordinate Judge in this connection in paragraph 12 of his judgment possess considerable force. No attempt appears to have been made at the time of the preparation of these accounts to check the boundaries stated by the village officials; and when a proper survey was effected in 1863, very considerable modifications were made. From Exhibits VIII and VIII *a* it appears that the bulk of the temple premises (27.67 acres) were surveyed as S. No 482 (pagoda poramboke). A smaller plot (2.02 acres) was marked as S. No. 483 (flower garden poramboke) and a small tope (1.48 acre) as S. No. 481 assessed Government dry land. In so doing the demarcation stones, while extending the eastern boundary of S. No. 482 considerably beyond the Adivettiparai brige, were so fixed as to *exclude* the whole of the site now in dispute; and, so far as appears, no objection whatever was raised to this demarcation. This a point of the utmost importance.

If the plaintiffs then set up title to the site in dispute, it is impossible to understand why no objection was raised to a demarcation which visibly excluded the site from the temple premises.

We shall now proceed to deal with the evidence of possession by the plaintiffs of the various items of the suit property.

(A) The Subordinate Judge finds that all the disputed sites lying to the west of the river bed (Nos. 4 and 5) belong to the temple, which acquired a right of absolute ownership to them by immemorial user; and in this we have no hesitation in concur-

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ring. In fact the Government Pleader has practically nothing to say against it. The evidence fully warrants the conclusion that the Sandyavandana Mantapam, with the court-yard in which it stands, was originally constructed by the temple authorities, and that from time immemorial it has been used by them as part of the temple premises for Brahmins to recite the Sandhyavandanam prayer after bathing. Item No. 4 was formerly occupied by the Kasilingaswami shrine which was an appurtenance of the main temple and under control of the trustees. It existed from time immemorial till it was washed away with the idol in the great flood of 1891. The materials of the shrine were subsequently used by the temple authorities for constructing a pavement on the open space adjoining the Sandhyavandana Mantapam and for other purposes. This portion of the plaint property is clearly disunited by the river and the foot of the hill, and the Subordinate Judge's inclusion of the whole site west of the river bed in his award to the temple is justified.

(C) The case of the Tirthavari Mantapam (No. 6) is very similar to that of the Sandhyavandana Mantapam (No. 5). The only difference is that there is the evidence of the Reverend Thomas Kimber to show that it was at one time used by European bathers as a dressing shed. This practice was discontinued more than 30 years ago, when separate bathing sheds were constructed, and in our opinion must be regarded as having been merely permissive. There is no reason to disturb the Subordinate Judges' finding regarding this Mantapam.

(E) The next item for consideration is the pool itself (Item No. 2). This is situated at the very foot of the falls, and has been hollowed out of the natural rocky bed of the river partly by the action of the water, and partly by blasting (*vide* Exhibit XVIII *e*). Forming, as it does, a portion of the bed of the river, particularly strong evidence should be required to establish either a grant by the Zamindar, or the acquisition of a title on the part of the temple authorities by adverse possession; and such evidence is, in our opinion, not forthcoming. Great reliance is placed by the plaintiffs on certain extracts from old temple accounts, produced to show that the temple authorities were in the habit of annually leasing out the right to collect "finds in the pool," that is, any articles of value which may

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have been dropped or thrown into it by the numerous bathers. The Subordinate Judge has accepted these accounts (Exhibit A series) as genuine, in which he is no doubt correct; but it is extremely difficult to say what the entries refer to. They relate to 5 faslis, between 1809 and 1840, and merely record leases of the " pool" or the " aruvi (falls) pool" for various sums. There appears to be no evidence to explain what they mean, or whether the explanation offered to the Subordinate Judge is correct. So far as appears no such leases of " finds " have been held for the last 60 years. Apart from these accounts, there is absolutely nothing to support the temple's claim beyond the fact that the idol has been daily taken to the pool and solemnly bathed there; but it is impossible to treat this as evidence of possession, or of any form of title. Against it we have the admitted fact that as far back as can be traced Europeans and also respectable Mahomedans have been in the habit of bathing in the pool while low-caste Hindus have been excluded by magisterial orders of the District Magistrate (Exhibits O and O 1) issued at the request of the temple authorities. The European residents of the District, as well as visitors, have not only bathed in the pool, but have annually formed a bathing committee and have collected and expended money on cleaning, deepening, and improving the pool and in erecting bathing sheds near it. Similar improvements, such as the erection of iron hand-rails, have been carried out by the temple; but it is as difficult to reconcile the long acquiescence of the temple trustees in the above act with the present theory of a lost grant of the pool, as it is to treat their possession as exclusive. It is in evidence that arrangements were made and adhered to in a friendly spirit for the convenience of all parties, the Europeans having the exclusive use of the pool for two hours every morning, fixed so as not to clash with temple worship, while on specially sacred days, they refrained from bathing at all. But such a sensible arrangement is no evidence of exclusive possession or recognition of title of either party. Special reference may be made to one incident in 1873 evidenced by Exhibit XVIII *c*. In that year, by the Collector's orders, Rs. 100 were spent out of the " waterfall fund " which was raised by subscription among bathers, in enlarging the bed of the pool by *blasting* during the dry season. We think it may be safely held that the acquiescence of the temple trustees

in such a proceeding shows that any enjoyment of the pool exercised by them at the time was not exercised with any consciousness of ownership, or intention of asserting ownership. The issue of the orders above referred to, Exhibits O and O 1, in no way supports the plaintiffs' case. Such orders must have been issued in the interests of the public peace and tranquility, rather than for the protection of proprietary claims, which could have been otherwise enforced. In fact, although the claims of different classes to bathe in the pool appear to have given rise to friction on several occasions, we can find no record of any assertion of ownership on the part of the temple trustees up to the time of institution of the present suit. We are of opinion that the plaintiffs' claim to ownership of the pool has not been established. A reference to Exhibit O 2 will indicate the spirit in which the aid of Government officers was invoked in the matter; the petitions giving rise to that order having apparently emanated not from the temple trustees alone, but from them together with "other ryots."

(D) The same decision must be arrived at in the case of what the Subordinate Judge describes as the site of the foot of the waterfall.

(F) The lower portion of the steep rocky side of the hill over which the water falls, has been decorated at some unknown time with "Sivalingams" carved in relief, which are now deemed sacred, and are the object of worship by the votaries of the temple: but it is impossible to treat this by itself as evidence of ownership on the part of the temple.

(B) There remains only the bridge which crosses the river, and forms the most convenient access to the falls. The present bridge was constructed in 1892, replacing a former structure which was partially destroyed in the same flood which washed away the Kaslingaswami and its shrine. Exhibit G 1 shows that it was constructed by the Local Fund Engineer under orders of the Shermadevi Taluq Board, which allotted Rs. 340 for the purpose from its reserve fund. At the same time the temple authorities were asked "to contribute a share if possible"— a very natural course to adopt considering how keenly interested the temple was in the speedy repair of the bridge. This request gave rise to an interesting correspondence between the temple

trustees and the Siva Temple Committee for the Tinnevelly District. (*Vide* Exhibit G and G 2). On receipt of copy of the Taluq Board's resolution, the trustees addressed Exhibit G to the Committee. In this they stated that, as the said bridge (meaning the former bridge) had always been under the control of the temple and chiefly useful to the temple, they had submitted an estimate for reconstructing it from temple funds (Exhibit F 2), but had not obtained sanction. Meantime as the Taluq Board had set the work in hand they recommended that the Taluq Board's request for a contribution should be complied with and one-third of the cost allotted. The letter proceeds thus:—

"Further, as the said bridge has always been in the private control *chiefly of the people and temple*, there would be ground for the temple to have *a greater right than the one which it naturally has*, if a third portion were paid......................."

The District Committee replied taking a much stronger line and enquired: "While the bridge and those places belong absolutely to the temple and while it is proper that that bridge should be constructed out of the temple funds, what was the reason for allowing it to be built from Local Funds?" To this, in Exhibit G 2, the trustees replied, as might be expected, acquiescing in the view of the District Committee; and it was then resolved that "the full amount should be paid." This was on the 3rd July 1893. No further correspondence is exhibited, from which it may be fairly inferred either that no further steps were taken to pay the amount, or that the offer was rejected by the Taluq Board. It seems quite certain that no actual payment was made from temple funds; and as it is presumably in the power of the Temple Committee to produce the subsequent correspondence, if there were any, it may be assumed that their failure to do so is due to the fact that it would not support their case. Altogether the correspondence and the course of events, while indicative of a *desire* on the part of both the trustees and Committee to assert ownership to the bridge, in no way tends to support their claim; while the artless admissions of the trustees in Exhibit G above quoted go strongly against it.

As to the repair and maintenance of the previous bridge or bridges, the evidence is conflicting. Probably both the temple

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and the Waterfall Committee incurred expenditure on the bridge from time to time. Exhibit B series shows that on several occasions between 1834 and 1840, when the temple was under the management of the revenue authorities, the bridge was repaired at the cost of temple funds; and it seems probable that in later times also the temple, being keenly interested, contributed to similar works. On the other hand Exhibits XVIII and XVIII *a* show clearly that repairs to the bridge were conducted from the Waterfall Fund under the Collector's orders in 1879 and 1873. Viewing the whole of the evidence we have no hesitation in finding that the plaintiffs' claim to the present bridge, which was admittedly constructed from Local Funds, has not been established.

The plaintiffs' claim of ownership to the remaining portions to the plaint property was rejected by the Subordinate Judge and, in our opinion, quite rightly. It rests on nothing better than a certain amount of oral evidence to the effect that the temple servants and the pilgrims used to collect firewood on the slopes of the hills. This is very unsatisfactory; and Exhibit XVII shows that in 1897 the temple trustees petitioned the Collector simply to allow them a right of way up the hill through this very land, without any suggestion of ownership.

From the above it will be seen that in our opinion, apart from all question of forest reservation, the plaintiffs have established their ownership only of the portion of the site west of the river bed (A), and the Tirthavari Mantapam and its verandahs (C) and not to the remainder of the plaint property. The right of carrying on daily puja at the falls and Tirthavari Mantapam and the right of way from the bridge to the falls and the Ponguma Kadal are established and were rightly allowed in the decree.

We have now to dertermine to what extent, if any, the above rights have been affected by the process of forest reservation.

According to defendant, the whole of the disputed site is included in the reserved forest, Tenkasi Block No. III, which was originally ordered to be reserved (prior to the introduction of the Forest Act) by Government Order No. 257, Revenue, dated the 11th February 1881, and notified under Section 25 of the Forest Act

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by Government Order No. 1611, Revenue, (Forest No. 142), dated the 20th December 1883. These orders are Exhibits IV and V; and it is argued that the effect of the latter was finally to extinguish all pre-existing rights in the reserved forest, which had not been admitted by Government prior to reservation. Admittedly no part of the present (suit) claim had been admitted, or even set up at the time of reservation.

The plaintiffs contend (*a*) that the plaint property falls outside the boundaries of the reserved forest; (*b*) that even if it be included therein, the notification under S. 25 has no effect on pre-existing rights.

The block of reserved forest in which the plaint land is said to fall was originally selected by a Forest Committee appointed by Government: their report, dated the 28th September 1880, forms part of Exhibit II. Their proposals were supported by the Board of Revenue and eventually accepted by Government in an order dated the 11th February 1881 marked as Exhibit IV. The order runs:—" Their selection is accordingly approved, and the general limits of the reserved forest being thus approved, demarcation and survey will follow in due course under the instructions conveyed in paragraph 17 of Government Order No. 1612, dated the 2nd August 1879." Neither of the above papers contains in itself any detailed statement of the boundary of the proposed reserve in the locality with which we are concerned. In the absence of demarcation it would be extremely difficult to give any verbal description, and the Forest Committee make no attempt to do so. A map, Exhibit II *a*, was submitted with the report on which the boundaries of the proposed reserves are marked. As the Committee says: " The separate pieces are clearly shown on the map, although it is not easy to specify their boundaries clearly and briefly in writing." It is therefore to the map, Exhibit II *a*, that we must turn primarily for information on this point, although the report contains certain explanatory remarks of considerable importance.

Subsequent to the issue of Exhibit IV, demarcation of the reserve boundaries by cairns was completed and in Exhibit VII, we have a Gazette Notification by the District Forest Officer which, quoting Exhibit IV as authority, prohibits free grazing

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outside a line of specified cairns, which obviously forms the boundary of the recently constituted reserve. The final notification under S. 25 of the Forest Act is contained in Exhibit VI, and describes the boundary as "the line of cairns marked by the Forest Committee in 1880 running near the base of the hills up to the Five-falls river." These cairns are undoubtedly those referred to in Exhibit VII.

Now the list of cairns in Exhibit VII runs thus :—

* * * *

9. Vayathu Parai.
10. Pallar Madam boundary stone.
11. Tannirkal Madai, Chittaruvikal.
12. Pirinthu parthan Parai..

* * * *

These are the cairns in the neighbourhood of the disputed land. There is no dispute as to the position of Nos. 9 and 12: but the parties profess to locate Nos. 10 and 11, which have disappeared or been destroyed, in different spots; the difference and its effect being clearly shown in a plan marked in the present suit as Exhibit T.

The defendant locates both cairns on the Revenue Survey boundary line, and contends that between the two—a distance of about a mile—the reserve boundary is conterminous with the revenue survey line. This includes the whole of the plaint site in the reserve. The plaintiffs, on the other hand, seek to locate the Pallar Madam cairn (No. 10) at the top of the hill about two furlongs south of the revenue survey line, while the Tannirkal Madai cairn (No. 11) is placed about a mile above the head of the falls to the south. The result as shown in Exhibit T (the plaintiffs' own plan) is to form two long narrow projections from the reserve, which, it is difficult to believe, any forest department would have approved of. If it had been determined to exclude so much of the northern slope of the hills as this line would indicate, convenience would obviously suggest the excision of these salient angles as is commonly done in similar cases to save unprofitable trouble and expense in delimitation.

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As stated already there was originally a contest as to the site of both cairns (Nos. 10 and 11) but it is now narrowed down to that of No. 11. The Subordinate Judge found the Pallar Madam cairn (No. 10) to be on the site indicated by the defendants and the learned vakil for the plaintiffs states that he does not dispute this. Everything therefore turns on the correct location of cairn No. 11.

As shown in Exhibit T, it makes very little immediate difference at which spot cairn No. 10 is held to have stood.

It is extremely difficult, if not impossible, to reconcile different portions of the Subordinate Judge's judgment dealing with the position of the reserve boundary line. In paragraph 46, he appears to arrive at the definite conclusion that the Tannirkal Madai cairn originally stood at the place shown by the plaintiffs, that is, at the southern end of the Spice Garden. The effect of this would be, even placing the Pallar Madam cairn on the revenue survey line, to exclude practically the whole of the plaint area from the reserve. But further on in his judgment, for quite independent reasons, and apparently without any reference to the finding in paragraph 46, he arrives at the conclusion (paragraph 53) "that the plain portion of the disputed sites including the foot of the falls is not included in the forest reserve, but that the portion of the plaint site, which consists of the slope of the hill and the stream of waterfall situated above the foot of the hill are (*sic*) included in the forest reserve." It is in accordance with this view that he has framed the decretal portion of his judgment; but it is a view utterly at variance with the evidence on both sides as to the correct location of the reserve boundary and is one which it is, in our opinion, impossible to uphold. There is not a particle of evidence to indicate that the line of the reserve boundary, as demarcated, ever followed the line indicated by the Subordinate Judge.

The Subordinate Judge's decision in the earlier part of his judgment regarding the location of cairn No. 11 is based, mainly, on a comparison of the oral evidence on the point, and consideration of what he deems to be an inconsistency necessarily following on its localisation at the defendant's spot. As regards the former it is not necessary to say much. Oral evidence on such a point must be accepted with caution. If the case had

to proceed on oral evidence alone, it might be difficult to say the Subordinate Judge's finding was wrong, though he certainly has unduly disparaged the defendant's witnesses and particularly defendant's witness No. 5, a retired ranger, who stated in evidence that he actually raised the disputed cairn in the course of demarcating the boundary. We certainly cannot follow the Subordinate Judge when he says that the evidence of this man is not very definite or reliable. It is as definite as it could possibly be, and it is hard to see why the evidence of such an officer, who, having retired, has nothing to gain or lose, should be viewed with distrust.

The supposed inconsistency referred to above lies in the fact that if a straight line be drawn between cairns Nos. 10 and 11, as located by the defendant, a certain portion of S. No. 482 and other private land will be included within the reserve, which admittedly was never intended. The answer of the Government Pleader to this is that both cairns being situated on the revenue survey line, the forest boundary between the two was intended to follow the said revenue survey line. There is nothing improbable or unreasonable in this. The learned vakil for the plaintiffs argues that if it were so intended, it would have been definitely stated in Exhibit VII, as it is, in describing the boundary west of the Five-falls river. The argument is a legitimate one, but it overlooks the fact that the boundary from the Five-falls river to the Travancore frontier is very much longer than the small stretch now under consideration; while, as appears from Exhibit I, there is another short stretch of about equal length midway between the disputed site and the Five-falls, in which the survey line appears again to have been resorted to without specific mention in Exhibit VI.

A careful consideration of the documentary evidence leads irresistibly to the conclusion that the location of the Tannirkal Madai cairn and the boundary is as indicated by the defendant. That it was not where the plaintiffs put it may be inferred from one circumstance alone. If it were, the Spice Garden would be outside the reserve. Now if anything is certain in connection with the case, it is that the Spice Garden lies *inside* the reserve. It is distinctly so stated in Exhibits II and VI and special provision is made for a right of way to reach it. In fact the plaintiffs'

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vakil can put forwaard no better reply than the suggestion that some other Spice Garden was referred to: suggestion which there is not a particle of evidence to support, which is now put forward for the first time and which may be dismissed without hesitation. If the plaintiffs' location of cairn No. 11 throws the Spice Garden out of the Reserve, as it does, it is safe to say that, whatever may be right, that location is wrong. This argument indeed is used by the Subordinate Judge to support his reasoning in the latter part of his judgement (*vide* paragraph 51) though, curiously enough, he seems to have altogether lost sight of it in coming to the decision recorded in paragraph 46.

The defendant's theory, on the other hand, receives strong support from all the record connected with the reservation and subsequent thereto. The Forest Committee in their report, Exhibit II, distinctly state in reference to the disputed locality that they propose to include " the whole valley down to the boundary of cultivation in the plain," within the proposed reserve, proceeding to justify their action on " purely æsthetic" as well as utilitarian grounds. The term " boundary of cultivation" can only mean the revenue survey line—the extreme limit to which the Revenue Survey Department, whose duty it was to survey cultivable lands, extended their operations. Exhibit II*a* is a small scale map and for that reason not very safe to rely on where a very small area is concerned; but it certainly seems to show the proposed reserve boundary at this part as conterminous with what it calls the " surveyed limit of cultivation," that is, the revenue survey line. No alternative meaning for the phrase " boundary of cultivation " has been even suggested on the plaintiffs' side. We think it is abundantly clear that, in this locality, the Forest Committee determined to include all available land as far down as they could go: and there is nothing to indicate that the Board of Revenue or Government dissented from their proposal or that any subsequent modification was made. Exhibit I is another map of the same reserve prepared in 1891 by the Government of India Survey Party, the carefulness and excellence of whose work is beyond question. In surveying the boundary of an existing reserve, reference must have been made to the cairns and boundary marks found on the ground. This map, which is on a scale of 4 inches to the mile, entirely supports the defend-

ant's case and shows the reserve boundary as identical with the boundary of the revenue village of Courtallum in the locality in question. A comparison of Exhibit I and Exhibit VIII, the Revenue Survey map of Courtallum, shows that they entirely tally.

Practically the only point that the plaintiffs have been able to make against this evidence is in connection with Exhibit II *a*, and almost certainly arises from carelessness on the part of the draftsman. It does not appear to have been taken in the lower court. This map, as already explained, is on a very small scale (something like 4 miles to the inch) and the cairns are roughly indicated by numbered circles. These are not placed on the boundary at all but adjacent to it. The plaintiffs point out that the circle bearing the number 11, which ought to correspond with No. 11 in Exhibit VII, is placed, not on the revenue survey line but very far south of it—far, indeed, south-west of the position indicated by the plaintiffs themselves. The position thus shown is as incompatible with the plaintiffs' line as with defendant's; and the numbering of the circles is equally inconsistent with the green line which marks the reserve boundary on the plan. Close to the spot where the Tannikal Madai should stand, according to the defendant's theory, is a similar circle with no number at all. From a careful consideration of Exhibit II *a*, we think there cannot be the slightest doubt that the inconsistency arises solely from wrong numbering of the circles, due to the carelessness of the draftsman who prepared Exhibit II *a*.

It may be added that the erection of a fence east of the river near the Falls in 1896, and the issue of the order Exhibit W in 1898 are unmistakeable assertions of the claim now put forward by Government, made long prior to suit and to the full knowledge of the plaintiffs. The fence certainly shuts the plaintiffs out from a portion of the area now claimed by them in proprietary right: but they appear to have been perfectly content at being allowed a right of way to the upper Falls and to have claimed nothing more. (*Vide* Exhibit XVII and the evidence of plaintiffs' witnesses Nos. 14 and 35).

For the above reasons we are satisfied that the boundary of the reserved forest runs as stated by the defendant, and that the whole of the disputed site is included within it.

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It remains to determine the effect of the reservation on the right which the plaintiffs possessed in the property in dispute at the time when the reservation was notified under S. 25 of the Act.

The learned Vakil for the plaintiffs argues that extinction of private rights in a reserved forest is only effected by the operation of S. 17 of the Forest Act; which in its turn only takes effect when the procedure laid down in S. 6 and following sections for inviting and enquiring into claims has been followed. We cannot accept this contention. Section 25 of the Act is, no doubt, a very drastic provision of law: but its intention, in our opinion, is to place all forests reserved by executive order prior to the introduction of the Act on precisely the same footing as reserves subsequently constituted in accordance with the provisions of the same. The provision in paragraph 1 of the section that a forest which has been reserved before the Act shall be reserved forest *under the Act*, and the last paragraph of the section, in our opinion, show that the intention was that the notification under S. 25 should operate in exactly the same manner as one under S. 16, to which S. 17 is a mere corollary. As pointed out by the Government Pleader, the continued existence in a reserved forest of rights which have not been admitted and registered after enquiry is incompatible with the intention and general scope of the Act.

No doubt provision is made in S. 25 for further enquiry being held into private rights, where Government deems it desirable: but the wording of the proviso unmistakeably indicates that this is purely discretionary with Government; and the undoubted fact that in this case Government did not order further enquiry must be taken to shew that Government did not regard the previous enquiry as insufficient.

It might be suggested, though the point was not taken by the plaintiffs' Vakil, that the order dated 11th February 1881 (Exhibit IV) does not amount to a final order of reservation. We have carefully considered this point, admitting, as additional Exhibits for the purpose, the two Government orders referred to at the commencement of the Forest Committee's report, and have decided that the argument is not really maintainable. Paragraph

17 of Government Order No. 1612, dated the 2nd August 1879, certainly seems to imply that Government at the time of its issue contemplated that, in future cases, a final notification should issue *after* survey and demarcation. But the issue of such an additional order would seem to have been in the discretion of Government. There does not appear to have been any legal obligation on Government to issue a further notification, and the fact that no further notification was issued does not, in our opinion, prevent the Government Order of the 11th February 1881, from operating as a reservation for the purposes of S. 25 of the Act. Exhibit II merely directs demarcation and survey in accordance with the earlier Government Order, without adding a word regarding the issue of any further notification. When issuing the order under S. 25 (Exhibit V) Government certainly treated G. O. No. 257, dated the 11th February 1881, as if it were a final order of reservation, and there seems to be no reason to hold that it was not so intended at the time of its issue.

One further point remains for consideration, and it is a point of great importance and one which is not free from difficulty.

Under S. 3 of the Act, the Governor in Council may constitute any land at the disposal of Government a reserved forest and by S. 2 of the Act, land at the disposal of Government is defined as including "all unoccupied land whether assessed or unassessed."

The Government Pleader conceded, as we understood him, that, when the reservation was made, or, at any rate, when the suit was brought, the plaintiffs had exclusive possession of the site marked No. 5, the site marked No. 4, and the pavement between sites Nos. 5 and 8 in the plan P. The question therefore arises, were these sites unoccupied land within the meaning of the Act when the reservation was made, and if they were not, is it open to the plaintiffs in this suit to set up a title to the land in question? The Subordinate Judge deals with this question in paragraphs Nos. 56 to 58 of his judgment (although, in the view he took on the question of the extent of the land reserved, it was not necessary for him to consider it). The learned Judge was of opinion that the question was governed by the principle of law which was the ground of the decision in *Ramachandra*

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v. *The Secretary of State for India*[1]. (See too *Subrahmanian Asari* v. *The Secretary of State for India*[2].) We doubt if this is so. In *Ramachandra* v. *The Secretary of State for India*[1], the reservation was made under S. 16 of the Act, and the Act itself provides the mode of redress given to a party who deems himself to be injured. The proviso to S. 25 can scarcely be said to give to a party a mode of redress by way of further inquiry since it is left entirely to the discretion of Government to say whether there shall be a further inquiry or not. But, as we have pointed out, S. 25 is a very drastic enactment. Its object would seem to have been to give legislative sanction to any forest reservation made by Government before the Act in all cases in which Government thought fit to exercise the powers given by S. 25, and by so doing to prevent the question of the legality of any forest reservation which purported to have been made under the executive powers of Government, or under any prior legislative enactment, from being raised. An enactment of this sort must of course be construed strictly (see for example, the judgment of *Lord Blackburn* in *Metropolitan Asylum District* v. *Hill*[3], but the words of the enactment in question seem clear. We do not think it necessary to discuss the case of *Balvant Ramachandra Natu* v. *The Secretary of State for India*[4]. In that case the reservation had been made under the Act and further, as the Judges' point out on page 508 of the report, the decision was under the Indian Forest Act which was earlier in date to the Madras Act, and it is only reasonable to assume that all departures in the local Act from the language of the earlier enactment were advisedly made and indicate some material difference in the intention of the local legislature that made them.

It is not necessary for us to decide whether a notification under S. 25 is in all cases conclusive on the question whether lands comprised in the reservation made before the Act came into force were lands at the disposal of Government at the time the original reservation was made. The Subordinate Judge finds in paragraph 57 of his judgment that, on the grounds given in paragraph 56, the Forest Committee though not tram-

1. (1888) I. L. R. 12 M. 105.
2. (1907) 17 M. L. J. 557.
3. (1881) 6 A. C. 193.
4. (1905) I. L. R. 29 B. 480.

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melled by the provisions of the Act was bound to carry on its duty in accordance with the requirments of justice and fairness, and has done so. We see no reason to differ from this conclusion. This being so, we are of opinion that the fact, which we have held to be established, that the whole of the land in question was included in the reservation made by Government before the Act came into force is a good defence to the plaintiffs' claim.

We are therefore constrained to hold that the rights, if any, which the plaintiffs possessed in the plaint property at the time of the reservation in 1881 were extinguished by the Notification, Exhibit VI, published in January 1884. We do so with reluctance, as it seems probable that the omission of the temple trustees to come forward at the time of the enquiry by the Forest Committee in 1881 was due to ignorance of the extent to which their rights would be affected. If they had represented their claims to the mantapams and to the right of access to the Falls for purposes of bathing and worship, it may well be that they would have been admitted. Even in contesting the present suit, Government has declared its willingness to safeguard any customary right not only of the temple, but of the public as well; and we do not imagine that Government will consider it its duty to adopt a different attitude in the future from what it has maintained in the past. The plaintiffs seem to have embarked on the present suit without making any attempt, beyond the notice prescribed by law, to secure recognition of the rights they claimed by representations to Government or its responsible officers. Such, at least, is the statement of the Government Pleader which is not contradicted on the other side.

The plaintiffs' suit must therefore be dismissed with costs in both courts, the appeal perferred by Government (Appeal Suit No. 153 of 1906) being allowed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Krishnasawmy Iyer.

Silamban Chetty .. Appellant*
(*Defendant*)

v.

Ramanadham Chetty .. Respondent
(*Plaintiff*).

Silamban Chetty *v.* Ramanadham Chetty.

Limitation Act, S. 12—*Time taken to obtain copies of judgment and decree.*

Under S. 12 of the Limitation Act, in computing the period of limitation prescribed for an appeal, both the time taken for obtaining a copy of the decree and the time taken for obtaining a copy of the judgment should be excluded even though the application for the one was made after the copy of the other was ready. [*Raman Chetty* v. *Kadiruvelu*[1] followed.]

Second appeal from the decree of the Subordinate Judge's Court of Madura, West, in A. S. No. 150 of 1906 presented against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 305 of 1904.

V. Purushotham Aiyar for (*The Advocate General*) for appellant.

C. S. Venkata Chariar for respondent.

The Court delivered the following

JUDGMENT:—The decree was passed on the 12th October 1905. The respondent applied for a copy of the decree on the 18th October and obtained it on the 19th December. He then applied for a copy of the judgment on the 22nd December and obtained it on the 16th February, 1906. The appeal was filed on the 3rd March and the question is whether the appeal to the lower appellate court was barred under Article 152 of Schedule II to the Limitation Act of 1877. The Subordinate Judge has held that under S. 12 the respondent is entitled to a deduction of the time between the 18th October and 19th December and the further time between the 22nd December and the 16th February, and he relies upon the decision in *Raman Chetti* v. *Kadiruvelu.* [1] This decision, no doubt, supports the judge's conclusion, though in that case the later application was made before the copy of the record first applied for was ready, and a portion of the time in obtaining one record formed a part of the time in obtaining

* S. A. No. 698 of 1907. 12th November, 1909.

1. (1898) 8 M. L. J. 148.

the other. The learned judges held that such overlapping period should not be counted twice over and with that exception both the two periods should be excluded. It is true, no doubt, that this would enable a party to apply for the copy of one record and then after obtaining that copy to apply for the copy of the other record, and thus extend the time, while if he had applied for both the copies at the same time, the time requisite for obtaining the copies would have been less. But we are unable to say that the learned judges who decided the case in *Raman Chetti* v. *Kadirvelu*[1] were wrong in holding that the time requisite for obtaining a copy is the period required to grant the copy after the application is made. It may, no doubt, be fairly argued that the time requisite for obtaining the copy is not necessarily the period after the date of the application, but any other construction will introduce other complications. We are not, therefore, prepared to differ from the decision in *Raman Chetty* v. *Kadirvelu*[1] especially as it is a rule of practice, and hold that the appeal was filed in time. There is no other question of law.

Silamban Chetty *v.* Ramanadham Chetty.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

A. Gopala Iyer .. Appellant*

v.

Ramaswami Sastrial .. Respondent.

T. P. Act., S. 6 *(e)—Right to sue for damages for breach of contract—Assignability.*

A mere right to sue for damages for breach of contract is not assignable either under the Transfer of Property Act or under the common law, even though the breach was in respect of the discharge of an obligation binding on the transferee.

Gopala Iyer *v.* Ramaswami Sastrial.

Second appeal from the decree of the District Munsif's Court at Tiruvalur in O.S. No. 429 of 1904 presented against the decree of the District Court of Tanjore in A. No. 150 of 1906.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for appellant.

The Advocate-General (P. S. Sivaswami Aiyar) for respondent.

The Court delivered the following

JUDGMENT.—Exhibit *E* purports to be a transfer by Sundari Ammal to the plaintiff of a right to sue for damages for

* S. A. 133 of 1907. 1. (1891) 8 M.L.J. 148. 8th November, 1909.

Gopala Iyer v. Ramaswami Sastri.

breach of contract between Sundari Ammal and the defendant (Exhibit *A*), the breach of the contract having occurred prior to the execution of Ex. *E*. It seems to us that this is a mere right to sue within the meaning of S. 6 (*e*) of the Transfer of Property Act, and consequently could not be transferred. On this point we agree with the decision of the Calcutta High Court in *Ali Mahommad* v. *S. C. Chander*.[1] We are of opinion that even prior to the amendment of the Transfer of Property Act, a mere right to sue for damages for breach of contract was not asssignable under the common law. The Advocate-General has contended that the fact that the debts which the defendant contracted under Ex. *E* to discharge were debts owing by the plaintiff and that the plaintiff has in fact paid these debts give the plaintiff a right to sue the defendant under Ex. *E*. We know of no principle of law or equity which gives any such right. The plaintiff, however, alleges in his plaint (paragraphs 4 and 10) a personal promise, by the defendant to the plaintiff, to pay the debts in question. As to this there was no issue and there has been no finding. In view of the fact that the point now taken before us was not raised in the courts below, we think the plaintiff should have an opportunity of showing, if he can, that the personal agreement by the defendant with the plaintiff, which is alleged in the plaint, was in fact made. The case will go back to the District Judge for a finding on this question. Further evidence may be taken. The finding should be submitted within two months, and ten days will be allowed for filing objections. This order is without prejudice to the right of the appellant to rely on the other grounds of appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Munro.

Venkatanarasimha Appa Row v. Narasimha Charyalu.

Rajah Venkatanarasimha Appa Row Bahadur, Zemindar of Nuzwid .. Appellant* .. (*Plaintiff*)

v.

Bukkapatnam Tirumala Narasimha Charyalu, late a minor, by his Mother and Guardian Bukkapatnam Tirumala Ranga Naickamma .. Respondent. .. (*Defendant*).

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*A. No. 26 of 1908. 16th November 1909.

1. (1909) I. L. R. 36 C. 345.

C.P.C. (1882), *S.* 13—"*Court of competent jurisdiction*"—*Appealable value to the Privy Council—Evasion of bar by including untenable claim.* Venkata-narasimha Appa Row *v.* Narasimha Charyalu.

A plaintiff cannot be allowed to evade the bar of *res judicata* by including in a later suit a clearly untenable claim (*i.e.*, one on the face of it barred by limitation) and thus increasing the value of the subject-matter so as to be capable of being appealed to the Privy Council.

Appeal from the decree of the District Court of Kistna in O. S. No. 59 of 1905.

T. V. Seshagiri Aiyar for appellant.

K. R. Krishnaswami Iyengar for *C. R. Tiruvenkatachariar* for respondent.

The Court delivered the following

JUDGMENT :—The first question for decision is whether the *razinama* in question has, by the decisions of this Court, been finally held, as between the parties, to be a binding agreement. There can be no doubt that the compromise referred to in Ex. *I* and *V* is the compromise, the terms of which are set out in Ex. *IV* and Ex. *V* clearly holds that compromise was valid respecting the only contention urged against it in the appeal. It is, however, contended that in the present case an appeal lies to the Privy Council, because the plaintiff claims a sum of more than Rs. 10,000, whereas in the suit of 1901, the sum claimed was less than Rs. 10,000 and that that fact brings the matter within the rule adopted by a full bench of this court in *Avanasi Goundan* v. *Nakammal*[1] and Ex. *V* does not bar the trial in the present case of the validity of the compromise. But it is clear on the face of the plaint that the claim for Fasli 1311, amounting to Rs. 3,800, is barred by limitation and no attempt is made in the plaint or before us to show that the bar can be in any way removed. Consequently, the claim for Rs. 3,800 must be deducted to arrive at the amount in respect of which the plaintiff may have honestly conceived himself entitled to a decree, and the claim is thus less than Rs. 10,000. The case is, therefore, in respect of the amount of the claim, on the same footing as the suit No. 15 of 1901, and the decision in that suit is final between the parties. The plaintiff is, however, clearly entitled to a decree for the amount of rent reserved by the compromise, Rs. 1,000 a year for Faslis 1312, 1313, and 1314 ; and he has, by the alternative prayer in paragraph 9 (*a*) of the plaint, in effect asked for such a decree in the event of

1. (1908) I.L.R. 28 M. 195.

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decision against him as to the claim originally made. We modify the decree accordingly by giving the plaintiff a decree for Rs. 3,000 with interest at 6 % from this date. As the litigation is entirely due to the plaintiff's persistent repudiation of the compromise, we disallow interest before decree, and seeing that he has endeavoured to evade the bar under S. 13 of the Code of 1882 by inserting in his plaint an obviously untenable claim, we think he cannot be allowed to recover any costs from the defendant and must pay the defendant's proportionate costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Sreemant Raja Yarlagadda Mallikarjuna Prasada Naidu Bahadur Zamindar Garu .. Appellant in both* (*Plaintiff*)

v.

Rayapati Venkata Vasudeva Row of China Muttevi .. Respondent in S. A. No. 1126 of 1908 (*Defendant*).

Mallikarjuna Prasada Venkata v. Vasudeva Row.

Madras Acts—Rent Recovery Act, S. 11*—Enhancement—Collector's sanction—C.P.C., S.* 100*—Second appeal—Question of law—Inference from facts.*

The rule as to the Collector's sanction for enhancement of rent does not apply to a case where the landlord merely claims to revert to *varam*, in the absence of contract.

Where from admitted facts a particular conclusion is the *only* inference that can be drawn by a court and the lower appellate court fails to draw that inference, the matter may be said to be one of law into which it would be competent to the High Court to enter. But where more than one inference is possible, the fact that the lower appellate court made one instead of another is no ground of law justifying interference in second appeal.

Second appeals from the decrees of the District Court of Kistna in A. S. Nos. 287 and 288 of 1906, presented against the decisions of the Court of the Head Quarters Deputy Collector, Bandar, in S. S. Nos. 250 and 251 of 1905.

P. R. Sundara Aiyar for appellant.

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* S. A. Nos. 1126 and 1127 of 1908. 21st December, 1910.

Mallikarjuna Prasada v. Venkata Vasudeva Row.

The Advocate-General (P. S. Sivaswami Aiyar) for respondents in both cases.

The Court delivered the following

JUDGMENT:—The landlord claims to charge a certain rate for dry lands on which wet crops are raised with Government water under a contract entered into in Fasli 1279 when the change was made from the Asara to the Visabadi system. The District Judge is wrong in supposing that the plaintiff's case was that the question of the rate for such cultivation was reserved for future settlement. The mistake probably arose from the fact that this case was heard along with other cases where there was such a contention. But it is, however, now conceded that there is no evidence of the contract set up. The landlord then contends that he is entitled to *varam* under the 3rd clause of S. 11 of the Rent Recovery Act. It is argued on his behalf that the rule as to the Collector's sanction for enhancement does not apply when the landlord merely claims to revert to *varam* when there is no contract. We think this contention is right. The learned Advocate-General, who appears for the respondent, does not dispute the correctness of this view. But he argues that there was a contract to pay the dry rate for dry land though cultivated with wet crop with the aid of Krishna water. This question was not expressly put in issue. And we do not understand the District Judge to have found upon it. The Advocate-General relies upon long payment of dry rates. But Mr. Sundara Aiyar draws our attention to the Muchilika, Exhibit E_{17} in Second Appeal No. 1127 of 1908 and to the payment of higher rates for one fasli in S. A. 1126 of 1908 as negativing the contract. It is for the District Judge to find upon the evidence on record "whether there is an implied contract to pay a fixed dry rate for dry lands irrespective of dry or wet cultivation being carried on."

The finding should be submitted within six weeks, and seven days will be allowed for filing objections.

[The District Judge returned the finding that there was no implied contract to pay Rs. 1-13-3 irrespective of dry or wet cultivation being carried on.—ED.]

After the return of the finding of the lower court, the Court delivered the following

Mallikarjuna Prasada v. Venkata Vasudeva Row.

JUDGMENT:—We accept the finding of the District Judge. The learned Advocate-General has argued strenuously that the question of implied contract is one of law and that it is competent to us to go into the facts with a view to determine whether a contract may be implied in this case or not. It has been held in *Siriparapu Ramanna* v. *Mallikarjuna Prasada Naidu*[1], *Mallikarjuna Prasada Naidu* v. *Lakshminarayana*[2] and *Brahmanna* v. *Appa Row*,[3] that the question of implied contract under S. 11 of the Rent Recovery Act, is a question of fact, and that it is not open to the High Court in second appeal to interfere with the finding of the lower appellate court. But the learned Advocate-General draws our attention to the decision in Second Appeals Nos. 617 to 620 of 1902. The judgment in these cases has referred to the other cases which we have cited and the observation is made that an inference from admitted facts is not a question of fact but a matter of law. It is no doubt true that where from admitted facts the only inference open to the courts is a particular thing and the lower court fails to draw that inference, the matter may be said to be one of law, into which it would be competent to the High Court to enter. But it cannot be suggested that upon the facts of this case, only one inference was open to the lower appellate court. When the Asara rate was commuted into a money rate, dry lands were being cultivated for dry crops, and for a considerable period dry rates alone have been charged. The District Judge also refers to the fact that in Fasli 1303 when a wet crop was raised, higher rent was charged and it was recovered by distraint. No exception was taken to the distraint and no suit was filed by or on behalf of the tenant. We cannot say that upon these facts the only inference that the judge was bound to draw was that there was an implied contract to pay at a particular dry rate. That being so, we think the inference in this case is a pure inference of fact and we are not entitled to interfere with the finding of the learned judge.

There being no contract, it is argued for the appellant that he is entitled to claim *varam*. He instituted his suit claiming a money rent of Rs. 3-13-0 for every acre of dry land on which wet crops were raised. He sought to enforce the acceptance of a patta with such a term. In second appeal also he claims to

1. (1893) I.L.R. 17 M. 43 at p. 47. 2. (1893) I.L.R. 17 M. 50 at p. 53.
3. (1901) 11 M. L. J. p. 292.

enforce the acceptance of the patta which he tendered. He no doubt raised a ground of appeal to the effect that he was at least entitled to *varam*. The respondent is prepared now to accept the patta with a money rent of Rs. 3-13-0 as provided in the patta. The appellant is not now entitled to say that he has a liberty to revert to *varam*. The defendant agreeing to the patta which the plaintiff tenders, we must accept that agreement and say that the patta tendered was proper. We would, however, modify the language of cluase (2) by substituting "this fasli" for "any fasli." The appellant will be entitled to his costs in this and in the lower appellate court.

Mallikarjuna Prasada *v.* Venkata Vasudeva Row.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Abdur Rahim.

Subbu Shettethi and others .. Appellants* (*Defendant*)

v.

Krishnacharya and others .. Respondents (*Plaintiffs*).

Subbu Shettethi *v.* Krishnacharya.

Malabar Law—Karnavan, powers of—Raising funds for defence of members in a rioting case.

A Karnavan will be within his rights in raising money on the security of his family property for the defence of the family members charged with rioting, if the money could not otherwise be procured for the defence.

Second appeal from the decree of the District Court of South Canara in A. S. No. 176 of 1907, presented against the decree of the Court of the District Munisef of Udipi in O.S.No. 5 of 1906.

The facts appear from the judgment.

B. SitaramaRow for appellants.

K. Ramanatha Shenai for respondents.

B. Sitarama Rao for appellants:—The only right of the junior members of an Aliyasantana family is the right to be maintained in the family house—*Subbu Hegadi* v. *Tongu.*[1] They have individually no right beyond that of support—*ibid*; Mayne's *Hindu Law*, 6th Edn., p. 359 ; Moore, p. 126. The right of the *yejman* to alienate family property is to be measured by his duty. Personally he has no higher right than individual members

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*S. A. 2 of 1909. * 6th April, 1910.

1. (1869) 4 M. H. C. R. 196 at 201.

Subbu Shettetki v. Krishnacharya.

—*Varanakot Narayan Nambudiri* v. *Narayan Numbudiri*[1]; *Narayani* v. *Govinda*.[2] He may be less amenable to control as to income. That is because he is not liable to account. He can alienate family property only for *family* purpose or to discharge *family* obligations ; *Kunhamed Hajee* v. *Kuttiath Hajee*.[3] If the criminal case were one connected with family property, as the result of his assertion or defence of the family right, it might be different. As it is, being only a case of rioting (involving no moral turpitude) and incited by the conduct of one of the accused, the expenses of the defence in such a case cannot be held binding on the women and children of the family. See S. A. 359 of 1906. Expenses of education have been held not to come within the right of maintenance—*Krishnan* v. *Govinda Menon*.[4] The absence of a right to partition requires a jealous scrutiny of undue extension of rights of individual members.

R. Ramanath Shenai for respondent—contended that most of the adult male members of the family being involved in the case, the defence was a family defence and the right to spend for such a defence against a false charge is similar to the right of personal protection, *e.g.*, medical expenses and they like. He instanced the case of a widow—*Nobinchandra* v. *Nishad Kamini Dasi*.[5]

B. Sitaram Rao, in reply, submitted that even if the last case is correctly decided (the point was not necessary in that case) analogies of a Hindu widow cannot apply to the junior member of a Tarwad.

The Court delivered the following

JUDGMENT :—We do not think any general rule can be laid down for all cases of this kind ; here a number of members of the family were charged with rioting. The Sessions Judge found that it was not proved that they were present at the riot and acquitted them on appeal. We think that it is impossible to say that the courts were wrong in holding the Karnavan was entitled in the circumstances to raise money on the security of the family property for the defence of the members of the family, if the money could not otherwise be procured, a question which is not before us.

The second appeal is dimissed with costs.

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1. (1880) I. L. R. 2 M. 328.
2. (1884) I. L. R. 7 M. 352.
3. (1881) I. L. R. 3 M. 169.
4. (1895) 8 M. L. J. 294.
5. (1902) 6 C. W. N. 648.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sankaran Nair.

Sellamuthu Servaigaran and Mottayan .. Petitioners*

v. (*Accused*)

Pallamuthu Karuppan .. Complainant.

Sellamuthu *v.* Karupan. Benson J.

Penal Code, Ss. 441, 457—*House trespass—Essentials—Intention to annoy or intimidate.*

The accused entered a house in the possession of another during the latter's temporary absence by breaking open the door with a view to assert his title to the house and assaulted the servant in charge. The finding was that he had not the intention mentioned in S. 441, I. P. C.

Held—per *Curiam*—that he was rightly convicted under S. 457, I. P. C.

Per *Benson* J:—Whether a man actually intends to cause annoyance or not he should be presumed to intend all the consequences which he knows will be the effect of his act.

Per *Sankaran Nair* J.:—The taking possession of the house by making a forcible entry by breaking open the door and assaulting the servant in charge brings the accused within S. 457, I. P. C.

[*Emperor* v. *Lakshmana*[1] followed. *Queen-Empress* v. *Rayapadayachi*[2], *Queen* v. *Hicklin*[3], *Reg.* v. *Dixon*[4], *Reg.* v. *Lovett*[5] referred to. *Emperor* v. *Jangi Singh*[6] and *Emperor* v. *Baxir*[7] distinguished].

Petition under Ss. 435 and 439 of the Cr. P. C. praying the High Court to revise the Judgment of the Sub-Divisional 1st Class Magistrate of Trichinopoly in Cr. A. No. 62 of 1910 presented against the conviction and sentence of the Stationary 2nd Class Magistrate of Trichinopoly in C. C. No. 269 of 1910.

The facts of the case and the cases quoted on both sides are to be found in the Judgment.

T. Ranga Chariar for petitioner.

The Public Prosecutor (*C. F. Napier*) and *M. Govindarajulu Naidu* for complainant.

The Court delivered the following

JUDGMENTS.—*Benson* J.:—In this case it has been found that the accused with a view to support a fraudulent claim of title to a house, broke into it at night during the temporary absence of the owner, assaulted the owner's servant who was in charge of the house, and took forcible possession of it.

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* Cr. Rev. C. No. 411 of 1910. 3rd January, 1911.
Cr. Rev. Pet. No. 341 of 1910.

1. (1902) L. R. 26 B. 558.
2. (1896) I.L.R. 19 M. 240.
3. (1868) 3 Q. B. 360.
4. (1814) 3 M. & S. 11.
5. (1839) 9 C. & P. 462 at 466.
6. (1903) I. L. R. 26 A. 194.
7. (1904) I. L. R. 27 A. 298.

Sellamuthu v. Karupan.

Benson J.

It is argued that the conviction of the accused for house-breaking by night under S. 457, I. P. C., cannot legally be sustained because there is no finding that the accused acted "with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property" within the meaning of S. 441, I. P. C. The Sub-Magistrate says that the accused "made a forcible entry into the house in order to establish the sale deed," and the Sub-Divisional 1st Class Magistrate found that the accused "broke open the house to take possession of it by force." The Vakil for Petitioners relies on the case *Queen Empress* v. *Rayapadayachi*[1] and on an unreported case (Cr. Rev. Case No. 349 of 1909)[2].

In the latter case the learned judges said: "The Magistrate finds that the intention of the accused was to take possession unlawfully of the land, and having found this, he says that the act of the accused necessarily involved annoyance to the complainant. * * * The act of the accused may have caused annoyance to the complainant, when he became aware of it, but unless the intention of the accused was to annoy (and this is not found) they cannot be found guilty under S. 447, I. P. C."

In the former case the learned judges said: "In our opinion the accused, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of the house, cannot be said to have intended either actually or constructively to cause such annoyance. It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result. The section (441) defining criminal trespass is so worded as to show that the act must be done with intent and does not, as other sections do (*e. g.*, S. 425), embrace the case of an act done with knowledge of the likelihood of a given consequence."

In neither of these cases have the learned judges referred to the principle in accordance with which a man is in law held to intend the ordinary and natural consequences of his act, if at the time of doing the act he knows what the ordinary and natural consequence would be. In the case of *Queen* v. *Hicklin*,[3] *Blackburn* J., at page 375, said: "I take the rule

1. (1896) I.L.R. 19 M. 240. 2. (1909) 6 M.L.T. 262.
3. (1868) 3 Q. B. 36.

Sellamuthu v. Karupan. — Benson J.

of law to be, as stated by *Lord Ellenborough* in *Rex* v. *Dixon* [1] in the shortest and clearest manner: 'It is a universal principle that when a man is charged with doing an act' (that is a wrongful act, without any legal justification) 'of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act.' And although the appellant may have had another object in view, he must be taken to have intended that which is the natural consequence of the act. If he does an act which is illegal, it does not make it legal that he did it with some other object. That is not legal excuse, unless the object was such as under the circumstances rendered the particular act lawful. That is illustrated by the same case of *Rex* v. *Dixon*[1]. The question in that particular case was, whether or not an indictment would lie against a man who unlawfully and wrongfully gave to children unwholesome bread but without intent to do them harm. The defendant was a contractor to supply bread to a military asylum, and he supplied the children with bread which was unwholesome and deleterious, and although it was not shown or suggested that he intended to make the children suffer, yet *Lord Ellenborough* held that it was quite sufficient that he had done an unlawful act in giving them bread which was deleterious, and that an indictment could be sustained, as he must be taken to intend the natural consequences of his act." In *Regina* v. *Lovett*,[2] *Littledale* J. said : " With respect to the intent of the defendant, a man must be taken to intend the natural consequences of what he has done." See also the remarks of *Lord Coleridge* C. J. in *Queen* v. *Martin*[3]. The necessity for giving effect to the principle has been well pointed out in the case of *Emperor* v. *Lakshman*[4]. There the learned judges, referring to the case of *Queen-Empress* v. *Rayapadayachi*[5], well observed at page 560 : "It cannot be disputed that mere knowledge of the possibility of annoyance resulting from an act of trespass is not sufficient to bring the case within the definition, but at the same time, it must be remembered that the word " intent" cannot be read as if it were identical with " wish " or "desire." There may be no wish to annoy, but if annoyance

1. (1814) 3 M. & S. 11 at p. 15. 2. (1839) 9 C. & P. 462 at p. 466.
3. (1881) 8 Q. B. D. 54 at p. 58. 4. (1902) I.L.R. 26 B. 558.
5. (1896) I. L. R. 19 M. 240.

Sellamuthu v. Karupan. Benson J.

is the natural consequence of the act and if it is known to the person who does the act that such is the natural consequence, then there is an intent to annoy. Most acts in the common course of natural events and human conduct lead to a series of results, and if these results are foreseen by the person doing the acts they cannot be said to be caused unintentionally. The ultimate object may be something different, but the person intends all the intermediate results which he knows will happen in the natural course of events, even though he may regret that they should happen. When it is uncertain whether a particular result will follow (as in the Madras case in which the accused hoped to keep his conduct secret) there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result." I think that the law is correctly laid down in this passage, and again at the end of the case where the learned judges sum up the result of the authorities in these words: "Although there is no presumption that a person intends what is merely a possible result which though reasonably certain is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result." In the present case the ordinary and natural consequences of the petitioners' acts would be to annoy the owner of the house and to intimidate and annoy his servant who was holding possession for his master, and the petitioners, as reasonable men, must have known that such consequences would flow from their acts. They must, therefore, in my judgment, be held to have acted with intent to intimidate and annoy within the meaning of the section, and the petitions must be dismissed.

Sankaran Nair J :—It is found that Karuppan Servai is the owner of the house in question, and that during his temporary absence, the accused broke open the door of the house, assaulted his servant, Prosecution Witness No. 1, whom he had placed in charge of it, and took forcible possession. The intention of the accused in effecting this forcible entry is found

Sellamuthu v. Karupan

Sankaran Nair J.

to have been to establish his title. On these findings it is argued on behalf of the accused that their conviction for house-breaking cannot be sanctioned in law as no intention " to commmit an offence or to intimidate, insult or annoy any person in possession" of the house has been found. The decision in *In re Venkataramanuja Reddy & others*[1] and the cases referred to in that judgment are relied upon in support of the arguments. The case above referred to shows that though the act of the accused necessarily involved annoyance to a person, yet unless the intention of the accused was to annoy, he is not guilty under that section. The decision in *Queen-Empress* v. *Rayapadayachi*[2] shows that the section defining criminal trespass is so worded that it does not include an act done with the knowledge of the likelihood of a given consequence. According to these decisions it may be that the act cannot be said to have been committed with intent to annoy the complainant.

But the further question remains whether the act was done with intent to commit an offence. Though the complainant was absent, the house was still in his possession as his servant was left in charge of the house (S. 27, I. P. C.)

On the facts found in this case, the accused could not take possession of the house except by effecting forcible entry, *i. e.*, by breaking open the door of the house and using criminal force to the servant, and he had therefore undoubtedly the intent to commit those offences. In *Emperor* v. *Jangai Singh*[3] and *Emperor* v. *Bazid*[4] the accused was able to, and could, take possession of the house without using any force. The owner was absent and he had not placed any of the persons referred to in S. 27 of the Indian Penal Code in possession, and in the case *In re Venkataramanuja Reddy and others*[1] it does not appear that any criminal force was used to take possession. The cases cited, therefore, do not apply and the petitions must therefore be rejected.

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1. (1909) 6. M. L. T. 262.
2. (1896) I. L. R. 19 M. p. 240.
3. (1903) I. L. R. 26. A. 149.
4. (1904) I. L. R. 27 A. 298.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Sri Satoda Bihara Mahapatra Kondamodalu Linga Reddi *alias* Sullee Abhoyee .. Appellant*

v.

Sree Rajah Kocherlakotah Venkata Krishna Row Bahadur Zamindar Garu, Proprietor of Polavaram .. Respondent.

Linga Reddi *v.* Rajah Venkata Krishna Row.

Land tenure—Permanent intermediate tenure—Onus—Practice—Pleadings, inconsistent—Limitation—Adverse possession—Tenant holding over—Limitation Act, Art. 139.

When the holder of an intermediate tenure between the Zemindar and the cultivating ryots contends that his tenure is a permanent tenure and there is no document on the language of which he can make out such a permanent tenure, the burden is upon him to establish the permanency of his tenure by other evidence in the case. The fact that for a period of 33 years an unvarying money rent was paid is not enough to establish the permanency of the tenure.

A person who set up a permanent intermediate tenure in the lower court was not allowed to set up a case of occupancy right in appeal.

A tenant holding over on the expiration of a lease and paying rent is a tenant from year to year and his possession is not adverse to that of the landlord until the date of the termination of the tenancy.

Appeal from the decree of the Court of the Government Agent, Godavari, in O. S. No. 1 of 1903.

C. F. Napier and *D. Seshagiri Row* for appellant.

N. Subba Row and *P. Narayanamurthy* for respondent.

The Court delivered the following

JUDGMENT:—This is a suit by the Zamindar of Polavaram to recover a certain village named Kondamadulu described in Schedule A attached to the plaint, and the forest which formed part of the same village and is described in Schedule B. The plaintiff's case is that the defendant is only a tenant from year to year and that the tenancy has been determined by due notice to quit. The defendant alleges that he is a Mokhasadar entitled to a perpetual tenure. He is not a cultivating tenant of the property but an intermediate holder between the Zamindar and the cultivating tenants. The *Kabuliat* executed by the Zamindar to Government under the permanent settlement, which is Exhibit A, shows that Kondamodulu is not amongst the Mokhasas of which a list is given. There is no dispute in the case that Kondamodulu is included in the Zamindari, although the name does not appear in the list of Jirayati villages given

* A. No. 26 of 1906. 17th December, 1910.

Linga Reddi v. Rajah Venkata Krishna Row.

in that document. It is stated for the respondent, and there is evidence in support of the view, that Kondamodulu is only a hamlet of Kondrakota Muttah. Kondrakottah is expressly mentioned in the list of Jirayati villages. Mr. Napier who appeared for the appellant very properly conceded that there is no evidence of the original grant of the Mokhasa to the defendant and it seems to us clear, from Exhibit A, that Kondamodulu was not a Mokhasa at the date of the permanent settlement. It is, whatever the tenure, of the nature of a subordinate interest carved by the Zamindar. When the holder of such subordinate interest contends that it is a permanent tenure in that he holds, and there is no document on the language of which he relies to make out, such a permanent tenure, the burden is upon him of establishing the permanency of the tenure by other evidence in the case. We are, therefore, to examine the somewhat voluminous evidence that has been adduced in the case on both sides and to find out whether the defendant has made out his plea of a permanent tenure.

[Their Lordships after discussing the evidence in detail went on to observe as follows :—ED.]

We think we have discussed really all the evidence that has been commented on before us. We have no hesitation in coming to the conclusion that the defendant has utterly failed to show that he had a permanent interest in the property. The only residual fact that may be said to have been established by the defendant is that for a period commencing about the year 1831 and extending to the year 1864, an unvarying rent of Rs. 60 was being paid, though even in this period it appears there were other persons associated with the defendent as joint Ijaradar for some time. We cannot on this fact rest a conclusion of permanent right in the defendant

Even if the onus lay upon the plaintiff, we should be inclined to hold that the plaintiff has discharged it and has shown that there is no permanent right in the defendant as regards the suit village.

The next point which is associated with this matter and which was raised by Mr. Napier, was that he is entitled to claim an occupancy right under the Estates Land Act. We think this contention completely gives the go-by to the attitude of the defendant and his contention in the court below. His whole case was as to subordinate tenure and not to an occupancy right which a tenant in actual contact with the property may claim, and, therefore, we decline to allow him to raise this contention, nor is there any ground of appeal which raises a case of occupancy right under the Estates Land Act. We are not disposed to allow such a new contention to be raised for the first time in the course of the argument.

The next point to which serious attention was directed was about limitation. Now if the Polavaram Zemindar was the

owner of the suit village and the defendant's predecessor was only a tenant for each year under the several muchilikas the last of the muchilika having ceased to operate from the year 1878, the question is, in what right did the defendant's grandfather continue to hold the property? We have already adverted to the circumstance that subsequent to the expiry of the last muchilika, Exhibit R 9, the defendant's grandfather continued to pay rent to the plaintiff's predecessor and the latter continued to accept it. Exhibit S 1, which is dated 20th February, 1880, is clear on the point. Even if we do not take into account the subsequent Irusalnamahs there is no doubt of the fact of payment, and we must presume a tenancy from year to year from the expiry of the muchilika Exhibit R 9. Now in the case of a tenancy from year to year, it is well-settled law that limitation can run in favour of a person who asserts a permanent right in the property only from the date of the termination of tenancy. Article 139 of the Limitation Act is perfectly clear on the point. The tenancy did not determine admittedly, whenever it was, before the year 1896 and 12 years had not run from that date at the date of the institution of the suit. The decisions in *Srinivasa Ayyar* v. *Muthuswami Pillai* [1], *Sheshamma Shettati* v. *Chicaya Hegade* [2], *Ramaswami Naik* v. *Thayammal* [3], are clear upon the point. Mr. Napier drew our attention to three other cases. *Sankaran* v. *Periasami* [4] has nothing to do with the point under consideration. There a person who was not holding under a derivative tenure set up a leasehold interest in the property in consequence of the payment by him of a certain amount of *porupu* for the statutory period under a claim of leasehold interest himself. It was held that he could prescribe for the whole proprietary interest in property of which he holds possession in the assertion of such right. *Paramaswaram Mumbanoo* v. *Krishnan Tengal* [5] is really an authority against Mr. Napier. There the learned judges hold that according to the plaintiff's case the tenancy having determined before a period of 12 years and the defendant having been alleged to have been a trespasser in possession for more than 12 years, clearly the period of limitation was 12 years from the date of the expiry of the original lease from which the plaintiff alleged the defendant was holding as a trespasser. Now the next case *Vadapalli Narasimham* v. *Dronam Raju Seetharamamurthi* [6] deals with altogether a different matter, viz., a case of tenancy by sufferance. That is also an authority in favour of the respondent, for it was there said if a tenant for a period holds over with consent of the landlord, then the tenancy would be one from year to year. It is, therefore, clear upon all the authorities to which our attention was drawn that the suit is not barred by limitation. We agree with the Governor's Agent and dismiss the appeal with costs.

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1. (1900) I.L.R. 24 M. 246.
2. (1902) I. L. R. 25 M. 507.
3. (1903) I. L. R. 26 M. 488.
4. (1890) I. L. R. 13 M. 467.
5. (1903) I.L.R. 26 M. 535.
6. (1907) I. L. R. 31 M. 163.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Krishnaswami Iyer and Mr. Justice Ayling.

Raja Tirumal Raju Bahadur Varu (died) and others .. Appellants* (*2nd Plff. & his L. R.*).

v.

Pandla Muthial Naidu & others .. Respondents (*Defts.* 2 *to* 8).

Tirumal Raju *v.* Muthial Naidu.

Limitation Act, Arts. 144, 148—*Adverse possession—Mortgage—Part failure of consideration—Mortgagee in possession claiming greater amount—No adverse possession—Mortgagor and mortgagee—Accounts.*

Where part of the consideration for a mortgage is void or fails or the mortgagee makes default in paying it, the mortgage is good to the extent of the consideration that has validly passed. If a mortgagee is entitled to possession under a mortgage even though the consideration was paid only in part, time cannot run in his favour for the acquisition of a larger interest by his mere assertion of it to the knowledge of the mortgagor.

The article applicable to a suit for redemption in the case is Article 148 and not Article 144.

Obiter.—Where a usufructuary mortgagee is in possession of the mortgaged property under a covenant that he should appropriate the income towards the interest on the whole amount and the balance towards the principal, without paying the whole amount of consideration for the mortgage :—*Held*, that the whole surplus remaining after the discharge of the claim for interest on the consideration to the extent to which it was paid, should go towards the discharge of the principal due.

Appeal from the decree of the Subordinate Judge's Court of North Arcot in O. S. No. 2 of 1906.

Suit by the Court of Wards on behalf of the Zemindar of Karvetnagar for Rs. 38,257, being the amount of surplus collections due to the plaintiff after taking accounts of the profits setting it off against the amount legally due under a usufructuary mortgage of 1881. The mortgage had been given for Rs. 24,600, composed of Rs. 17,000 for sundry decree debts and Rs. 7,600 for other debts. The terms of the bond material for this report were : "Usufructuary mortgage debt bond executed, etc. * * * * * * * Total Rs. 24,600. We became indebted to you ; so interest hereon from this 21st May is at the rate of Rs. 0-8-0 per cent. per mensem. Till the principal and interest that accrues are paid off to you, we have mortgaged as security for the said

* A. No. 145 of 1906. 18th January 1911.

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principal and interest, the following:—* * * * * * * *
We have settled the beriz at the rate of Rs. 1,764 in one lump sum and put the said village in your possession together with all the above-mentioned privileges till the sum due under the bond is discharged * * Out of the Billmukta of Rs. 1,764-0-0 you shall not only credit towards interest Rs. 1,476, being the interest due under the terms of the bond from the month of Audi Chitrathu to Aowni each year (15th July 1882) and produce to the Taluq Kacheri the balance sum of Rs. 288 towards peishcush * * * * * * * we shall pay you the principal amount of this bond at once at the end of June 1888; should we manage to pay you the amount at any time before the due date, you shall take it at the end of the sowing season of Aowni of that year."

The case of the plaintiff was that the mortgage, so far as the decree amount went, was bad as it provided for payment of a larger sum than was due under the decree; that the collections worked off the good and valid portion of the principal several years ago and that he was entitled to all the surplus collections. Under the Court of Wards Act, the plaintiff came into possession in 1900 and the suit was brought within 3 years of such possession and entry (Art. 105, Limitation Act). The Sub-Judge dismissed the suit on the ground that the defendant, by being inpossession for over the statutory period, had prescribed for a mortgagee's interest for Rs. 24,600, and was not bound to account for the income, and dismissed the suit. Hence the appeal.

L. A. Govindaraghava Aiyar, for appellant, contended that the mortgage was good to the extent of Rs. 7,000—*Bhagabai* v. *Narayan*[1]; *Munshi Bajranji Sahai* v. *Udit Narain Singh*[2]; *Rajani Kumar Dass* v. *Gour Kishore*[3]; *Srinivasaswami* v. *Athmarama Aiyar*[4]; JONES, Vol. i, S. 378. Defendant being in possession lawfully, could not prescribe for any interest adverse to the plaintiff—*Juggernath* v. *Brignath*[5]; *Madhava* v. *Narayana*[6]; *Khiarajmal* v. *Daim*[7].

K. Srinivasa Aiyangar for *P. R. Sundara Aiyar*, for respondent, contended first that the mortgage as such was bad, relying

1. (1907) I. L. R. 31 B. 552.
2. (1906) 10 C. W. N. 985.
3. (1908) I. L. R. 35 C. 1051.
4. (1908) I. L. R. 32 M. 281.
5. (1878) I. L. R. 4 C. 322.
6. (1885) I. L. R. 9 M. 244.
7. (1904) I. L. R. 32 C. 296 (P.C.) at 311.

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on *Subba Rau* v. *Devu Shetty*[1] and distinguished *Bhagbai* v. *Narayan*[2] on the ground (i) that no question of limitation was involved in it; (ii) the mortgage cast the duty of accounting on the mortgagee ; (iii) the mortgage in that case was treated as consisting of several divisible mortgages. *Rajani Kumar Dass* v. *Gour Kishore*[3] was distinguishable as the intention of the parties in adding on fictitious debts in order to defraud creditors is clearly that the mortgage was to hold good for the balance. *Munshi Bajranji Sahai* v. *Udit Narain Singh*[4] also proceeded upon an inference of fact that the parties consented to treat the mortgage good *pro tanto*. He referred also to *Walker* v. *Carleton*[5] to show that the mortgage was wholly bad. Similarly *Srinivasaswami* v. *Athmaram Aiyar*[6]. He also submitted that a distinction ought to be made between cases of initial failure of consideration and a subsequent failure of consideration. In the one case, the possession is bad in its inception ; in the other, it is lawful in its commencement. He relied upon *Subba Rau* v. *Devu Shetty*[1]. *Khirajmal* v. *Daim*[7] was a case in which, under the mortgage deed, the mortgagee was liable to render accounts. Their Lordships in their observations at p. 311 also deal with only subsequent adverse possession. They do not deal with a case in which, contemporaneous with the lawful relationship, a concurrent adverse possession of another practical interest arises. Here the mortgagee was not entitled to receive profits beyond the interest for the good portion of the mortgage, and as such he has been in adverse possession of the profits for the balance, *i.e.*, of property, to the extent of that interest. In any view Art. 105 would not apply to this case as the claim for each year's extra profits is a claim for money had and received and not for extra profits under the mortgage. The mortgage deed clearly does not entitle him to claim such account.

The Court delivered the following

JUDGMENT :—The plaintiff's predecessors in title gave a usufructuary mortgage to the 1st defendant and the 2nd defendant's father for Rs. 24,600 in the year 1882. Part of the consideration for the bond consisted of Rs. 17,000 stated to be due under decrees previously obtained against the mortgagors. It is

1. (1894) I. L. R. 18 M. 126.
2. (1907) I.L.R. 31 B. 552.
3. (1906) 10 C.W.N. 932.
4. (1908) I.L.R. 35 C. 1051.
5. (1881) 97 Ill. 582.
6. (1908) I.L.R. 32 M. 281.
7. (1904) I.L.R. 32 C. 296 (P.C.) at 311.

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contended for the plaintiff that this sum was in excess of the amount actually due under the decrees and that the agreement to pay was in contravention of S. 257-A of the old code and therefore void. The court below has given no finding on the question, no evidence having been taken on the point. Assuming the plaintiff's contention to be well founded, the further point arises whether, the defendants having been in possession for more than 12 years under the usufructuary mortgage for Rs. 24,600, they have acquired a prescriptive title to that mortgage interest. The District Judge has decided in their favour. On appeal it is argued for the appellant that there was a good usufructuary mortgage for Rs. 7,600 at all events, and, the possession of the mortgagees having commenced under a valid mortgage for that sum, the defendants could not by assertion of a larger interest acquire a prescriptive title to it.

The first question we have then to consider is whether there is a good usufructuary mortgage for Rs. 7,600. There is nothing to show, as pointed out in *Srinivasaswami* v. *Athmarama Aiyar*,[1] that the parties expressly stipulated that the mortgage should not take effect unless the whole consideration was really and validly given by the mortgagee. It cannot be said that there is an implied understanding in the case of every mortgage, where less than the full consideration is advanced by the mortgagee, that the mortgage should fall through unless the balance of the consideration is made good. It may also be that, if there is an agreement to advance the full consideration for the mortgage and there is a breach of the agreement on the part of the mortgagee, S. 39 of the Indian Contract Act will, as suggested in *Subba Row* v. *Devu Shetti*,[2] justify the mortgagor in putting an end to the contract of mortgage. It seems to us that the mortgagor may treat the mortgage as good to the extent of the consideration received and sue for damages for non-payment of the balance as suggested in *Anakaran Kasmi* v. *Saida Madath Avulla*[3] and expressly decided in *Chinnayya Ravuthan* v. *Chidambaram Chetty*.[4] He may allow the mortgagee to treat the mortgage as good and sue the mortgagor for sale as in *Rajani Kumar Dass* v. *Gour Kishore*[5] or for

1. (1908) I. L. R. 32 M. 281.
2. (1894) I. L. R. 18 M. 126.
3. (1878) I. L. R. 2 M. 79.
4. (1880) I. L. R. 2 M. 212.
5. (1908) I. L. R. 35 C. 1051.

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foreclosure as in *Munshi Bajranji Sahai* v. *Udit Narain Singh*[1]. The decision in *Subba Row* v. *Devu Shetti*[2] which treated the mortgage as invalid because part only of the consideration agreed upon was advanced, was based on the view that the mortgagor had cancelled the mortgage and the mortgagee had acquiesced in the cancellation. Where part of the consideration is void or fails, or the mortgagee makes default in paying it, the right principle seems to be that the mortgage is good to the extent of the consideration that has validly passed. In JONES on *Mortgages*, Vol. 1, S. 378, the rule is thus stated:—"If the mortgagee advance only a part of the sum contemplated in the mortgage it is a valid security for so much as he does advance and for so much only. For the advances actually made the mortgage is good against the mortgagor's assignee in bankruptcy." A number of American cases are cited at the foot in support of the above principle. Mr. K. Srinivasa Aiyangar who appeared for the respondent pressed upon our attention the case of *Walker* v. *Carleton*[3] as a decision in his favour. Apart from the fact that the decision is adversely criticised by the learned author, the case appears to be clearly distinguishable because the mortgagor gave a separate note payable in a shorter time for the part of the consideration, which was all that was advanced. Putting aside this case, therefore, as inapplicable, the whole weight of authority appears to be in favour of the rule enunciated in the passage cited. Mr. SrinivasaAiyangar further contended that to give effect to the mortgage as good for the consideration actually given would be to make a new contract between the parties. We do not think the argument is sustainable. It would be perfectly open to the mortgagor, as already pointed out, treating the whole contract as valid and enforceable, to recover damages for the partial breach. If, then, the mortgage of the entire property for the consideration that validly passed between the parties is a valid transaction, there is no foundation for the further contention that the mortgagees have acquired a prescriptive title to the usufructuary mortgage interest of Rs. 24,600. If the defendants were entitled to remain in possession as mortgagees under the valid mortgage for Rs. 7,600, time could not run in favour of the defendants for

1. (1906) 10 C. W. N. 932. 2. (1894) I. L. R. 18 M. 126.
3. (1881) 97 Ill. 582.

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the acquisition of a larger interest by their mere assertion of it to the knowledge of the mortgagor. Under the terms of the mortgage instrument, Exhibit *A*, interest was payable at 8 annas per cent per mensem. The usufructuary mortgage of the property was till the principal and interest were paid off. The income of the entire mortgaged property receivable by the mortgagees was fixed at Rs. 1,764, out of which Rs. 1,476 was to be appropriated towards interest, estimated to be due at the rate mentioned, and the balance of Rs. 288 towards the peishkush. If the consideration for the mortgage became void to the extent of Rs. 17,000, a proportionate amount of the annual interest would not be payable out of the income fixed, but under S. 76 of the Transfer of Property Act, Cl. *(b)*, the sum was liable to be debited against the mortgagee in reduction of the principal sum due under the mortgage. But whether this is so or not, the question as to what becomes of the available surplus does not affect the relation of mortgagee. Notwithstanding, then, the invalidity of part of the consideration, the mortgagee's right to possession under the mortgage remains. Article 148 applies to a suit for redemption or for recovery of possession of immoveable property mortgaged notwithstanding any assertion by the mortgagee of a larger interest than was validly passed to him under the mortgage. Article 144 has no application where other special provision is made by the Limitation Act for a suit for possession of immoveable property. It cannot be denied that Article 148 is such a provision. The mortgagor's right of redemption is not extinguished, and as the whole property has been validly mortgaged the 60 years' period under Article 148 applies. This was the decision of the Privy Council in *Khirajmal* v. *Daim*[1]. The mortgagees were bound to pay part of the income of the mortgaged property of which they had possession as a subsistence allowance to the mortgagor. Under an invalid sale the mortgagees purchased the mortgagor's interest though the sale was in somebody else's name *benami* for them. The Privy Council said : "As between mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years nor any acquiescence by the mortgagor not

1. (1904) I. L. R. 32 C, 296.

amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem." This view was followed in *Muzaffar Ali Khan* v. *Parbati*[1]. The same principle was applied in *Ali Mahammad* v. *Latta Bakhsh*[2], *Rairu Nayar* v. *Moidin*[3] and *Byari* v. *Puttanna*[4]. As the mortgagor has a subsisting right to redeem and to recover possession, the mortgagee cannot prescribe for a larger interest. We must set aside the decree of the Subordinate Court and remand the case for disposal according to law. The costs hitherto incurred will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Krishnaswami Aiyar and Mr Justice Ayling.

Pallithara Vayal Kotavalli Nambudri Illath
Kesavan Nambudri and another .. Appellants*

v.

Abhikesava Vathiar and others .. Respondents.

Kesavan Nambudri *v.* Abhikesava Vathiar.

Limitation—Adverse possession of Uraima right—Denial of right and exclusion.

Held that the consistent denial of plaintiff's right to the Uraima right from 1875 down to 1892 by the defendants coupled with the actual exclusion of the plaintiff from all management was sufficient in law to put an end to the plaintiff's Uraima right by lapse of time.

Appeal from the decree of the District Court of North Malabar in O. S. No. 10 of 1905, dated 27th March 1907.

J. L. Rosario for appellants.

K. M. Krishna Kurup and *A. Sivarama Menon* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs in Original Suit No. 10 of 1905 claim to be members of the Vaiyal Kotavalli *illom*. The 1st plaintiff claims to be adopted or affiliated to this *illom* and the 2nd plaintiff is the widow of a male member of the *illom*. The suit is brought by them for a declaration that they have

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* A. No. 117 of 1907. December, 1910.

1. (1909) I.L.R. 29 A. 640 at p. 647.
2. (1878) I.L.R. 1 A. 655.
3. (1889) I.L.R. 13 M. 39.
4. (1890) I.L.R. 14 M. 38.

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the *Uraima* of certain temples along with certain of the defendants. The third issue in the case raises the question, "whether the *Uraima* of the 2nd plaintiff's *illom* is extinguished on account of exclusive adverse possession by the 5th defendant's *illom* of the plaint *devaswoms*." As the plaintiffs Nos. 1 and 2 claim to be the sole members of the plaintiff's *illom*, we understand the issue to mean "whether the right of the 1st plaintiff and of the 2nd plaintiff is extinguished by the lapse of the statutory period." As regards the 2nd plaintiff's claim, there is a further issue raised, which is No. 2, and on that issue the District Judge has found that, being a widow, she has no right to exercise *Uraima* right according to law or valid custom. This finding of the District Judge has not been attacked before us. It is sufficient, therefore, to dispose of her appeal upon the finding on the 2nd issue.

As regards the 1st plaintiff, the case has been dealt with in paragraph Nos. 12 and 13 of the District Judge's judgment. In the year 1875, there was a suit by the predecessors of the present 4th and 5th defendants, who were the *Urallars* of the plaint temples, to remove a *Samudayi*. They then set up the claim that they were the sole *Urallars* of the temples. The *Samudayi*, who was the 1st defendant, pleaded that there were four other *Urallars* entitled to be joined as parties to the suit. An application was made by a widow of the plaintiffs' illom, both on her own account and on behalf of the present 1st plaintiff, to be joined as parties to the suit. The Munsif who decided that case dismissed the application as regards the claim of the present 1st plaintiff to join and allowed the joinder of the lady. She was then placed on the record as the 3rd defendant. There is no doubt that both in the plaint and in the subsequent proceedings there was a distinct denial of the right of the present 1st plaintiff to joint management. It is stated before us that the 1st plaintiff attained majority in 1886. But in 1881, the 4th and 5th defendants as *Urallars* of the temple gave a power of attorney to a brother of the 5th defendant to manage the temples as *Samudayi*. He was answerable to them and he was liable to be removed by them. This again was a distinct assertion of the sole right to management on the part of the 4th and 5th defendants and an actual management of the property on their

behalf by a *samudayi* appointed by them. In 1884, the 4th defendant instituted a suit for the recovery of certain property from a tenant and he made the 5th defendant a party-defendant to the suit together with the female representative of the plaintiffs' *illom* already mentioned. Her *Uraima* was admitted, but so far as the judgment in the case shows, there was no admission of the right of the present 1st plaintiff. Kesavan Nambudri v. Abhikesava Vathiar.

We come next to Exhibit XVII, which is in the year 1892. That is the judgment in a suit by the 6th defendant against the 4th defendant and a tenant of certain properties belonging to the *Devaswom*. The 4th defendant, who was then impleaded as the 2nd defendant, set up the right of the present 1st plaintiff as *Urallar* of the plaint *Devaswoms*. Stopping here we find that from the year 1875 down to the year 1892, when the 4th defendant for the first time changed front, there has been a consistent denial on the part of the 4th and 5th defendants or their predecessors of the right of the 1st plaintiff to participate in the management of the plaint temples. This denial, coupled with the actual exclusion of the 1st plaintiff from all management, is sufficient in law to put an end to his right. Assuming, for the sake of argument, that the acknowledgment by the 4th defendant in the year 1892 would, if coupled with enjoyment on the part of the 4th defendant down to the date of the plaint, give the 1st plaintiff any fresh title, we have no hesitation in saying that, having regard to what the 4th defendant himself has pleaded in 1889 and 1900 as per Exhibits XVIII to XIX, what the 4th defendant stated in 1892 was a mere device on his part to checkmate the 5th defendant. The 4th defendant has not been consistent in his assertion of 1892. He has clearly averred in later years that the present 1st plaintiff had no right to the property for he actually stated that the right of the plaint *illom* had lapsed to him. We may, therefore, dismiss Exhibit XVII as of no value at all in connection with the question of exclusion of the 1st plaintiff. We must hold that the 1st plaintiff's right has been extinguished by the statute of limitation. It was argued by Mr. Rosario that the denial of 1875 would give no cause of action to the 1st plaintiff to institute a suit. He said that the 1st plaintiff could not institute a suit for a declaration

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that he was a member of the plaint *illom* as he came into possession of all the *illom* properties in 1886. He could not institute a suit, according to him, in respect of the plaint temples in consequence of the denial of 1875. We cannot accept this argument. It was perfectly open to the plaintiff to institute a suit if he chose that he was entitled to the joint *Uraima* of the plaint temples immediately after the denial of 1875 by virtue of his being a member of the plaint *illom*. The question as to whether he was a member of the plaint *illom* would, no doubt, have to be in issue, but that issue could only be for the purpose of determining whether the 1st plaintiff had any right to the *Uraimaship* in the plaint temple. We must, therefore, express our concurrence with the District Judge in his finding that the 1st plaintiff has lost any right that he might have had in 1875 to the joint *Uraima* with defendants Nos. 4 and 5. We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Abhikesava Vathiar, Manager and Karnavan of his Tarwad .. Appellant*.

v

Vyal Kotavali Nambudri Illath Kesavan Nambudri and others Respondents.

Abhikesava Vathiar *v.* Kesavan Nambudri.

Malabar Law—Uraima right—Right of Widow.

Held, on admission, that according to Malabar law and custom a widow cannot exercise the *Uraima* right in a *Devaswom*.

Appeal from the decree of the District Court of North Malabar in O. S. No. 16 of 1905.

1907.

C. V. Anantakrishna Aiyar for *P. R. Sundara Aiyar* for appellant.

K. M. Krishna Kurup and *A. Sivarama Menon* for the respondents.

The Court delivered the folowing

JUDGMENT :—The plaintiff in Original Suit No. 16 of 1905 was the 1st defendant in Original Suit No. 10 of 1905. The judgment that we have just delivered in the other case

A. S. 118 of 1907. † December 1910,

Abhikesava Vathiar v. Kesavan Nambudri.

(*Kesavan Nambudri v. Abhikesava Vathiar*)[1] covers the present case also. But some additional arguments were urged on behalf of the plaintiff in this case by Mr. Ananthakrishna Aiyar. He contended that so far as his client was concerned, there was no denial in 1875. This statement of his we cannot accept. Exhibit XII shows that the plaintiffs in that case, namely, the predecessors of the present 4th and 5th defendants, claimed to be themselves *Urallars* and would not admit the claim of any other person to the *Uraima*. The present 1st defendant was joined subsequently to the institution of the suit as the 2nd defendant in that case. An issue was expressly raised as to whether the then plaintiffs were alone competent to institute that suit, and on that issue the District Munsif stated that it was unnecessary for him to express an opinion. On the question as to whether the 1st defendant, then the 2nd defendant, was entitled to the *Uraima*, he passed a decree dismissing the *Samudayi* and decreeing a certain sum of money in favour of the then plaintiffs on behalf of the *Devaswom*. The decree for possession on behalf of the *Devaswom* cannot enure to the benefit of the then 2nd defendant, because the District Munsif expressly stated he would not decide, in the teeth of the plaintiff's denial, that the 2nd defendant had the *Uraima* right. It is not contended by Mr. Anantakrishna Aiyar that the plaintiff in this case has been in actual possession of the suit temples. He claims to have been in possession constructively because the defendants were in possession and their possession enured to his benefit. He placed his case on the same footing as that of a tenant-in-common, who is not actually in management of the common property and whose title is denied. Even if the possession of the present plaintiff was only that of a tenant-in-common, we should be prepared to hold that there was sufficient evidence as to exclusion. There is nothing in *Jogendranath Rai* v. *Baldeo Das*[2] and in FREEMAN on *Co-tenancy*, S. 221, to which we were referred, which militates against the view that the present plaintiff has been excluded from participation in the *Uraima* right of the plaint temples. And if there was such exclusion, Mr. Anantakrishna Aiyar does not contend he would not be barred. But we are inclined to place the present case on a different footing, because the possession of a joint *Urallar* is not

1. (1911) 21 M. L. J., p. 175. 2. (1907) I.L.R. 35 C. 961 at p. 966.

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that of a mere tenant-in-common but that of a joint tenant. The acts of the other trustees in management have been held to be illegal if any one trustee is not consulted in the management of the trust properties except in cases where by custom or by practice or the course of management any one trustee who does not actually participate may be deemed to have accepted or concurred in the management of the others. The acts of the 5th and 6th defendants in this case from the year 1875 to which Exhibit XII relates are acts which are only consistent with the explanation of a consistent denial of plaintiffs' rights and a consistent exclusion from participation in the management of the plaint temple. We are, therefore, quite prepared to hold that the District Judge is right in his finding that the plaintiff's suit is barred by limitation. We dismiss the appeal with costs.

Kalagayya v. Yanadamma.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Chellamcherla Kalagayya *alias* Sundaramayya .. Appellant*

v.

Mummareddi Yanadamma (died) and others .. Respondents.

Mortgage—Subrogation—Discharge of prior mortgage binding on third party—Subsequent mortgage of other property by one of the mortgagors.

A second mortgagee from a certain person applied part of the mortgage money in discharge of a prior mortgage which bound the interest of a third person. There was an express statement of an intention to keep alive the discharged mortgage. There was no intermediate incumbrance against which the prior mortgage might be presumed to be kept alive; and the rates of interest stipulated under the mortgage differed from that provided in the earlier one. *Held*, that the second mortgage was not binding on the third person's interest. [*Mohesh Lal* v. *Mohunt Bawan Das*[1] followed. *Gokal Das Gopal Das* v. *Purammal Premshuk Das*[2] distinguished. *Surjiram Marwari* v. *Barhamde Das Pershad*[3], *Bisseswar Prasad* v. *Lala Surman Singh*[4] and *Govindasawmi Devan* v. *Doraisawmi Pillai*[5] referred to.

Appeal from the decree of the District Court of Nellore in O. S. No. 36 of 1906.

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* S. A. 213 of 1907. 20th December 1910.

1. (1882) I. L. R. 9 C. 961.
2. (1883) I. L. R. 10 C. 1035.
3. (1905) I. L. R. 2 C. L. J. 288.
4. (1907) 6 C. L. J. 134.
5. (1910) 20 M. L. J. 381.

K. R. Shenai for *T. Prakasam* for appellant. Kalagayya v. Yanadamma.

The Advocate-General (*P. S. Sivaswami Aiyar*) for 2nd respondent.

Ryru Nambiar for 3rd and 4th respondents.

The Court delivered the following

JUDGMENT:—The first question argued in this appeal relates to the payments pleaded by defendants Nos. 1 to 3. They form the subject of the 1st issue. We agree with the finding of the District Judge on it.

The only substantial question in the case relates to the liability of the 6th defendant's share in the mortgaged property. The suit mortgage is dated 6th December 1890. The 6th defendant did not join in the execution, although he had been given a share in it under Exhibit VIII which is dated 7th May 1886. It was not argued before us on behalf of the respondent that the mortgage bound the 6th defendant's interest also, even though he was no party to the document. The ground on which the plaintiff has been given a decree for a portion of the mortgage money against the 6th defendant's interest in the property, is that it was applied in discharge of an earlier mortgage, Exhibit B, dated the 15th of August 1884, which was binding on the whole mortgaged property as it was, anterior to the carving out of a share in favour of the 6th defendant. The question we have to consider is whether the plaintiff is entitled to claim subrogation and to stand in the shoes of the mortgagee under Exhibit B. We may dismiss at once the argument of Mr. Shenai that there is nothing to show that part of the mortgage money under Exhibit A was applied in discharge of Exhibit B. It is not open to the appellant to raise this contention for there was no express denial in the written statement of the allegation in the plaint that part of the mortgage money was so applied. Exhibit A recites the purpose. No question appears to have been raised before the District Judge as regards the actual application of the money. But the more important question remains as to the right to subrogation. We think this case is exactly covered by the decison of the Privy Council in *Mohesh Lal* v. *Mohunt Bawan Das*[1]. The facts of

1. (1882) I. L. R. 9 C. 961.

Kalagayya v. Yanadamma.

that case are closely analogous to those of the present case. A second mortgagee from a certain person applied part of the mortgage money in discharge of a prior mortgage which bound the interest of another person as well. There was no express statement of an intention to keep alive the discharged mortgage. There was no intermediate incumbrance against which the prior mortgage might be presumed to be kept alive. The rate of interest stipulated under the suit mortgage differed from that provided in the earlier encumbrance. All these facts are present in the case before us. The principle underlying that decision is unaffected by the later decision of the Judicial Committee. in *Gokaldas Gopaldas* v. *Purammal Premsukhdas.*[1] We accept the law as expounded in *Surjiram Marwari* v. *Barhamdeo Persad*[2] by Mr. Justice *Mookerjee* and followed in *Bisseswar Prasad* v. *Lala Surman Singh*[3] and by this Court in *Govindasawmy Thevan* v. *Duraisawmi Pillai*[4]. We must modify the decree of the Court below by exonerating the 6th defendant's share under Exhibit VIII in the suit properties from all liability. The 6th defendant is entitled to his costs in this and the lower Court against the respondent. The appeal is otherwise dismissed with costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis.

The Krishna Jute and Cotton Mills Company, Limited, by their Secretary and Treasurer, Mothe Gangaraju of Ellore .. Appellant* (*Defendant*).

v.

J. Innes (absent in England) and others .. Respondents (*Plaintiffs*).

Contract Act, Ss. 39, 73—Breach of contract—Measure of damages—Difference between contract rate and market rate—Market rate as on what date.

Per *Chief Justice* and *Wallis* J. (*Ayling* J. dissenting)—In the case of a breach of contract to sell goods, the measure of damages is the difference between the contract rate and the market rate as on the date fixed for performance and not as on the date of breach, whether the action be brought

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* A. No. 45 OF 1909. 20th December 1910.

1. (1883) I. L. R. 10 C. 1035.
2. (1905) I. L. R. 2 C. L. J. 288.
3. (1907) 6 C. L. J. 134.
4. (1910) 20 L. M. J. 381.

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before or after the date fixed for performance. There is no difference between the English and Indian Law on the point.

Per *Ayling* J.:—The damage is to be assessed on the difference between the contract price and the market price on the day of the breach of the contract. The English law is not applicable to India in the face of S. 39 of the Contract Act.

Per *Curiam*:—*Held* on the facts of the case that (1) there was a completed contract in the case; (2) that the breach occurred on the day when the defendant wrote the letter which plaintiffs rightly treated as a breach, (3) that the defendants' case having been that they were entitled to claim a formal transfer, it was not open to them to raise the objection that the contract itself was invalid.

Appeal from the decree of the Subordinate Judge's Court of Cocanada, dated 11th December 1908. in O. S. No. 37 of 1907.

P. R. Sundara Aiyar and *V. Ramesam* for appellant.

P. Narayanamurthi for respondent.

This appeal coming on for hearing in the first instance* before their Lordships, *Sir Charles Arnold White*, Chief Justice, and Mr. Justice *Aiyling*, The Court delivered the following

JUDGMENTS:—*The Chief Justice*:—In this case a question of some general importance and interest has been raised with reference to the rule applicable as to the measure of damages, assuming the plaintiffs have a right to claim damages, for the alleged breach of contract. We reserve judgment on that question. As regards the other questions raised in the appeal, we propose to deal with them now. The case of the plaintiffs is that towards the end of January 1907, a contract was entered into between them and the defendants for the sale of jute to the defendants, and that the defendants refused to accept delivery in pursuance of the contract. The plaintiffs sued for damages on account of the breach of contract, and the Subordinate Judge of Cocanada awarded a sum of Rs. 18,000 and odd to the plaintiffs. The defendants prefer an appeal to this Court. The plaintiffs are merchants who carry on business at Cocanada, and the defendants are a Limited Liability Company having their head office at Ellore. Prior to the transactions between the plaintiffs and the defendants, which are in question in this case, the

* 26th to 28th September 1910,

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plaintiffs entered into certain contracts with local growers of jute for the purchase of jute. These contracts I will refer to as the subsidiary contracts. The contracts with these local growers are to be found in Exhibit GG series and the terms of these subsidiary contracts are set out in a tabular form in the schedule to Exhibit Y. The subject matter of the contract between the plaintiffs and the defendants was 1,032 putties of jute. As regards 155 putties there is no dispute.

The first question for consideration is—was there a completed contract between the parties in January 1907. In order to deal with this question, it is necessary to examine the correspondence between the parties with some minuteness. The matter is not altogether easy, as the correspondence is somewhat confused, but, after full consideration, I have come to the conclusion that there was a completed contract between the plaintiffs and the defendants on the 26th January 1907. The first letter is in the form of an offer which is made by the defendants to the plaintiffs, or rather by the defendants' agent to the plaintiffs' agent, and that letter is only intelligible by the light of the fact to which I have referred, *viz.*,the existence of the subsidiary contracts between the plaintiffs and third parties. This letter refers to the subsidiary contracts. The letter (Exhibit Al) says : "To-day this offer is given to you through Chicacole Venkata Rao, until 3 P. M. on the next day for purchasing from you on condition of taking delivery on the due dates fixed by them (the parties to the subsidiary contracts) of about 1,100 putties sold to you at Rs. 50-4-0 a putty, so that the same might be delivered * * *Immediately on the receipt of acceptance from your Company, out of the advance of Rs. 50-4-0 for every putty payable to you, the amount at the rate of Rs. 5 shall be paid within 5 days and the further amount at the rate of Rupees five shall be paid within 15 days from this day and your assamiwar contracts shall be taken." Now this is an offer by the agent of the defendants that they will pay the stipulated amount for the jute, and that the delivery of the jute is to be on the dates fixed in the subsidiary contracts. On receipt of this letter, the plaintiffs' agent telegraphed the reply (Exhibit Bl). That was intended to be an authority to the plaintiffs' agent to accept the offer which had been made to them by the defendants. Then

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we have the acceptance of the offer by the plaintiffs' agent, Exhibit C. It says: " A reply is come confirming the offer made by you." That means that the agent had received his principal's authority to accept the offer. Then the letter concludes with these words : " I shall reduce all the conditions to writing, receive the advance, and transfer the contracts." This transfer has reference to the subsidiary contracts.

Then on the same day we have a receipt, Exhibit D, which is given by the plaintiffs to the defendants. The receipt is in these terms: "Yesterday, Depuguntla Purushotham Garu on your behalf confirmed the offer of 1132 Kh. of jute purchased by us at Ongole at Rs. 5-4-0 per putty. The advance of Rs. 2,000 this day given by you is credited towards the advance stipulated to be paid by you * *."

It seems to me that the letters to which I have referred, read by the light of Exhibit D of the same date, a receipt given by the plaintiffs for the advance taken that day, show that there was a completed contract on that day and that the words " I shall reduce all the conditions to writing" mean—reducing to writing the terms of a contract which had been already completed on that day. The reduction and the formal transfer by the plaintiffs were merely incidental to the completion of the contract; neither party, when the offer was made and accepted, contemplated any outstanding term or condition which had to be arranged before there was a completed contract. It is no doubt true that some terms had been left unprovided for in the contract: but that does not show that the contract itself was not complete.

Differences arose within a few days. It would appear that jute fell in price considerably after the end of January 1907; certain figures as to the price of jute are to be found in Exhibit LL. I do not say that these figures are conclusive as to the market price which prevailed in January, February and March, and no doubt they are somewhat meagre. During January the price of jute never stood at as high a figure as Rs. 50 and by the end of February there had been a serious fall in price. The price never recovered so far as appears in Exhibit LL. During March the prices were somewhere about Rs. 37. Five or six days after the letter of acceptance was received, the plaintiffs wrote Exhi-

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bit F on the 31st January in which they called the defendants' attention to the fact of their neglecting to take delivery of the jute; they say "We have kept at your risk about 350 putties of goods in the platforms at Ongole, &c." Then we have a letter from the defendants to the plaintiffs on the same date, Exhibit G, in which they complain as to the quality of the jute. In that letter there is no mention of any outstanding condition as to which the execution of a further document was necessary. On the same day, we have another letter from the plaintiffs to the defendants, which is Exhibit H. Now that is a letter on which Mr. Sundara Aiyar strongly relied. The letter says, "I do not know how without your paying the balance, *viz.*, the advance of Rs. 3,000, without our transferring the contracts to you, the goods were given delivery to you and how you have taken delivery. It is not valid. We do not accept that the said delivery was given under our contract * *." Mr. Sundara Aiyar contended that the denial on behalf of the plaintiffs of the validity of the delivery made by the plaintiffs, shows that there was no completed contract. I do not take that view myself. As regards the other matter mentioned in the letter, *i. e.*, the failure to make the advance, the plaintiffs were entitled to say they would not make delivery until the advance stipulated for had been paid. There is another letter of the 31st January (Exhibit J) in which the defendants again raise the point that the contract was not reduced to writing and that they were not liable to take delivery of the goods till then. The outcome of this letter was a telegram (Exhibit K) dated the 3rd February from the plaintiffs to the defendants in thesewords : "We are ready to transfer all our jute contracts * * at your risk ; if transfer not obtained within 3 days suit will be filed." This means that if the transfer is not accepted within 3 days legal proceedings will be taken. The next letter dated the 4th February 1907 from the plaintiffs to the defendants (Exhibit N) reiterates their readiness to transfer the contract at the defendants' risk. In reply to this, the defendants on the 6th February (Exhibit O) refer again to the reduction of the terms of the contract to writing. There they say: "Even now if you send us your draft terms of the contract for our acceptance, we shall come to a final settlement, and take the transfer of orders under the agreement entered into by our agent with yours at Ongole,"

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Then we come to a letter, Exhibit T, dated the 7th February It is to be observed that this letter is not by the plaintiffs' agent but by the firm, and it seems to me that the letter places the case of the plaintiffs on the right footing. The letter says: "Our contract with you is clear and complete. It consists of your letter, dated the 25th January 1907, fully detailing all the terms and conditions on which you offered to buy from us about 1,100, candies of jute, coupled with our acceptance of your offer * * * * When you entered into the contract, you were so satisfied with the season's quality that you made no stipulation whatever about it in your offer * * As yet you have not taken delivery of this ready stuff, nor of further arrivals which are accumulating, though you bound yourself to take our place towards our sellers." In reply to the above letter, we have a letter, dated 8th February 1907, from the defendants to the plaintiffs (Exhibit W). It says: "The only proper course for you to do is to call upon your agent, why he objected to the fulfilment of the contract entered into with our agent." Here there is an express reference to "the fulfilment of the contract." In the plaintiffs' letter of February 9th (Exhibit Y) the plaintiffs say: "The contract was completed on the 25th January 1907. Our agent had no authority to alter or modify the same subsequently, nor does his letter dated 26-1-1907 amount to any such modification of the original contract * * We were perfectly justified in withholding delivery until the balance of advance agreed to be paid and the difference of price was actually paid, both to be paid for against delivery as per the original coutract." Accompanying the above letter there is a draft document which is a formal transfer of contracts of jute by the subsidiary contractees. I think the attitude of the plaintiffs was clear when they wrote this. There was a breach of contract at the end of January, but since the defendants required a formal transfer of the contracts, the draft document was sent to the defendants. The plaintiffs do not admit thereby that they were under any obligation to do so. They send it as a means of settlement, and without prejudice to their rights in a court of law. I think that may fairly be taken to describe the position of the plaintiffs at this time. The draft document says: "We are no longer responsible to the Krishna Jute and Cotton Mills Co., Limited, for any purpose whatsoever relating to the said

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contracts as shown in the schedule annexed, but the said Krishna Jute and Cotton Mills Co., Limited, themselves shall suffer all and everything that may happen in the several transactions relating to the said contracts as if the said Krishna Jute and Cotton Mills Co., Ltd., themselves originally obtained the contracts from the persons noted and mentioned in the 2nd column of the schedule hereunto annexed." The response to this letter was a letter, dated the 14th February, from the defendants to the plaintiffs (Exhibit Z). That letter concludes with these words: "Though you assert that this season's Nellore District jute is exceptionally good, and though you are informed that we went in for jute of such a quality, the draft sent for our approval is silent about it; and reading between the lines of this document, one can evidently see your anxiety to thrust on us any worthless stuff that you might have purchased. Unless and until you introduce into this draft a clear stipulation as to the quality, in the wording contained in your letter of the 7th instant, we regret we cannot approve of this document." Here they insist not only on a further document but that that document should contain a stipulation as to quality. Having received that letter on the 14th February, the plaintiffs treated it as a repudiation of the contract by the defendants and on their part elected to treat the contract as at an end. I think they were legally entitled to do this. On the 4th March, they gave notice for the sale of jute by public auction. On the 5th of the same month, their vakil wrote to the defendants letter, Exhibit BB. Here they say that they cancel the contract and will recover damages which they have suffered through court of law, if they are not paid up. Mr. Sundara Aiyar has referred to some authorities, one of which was the leading case of *Hussey* v. *Horne Payne*[1]. I do not think that the cases as to specific performance afford us much assistance. The question we have to decide is—What did the parties mean when the offer was made and accepted in January? The conclusion to which I have come is that there was a completed contract at the end of January. As I have said, we reserve, for further consideration, the question as to the measure of damages; but in connection with that question there is the further question, which may be material, as to when did the breach occur. It seems

1. (1879) 4 A. C. 311.

to us the breach occurred on the 14th February 1907 when the defendants wrote the letter, which the plaintiffs treated as a repudiation of the contract, since, as I have said; in my view the plaintiffs were legally entitled so to treat it.

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There only remains to consider a point of law which, though not raised in the grounds of appeal nor taken in the pleadings, was argued by Mr. Sundara Aiyar. The point was that the plaint disclosed no cause of action since it did not allege that the transfer of the contracts was made with the consent of the original contractors.

Seeing that the defendants' case throughout has been that they were entitled to claim a formal transfer of the contracts, it seems to me it is not open to them to raise the objection that the transfer of the contracts was invalid. It is, therefore, unnecessary to discuss the question whether executory contracts of this character could in law be transferred without the consent of the original contractors. There is nothing, however, to indicate that the original contractors would not have been willing to transfer the contracts if called upon to do so. So long as they got their contract price it would appear to have been immaterial to them whether they made delivery to the plaintiffs or the defendants. The case of *Kemp* v. *Bearselman*[1], might have been in point if the objection had been taken by the original contractors, or they had sought to be released from their liability on their contracts. As things are, it seems to me the case is not in point.

Ayling, J.—I concur.

The question about the rule applicable as to the measure of damages for the alleged breach of contract having stood over for consideration till 14th October 1910, the Court delivered the following

JUDGMENTS :—*The Chief Justice* :—We reserved judgment on the question of the rule applicable as to the measure of damages.

The Subordinate Judge dealt with the question of damages very shortly in paragraph 21 of his judgment and he awarded the plaintiffs the amount which they claimed. In so doing he would have seemed to have proceeded on the assumption that the property in the goods had passed to the defendants. In my

1. (1906) 2 K. B. 606.

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opinion, the property in the goods had not passed, and the measure of the damages is the difference between the contract price and the market price. Then the question arises—what is the date on which the difference is to be ascertained—the date when the contract between the plaintiffs and the defendants was repudiated by the defendants or the dates provided for in the subsidiary contracts with the plaintiffs?

Section 73 of the Contract Act contains the general rule as to damages on the lines of the decision in *Hadley* v. *Baxendale*[1]. Appended to the section are numerous illustrations, but none of them would seem to cover the present point. Neither S. 73 nor S. 39 of the Contract Act, as it seems to me, throws any light on the point we have to decide. The English rule is, I think, well settled that the damages are to be calculated with reference to the date on which the contract should have been carried out. That is, it will be treated as rescinded for the purpose of suing upon it and as existing for the purpose of calculating the damages—MAYNE on *Damages* (8th edition), p. 205; see *Brown* v. *Muller*[2]; *Roper* v. *Johnson*[3]. Mr. Sundara Aiyar contended that the rule laid down in *Roper* v. *Johnson*[3] should not be applied in India. I can see no good reason why it should not, and I do not find anything in the provisions of the Contract Act to indicate that this rule should not apply. There is surely no hardship in holding that when a party *ex hypothesi* has broken his contract the onus of establishing facts which would would go to mitigate the damages should be on him. No doubt when the action is brought before the time for performance has arrived there is a difficulty in assessing the damages, but I am unable to accede to Mr. Sundara Aiyar's contention that this in itself is a good reason for holding that the English rule is not applicable in this country. As to this question of difficulty Mr. Mayne observes: "Where the trial takes place after the contract has thus been rescinded, but before the time for performance has arrived, there may be a good deal of difficulty in exercising that prophetic judgment which will enable the proper measurement of damages to be assessed. This difficulty, however, is not greater than that of estimating

1. (1854) 23 L.J. Ex. 182. 2. (1872) L. R. 7. Ex. 319.
3. (1873) L. R. 8 C. P. 167.

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thevalue of a debt payable on a contingency under the bankruptcy law and the courts have always held that the difficulty of estimating damages is no reason for refusing to fix them " (MAYNE on *Damages* Eighth edition, pages 206 and 207.

In *Cooverjee Bhoja* v. *Rajendra Nath Mukerjee*[1] the Calcutta High Court applied the rule laid down in *Brown* v. *Muller* [2] and *Roper* v. *Johnson.* [3] No doubt the suit there was brought after the time for the performance of the contract had expired and thus no practical difficulty arose. But in my view this does not affect the principle. I can find no authority for the view that if the action is brought before the time for performance provided for by the contract has arrived, the damages must be ascertained as from the date of the repudiation of the contract. I may observe that in Shephard's Indian Contract Act, *Brown* v. *Muller* [2] and *Roper* v. *Johnson* [3] are cited in the notes to S. 73 of the Contract Act and it is not suggested that the law as there laid down is not applicable in India.

Ayling J. :—The point on which we have reserved judgment is as to the mode of assessing damages. The respondents' vakil contends that the English rule laid down in *Roper* v. *Johnson*[3] should be followed; that is, irrespective of the date of repudiation of the contract by the promisor and its acceptance by the promisee, damages must be assessed as on the date or dates fixed for performance of the contract, provided that the promisor may prove that the promisee had it in his power to reduce the loss and may claim mitigation *pro tanto.*

No case is quoted in which this rule has been followed in India where the promisee has, as in this case, put an end to the contract under S. 39, Indian Contract Act. *Cooverjee Bhoja* v. *Rajendra Nath Mukerjee,*[1] is distinguishable on the ground that in that case although the promisor had definitely repudiated his liability under the contract the promisee took no action on receipt of intimation to this effect, but waited till after the due date of performance before bringing his suit for damages.

The difficulties in the way of assessing damages on these lines where the suit is brought before the due date are obvious, and their existence is recognised in the English rulings: where,

1. (1909) I. L. R. 36 C. 617. 2. (1872) L. R. 7 Ex. 319.
3. (1873) L. R. 8 C. P. 167.

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as may conceivably happen, the due date or dates are far distant, they would be almost, if not quite, insurmountable.

The statutory provisions of law contained in Ss. 39 and 73 of the Contract Act provide a much simpler, and not less equitable, line of procedure. Section 39 provides that where a promisor refuses performance of a contract or disables himself from performance, the promisee shall have the option of disregarding the repudiation, still treating the contract as subsisting (in which case he can, of course, sue for damages for breach as if committed on the date fixed for performance): or he can treat the contract as at an end, in which case it must be held to have been broken by the promisor on the date of his refusal or disablement. As it is only the loss or damage naturally S. 73, from the breach of contract which are recoverable under section it inevitably follows that damages must be assessed as on the date of breach (as thus determined) and not on the date originally fixed for performance. This I take to be the meaning of the two sections. In the presence of these statutory provisions, it seems unnecessary and undesirable to look to the case-law of England for guidance. (Vide *Burn and Co.* v. *McDonald.* [1])

I would therefore assess damages as on the date of breach (the 14th February 1907).

The Chief Justice:—As my learned brother takes a different view with regard to the rule as to the damages, under S. 98 of the Code, we refer to a third Judge the following point of law:—

Where a contract provides that it shall be performed on a specified date and the promisee lawfully puts an end to the contract under S. 39 of the Contract Act, and sues for damages, are the damages to be ascertained with reference to the date of the breach of the contract for with reference to the date provided for the performance of the contract—

(*a*) when the suit is brought before the last-named date ?

(*b*) when it is brought after that date ?

This case coming on for hearing on 15th and 16th December 1910 under S. 98 of the Code of Civil Procedure, before Mr.

1. (1908) I. L. R. 36 C. 354.

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Justice *Wallis*, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT :—My answer to the reference is that in both the cases put the damages must be ascertained with reference to the date provided for the performance of the contract. When before the date fixed for performance of a contract the promisor refuses to perform it, and the promisee rightly rescinds it under S. 39 of the Indian Contract Act, he is under S. 75 entitled to "compensation for any damage which he has sustained through the non-fulfilment of the contract." This appears to me to be the section applicable to the present case and I think that non-fulfilment of the contract means non-fulfilment at the date specified in the contract, and that, according to the proper construction of the section, compensation is to be ascertained with reference to that date, and not with reference to the date of the act of refusal which gave rise to the right to rescind. At the hearing of the appeal, however, and also at first on this reference, the case was argued as if the suit was one to recover compensation under S. 73 for a breach of contract, the breach in this case being the refusal of the promisor to perform the contract. This, however, is not the way in which the case has been dealt with in England—*Frost* v. *Knight*,[1] *Hochester* v. *De La Tour*[2]—and I propose so to deal with it here both for this reason and because I think the result is the same whether the case is regarded as governed directly by S. 75 or S. 73. The breach being the defendants' refusal to perform, the plaintiff is then entitled, under S. 73, to compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach. This merely expresses the English rule as to the nature of damages in *Hadley* v. *Baxendale*,[3] so that the general principles upon which compensation or damages are to be assessed in cases of this kind are the same in India as in England and there is nothing in S. 73 to warrant the question being dealt with on different lines in India. When the Indian Contract Act was drafted and enacted the correct method of assessing damages in this particular case had not been clearly decided in England;

1. (1872) L. R. 7 Ex. 111, 2. (1853) 2 E. and B. 678.
3. (1854) 9 Ex. 341.

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Wallis J.

otherwise seeing the importance of the point, it would probably have been dealt with in an illustration to S. 73 or S. 75. But in February 1872, the year in which the Indian Contract Act was passed, it was held in England, by the Court of Exchequer Chamber in *Frost* v. *Knight*[1] and by the Court of Exchequer in the following June in *Brown* v. *Muller*[2],—though only *obiter*—that the damages were to be estimated with referto the time fixed for performance in the contract. In the following year (1873)the point was expressly decided in *Roper* v. *Johnson*,[3] in which the refusal to perform, the bringing of the action and the trial all took place before the date for performance specified in the contract, and after the case had been argued by two of the foremost lawyers of the day, Holker on the one side and Herschell on the other, it was held that the true measure of damages was *prima facie* the difference between the contract price and the market-price at the date fixed for delivery although that date had not arrived when the action was brought and the suit tried. The decision dealing with an important question of every-day occurrence in a commercial country has now been treated as settled law for nearly thirty years in England, and also I think I may say in India, having regard to the frequency with which the point must have arisen and the absence of any reported cases to the contrary. As regards the Original Side of this Court, I can speak personally to its having been followed in several unreported cases. In these circumstances, I should be of opinion that it ought to be followed even if I ventured to differ from the reasons given in the judgments. On the contrary, those judgments, especially that of *Brett* J., afterwards Lord *Esher*, appear to me to be conclusive; and further it seems to me that the alternative method of ascertaining the compensation with reference exclusively to the date of the breach, *viz.*, the refusal to perform, would in many cases fail to give compensation for the loss or damage naturally arising in the usual course of things from the breach, and so fail to satisfy S. 73

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1. (1872) L. R. 7 Ex. 111.
2. (1872) L. R. 7 Ex. 319.
3. (1873) L. R. C. 8. P. 167.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair.

Swami Vidhyananda Paramahamsa *alias* T. S. Muthusawmi Sastri .. Petitioner*

v.

Y. T. S. Narayana Sastri .. Counter-Petr.

Hindu Law—Guardianship of children—Sanyasi's right — Conversion to Brahmoism—Father's right to keep daughters unmarried—Cr.P.C., S. 491 *—De facto guardianship—Penal Code, S.* 361.

Muthusawmi Sastri *v.* Narayana Sastri.

A Hindu father is quite free to keep his daughters unmarried till their 16th year and even after that. A Hindu who becomes a *Sanyasi* loses his rights of guardianship over his children and cannot regain them by reverting back from *sanyasam* ; and consequently, he does not regain his right of guardianship by becoming a Brahmo.

De facto guardianship is sufficient to sustain a prosecution under S. 361, I. P. C., and as against strangers, would entitle the *de facto* guardian to an order for restoration of the ward to his custody under S. 491, Cr. P. C.; but where the custody is not illegal and improper the proper procedure is to restore the minor to his lawful guardian under Cl. (*a*) of S. 491, Cr. P.C.

Application for a writ of *Habeas Corpus.*

K. Narayana Row for petitioner.

T. Ethiraja Mudaliar for counter-petitioner.

The Court delivered the following

JUDGMENT :—This is an application under S. 491, Criminal Procedure Code, in the nature of a writ of *habeas corpus* by a father for the custody of his two daughters in their 14th and 16th years respectively.

On reading the affidavits it appeared to me that the case is one which ought to be decided on sworn testimony. I accordingly directed the parties to examine witnesses. These are the facts.

The petitioner who calls himself Swami Vidhyananda Paramahamsa *alias* T. S. Muthuswami Sastri is a B. A. of the Madras University and was a tutor in the Madras Christian College from 1892 to 1899, drawing a pay which ranged from Rs. 35 to 65. Before 1889, he had pledged himself that he would not marry his daughters before their 16th year. His wife had English education in the Training School and was a teacher in

*30th August 1910.

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the Vijianagaram Rajah's Girls School. In 1895, while a tutor, the petitioner donned the yellow robe. In 1899 he went to Sringeri to become a Sanyasi. From there he wrote Exhibit II to his brother Narayanan, with whom his daughters are living and who opposes this application. He resigned his appointment in the Christian College to become a *Sanyasi*. He writes in Exhibit II:—Now you are wise, experienced and gentle. I therefore give the whole family burden to you. The children are all yours, the books and furniture are yours. I make you a complete Manager * * Out of family dignity I would ask you to support the renounced family completely from your income.* *Do not write to me anything about the private affairs of the family." There can be no doubt that his wife did not like this. A few months after, in November, 1899 Narayanan from Madras wrote to him that she was refusing to receive any help from him and said she did not want any help at all. He wrote that they were not on friendly terms on account of his refusal to receive the mother-in-law into the house. He states that for one month he supplied every thing she wanted and would do so again willingly if she would allow him. He wrote he would help his brother the petitioner also. So far as the sons are concerned, Narayanan took charge of them from 1900. They have been living with him ever since, and were educated by him. The eldest boy is now 21 or 22. The petitioner came to Madras and became a Sanyasi at Tiruvottiyur in 1901, obtaining the consent of his wife, which he says was given on condition that he would not renounce the duties of a husband. His father died in 1901. He left it to his brother Narayanan to perform the usual ceremonies in the ordinary way. He did what a *Sanyasi* does on such occasions, bathe with the clothes he was then wearing. From June 1901 to June 1902 he travelled in the Madras Presidency. He spent the rest of 1902 and the whole of 1903 in Northern India and returned to Madras only at the end of the year. A photo of his taken during this trip is Exhibit IV, filed to show he was then a *Sanyasi*. Till March 1905 he lived at various places in Madras but not with his wife and children, whom he admits he did not maintain and who, Narayanan says, were maintained by him. He was suffering from fever for four or five months when he says his wife asked for the favour of an

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interview with him which he was pleased to grant. From that time she was visiting him occasionally but did not live with him. He also says that the eldest son who must have been then below ten, stayed with him and cooked his meals for him. In March 1905, he went to the Circars for about 6 months to collect subscriptions for a press, leaving his wife and daughters in the house. He returned in about November 1905 and after that period to her death, according to himself, she permanently lived with him, though according to his brother such permanent residence was only from 1906. Early in June 1906 his mother died; he refused to perform the funeral ceremonies as he thought that Narayanan, who had become the eldest son in the family, by his own renunciation of that place which was his by birth, was the proper person. On the 11th of that month he wrote "as a self-adopted son of Mother India" a characteristic letter to Narayanan, in which he assured him, "I went away from the bodily mother in order I might serve Mother India" and that he was one of the best of their race and that Narayanan ought to be proud of him as the only "Sanyasin product" of the Madras University and 'calls upon' Narayanan to honour his mother's memory with a contribution of Rs. 15 a month towards the maintenance of the press, which, he says, is for the improvement of the vernacular literature. The evidence does not show what the reply was. Though he did not attend the funeral ceremonies, his wife attended, without asking him, as he says in such matters she did not take his consent. It is probable he was displeased with her treatment as she took away the daughters who were till then living apparently with Narayanan. Within a few days after this, 16th June 1906, the petitioner signed the covenant and became a Brahmo. His wife did not sign the covenant. But it is probable that to please him she lived a Brahmo life. Till September 1908 his daughters continued to live with him. His sons were with Narayanan. He wanted Narayanan to send them to him. Narayanan says he left it to them to do what they liked. But it may be inferred that he was not willing to send them and the petitioner says that his wife dissuaded him from taking any legal steps. In 1908 his eldest daughter ran away to her uncle Narayanan's house, as she hoped that he would get her married. The petitioner brought her back and to prevent any further attempts placed her in a home at Poona

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in September 1908. The second daughter also was taken there in January 1909. His wife went to Poona in September 1909 and brought them away without obtaining the consent of the petitioner and against his wish. The petitioner states that the reason was that it was a hard life his daughters were leading there. The evidence on the other side is that they wanted to get them married; after this they lived together. But according to the daughter, the petitioner, cooked his own meals, and they cooked their meals separately, though they lived in the same house. This is denied by the petitioner. The evidence on either side to corroborate this is not of much matter. The wife and children lived with the petitioner till April 1910, when the wife went to the Maternity Hospital. She died there. Between 1906 and 1910, the petitioner and his wife lived as husband and wife and she bore him children. On her death, the petitioner states that he performed the memorial service in Brahmo form. Narayanan was not in Madras on the day of her death and, therefore, a priest was engaged the first day. On the second day he arrived and the ceremonies were thenceforward carried out in the orthodox Brahmin style.

There is no doubt that from 1906 to 1910 while his wife and daughters were with him, he was earning enough to maintain them, but it is also proved beyond doubt that she underwent great privations. Besides the evidence of witnesses on either side, who prove payment of small sums of cash and their supplying them with necessaries like rice, there is the strong evidence furnished by Exhibit I, a memo left by her on her death, which shows that she pledged even her Tali, marriage symbol, for 8 annas. A married woman will, of course not do this unless in very dire straits. She tells her children, in this memo, not to tell their father of this, and it is evident from his distress in the witness box when he read this that it came to the petitioner as a painful surprise. My conclusion on this point is that he was so absorbed in his divine mission, the service of 'Mother India', that though he earned sufficient for their living, he did not give her enough and that she bore everything in silence, trying as best as she could in various ways to make both ends meet. The object of petitioner is to prevent the marriage of his daughters before they complete

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their sixteenth year. His brother and other relatives apprehend that if the girls are not married before they attain age, they may be put out of caste or they may find it difficult to get them married, and if the girls return to the father who is a *Sanyasi* and was living with his wife there might arise further difficulties.

I think the petitioner is quite free to keep his daughters unmarried till their 16th year or even after that age even though he may put his daughters not only to great inconvenience but to the danger of excommunication.

The fact that he has become a Brahmo does not affect the matter. He will not thereby lose any rights he had before. Leaving out of consideration for the present his living with his wife, there is nothing proved against his character. He seems to be a man of strong convictions, who is acting upon them, sacrificing his wordly prospects, who has consecrated his life to what he regards his holy mission in life and will not allow on that account the material interests of his wife and children to stand in the way. He wants his daughters to be brought up according to his own views.

None of his relatives, his brothers, brother-in-law, etc., share his views. They retain their old faith and strictly orthodox ideas in their completeness. His wife was an educated lady herself. She led an uncomplaining, silent and hard life from 1900 to her death. She had undoubtedly a will of her own. She brought away her daughters from Poona. Her husband admits that she would not take his consent for such things as attending funeral ceremonies, etc. She attended his mother's funeral without his leave, and she persuaded him to leave her three sons with Narayanan and on her death-bed practically advised her daughters to leave their father and live with Narayanan.

In these circumstances there is no question of morality or corruption to influence my decision. If the petitioner retained his right of custody when he became a Brahmo, the daughters must be placed in his custody, as nothing has happened since to deprive him of that right. Whether he had such rights then is the question for determination. His declarations in his

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letter Exhibit II already extracted, the resignation of his appointment in the Christian College, his renunciation of his position as the head of the family by giving up the family lands to Narayanan, his entire and otherwise inexplicable and very reprehensible abandonment of his wife and children till 1905, his wanderings throughout the country, when he was photographed as a *Sanyasi*, his discarding the sacred thread, taking a new name, the ceremony of his initiation, and his conduct on the deaths of his parents when he declined to perform the funeral ceremonies on the ground that he is a *Sanyasi* and Narayanan who has become the eldest son on account of his renunciation is the proper person to perform them, living the life of a *Sanyasi*, apparently lead only to one conclusion. He insists himself that he has become and is still a *Sanyasi*. His own statement is remarkable: "While I admit that I have been wearing a *kashaya garb*, I deny I am a *Sanyasi* in the ordinary acceptation of the term. I took up the Sanyasa with my own interpretation of the prescribed formulae to a sympathetic priest that I chose, and who was fully apprised of my views and motives, and I feel bound only by that interpretation. I am not a total innovator in this matter but an imitator of religio-social labourers like Sankara, Ramanuja and Madhwa who put what interpretation they chose upon the *Vedic* text. My object has always been to effect religious and social amelioration according to the best of my lights."

He has not given in his evidence his own interpretation of the formulas to show that the ordinary legal consequences should not follow from his having become a *Sanyasi*. But it is clear from Exhibit II and his conduct during the subsequent years that such peculiar interpretation has nothing to do with the question now under consideration whether he has ceased to belong to his natural family.

Mr. Narayana Row contends that he is not *Sanyasi* and relies upon two facts; *first*, he has been made a *Sanyasi* by Mr. Subramaniem, Assistant Professor in a college; *secondly*, he was living with his wife. When Mr. Subramaniem was in the witness box, his qualifications or disqualifications for making one a *Sanyasi*, were not elicited. I am prepared, however, to assume that not being himself a *Sanyasi*, he was not competent

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to initiate the petitioner into the *Sanyasi Asramam*. But I have very little doubt that the petitioner himself was in real earnest and acted in good faith. He still maintains the validity of his initiation.

To hold otherwise would be to make him an out-cast and I am not prepared to decide so when he himself earnestly states he is a *Sanyasi* and the opposite side does not raise the question. It is also true that he lived with his wife in 1905 or 1906. But he did so, not because he was not a *Sanyasi* but on account of the promise he had to make, to get her consent. It can only be treated as a violation of his *Sanyasi Asramam*. I must therefore hold that he was, what he himself says he was, a *Sanyasi* and he, therefore, was not in 1906 when he became a Brahmo, the guardian in Hindu Law of his children.

There is undoubtedly the strong circumstance in his favour that he was their *de facto* guardian from 1901 till his wife's death. Such *de facto* guardianship is sufficient to sustain a prosecution under S. 361, Indian Penal Code, and as against strangers would entitle him to an order for restoration to his custody under S. 491, Criminal Procedure Code.

It was then suggested that though he may have lost his rights when he became a *Sanyasi* it was open to him to resume them. I do not think so. The ordinary rule of Hindu Law is that rights once vested are not divested and he does not regain his status in the natural family he has renounced.

In these circumstances, I have now to see what order I should pass under S. 491, Criminal Procedure Code. No rules have been passed under S. 491 (2) to regulate the procedure. I have found that the children have not been illegally or improperly detained. So S. 491 (1) (*b*) does not apply. I have, therefore, to pass orders under clause (*a*). I find then that the petitioner has not proved his right to the custody of his daughters; their adult brothers are living with Narayanan who has educated and brought them up; that there is no allegation that they are not likely to be well treated by him; their mother on her death-bed was willing that they should live with him. After their father, their brothers and Narayanan are their nearest relations who are in possession of the little family property they have.

On these facts, I am not prepared to grant the prayer that the daughters should be restored to his custody and, rejecting that part of the application, direct that the girls be

informed that they are free to go where they like—to their father, uncle, or brothers.

Application rejected.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :— Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

16 Cw.N. 606 (R.) Syed Ajam Sahib .. Appellant* (*Defendant*)

v.

Madura Sree Meenatchi Sundareswarar Devastanam, through its Manager P. S. Ananthanarayana Aiyar .. Respondent (*Plaintiff*).

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Transfer of Property Act IV of 1882, *S.* 107—*Lessor and lessee—Lease—Registered instrument—Validity.*

Per *Full Bench.*—The registered instrument referred to in S. 107 of the Transfer of Property Act, in order to be valid, need not be signed by the lessor.

Per *Chief Justice* and *Ayling* J.—*Obiter.*—If a registered instrument signed by the lessee and accepted by the lessor were not a lease, the mere fact that the instrument was signed by the lessee does not preclude him from denying his liability thereunder.

Per *Krisnaswami Aiyar* J :—*Obiter* :—If the deed signed by the lessee were invalid the lessee is not liable except on the footing of use and occupation.

Appeal from the order of the District Court of Madura in A. S. No. 135 of 1908.

S. T. Srinivasa Gopalachariar for appellant.

C. V. Anantakristna Aiyar for respondent.

This appeal coming on for hearing in the first instance before their Lordships Mr. Justice *Munro* and Mr. Justice *Sankaran Nair*, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.—In this case the question arises whether a lease of immoveable property under S. 107 of the Transfer of Property Act can be created by a document signed by the lessee only. In *Turof Sahib* v. *Esuf Sahib*[1] it was held that the registered instrument by which a lease can be effected under S. 107 of the Transfer of Property

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* A. A. O. No. 50 of 1909. 3rd November, 1910.

1. (1907) I.L.R. 30 M. 322.

Act must be an instrument bearing the signature of the lessor. The correctness of this ruling was doubted by *Krishnaswami Aiyar*, J. in S. A. No. 413 of 1908 and also apparently by the Full Bench of the Allahabad High Court in *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh*[1]. The matter is one of great importance, and should, we think, be set at rest. We therefore refer to the Full Bench the questions—

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(1) Whether the registered instrument, referred to in S. 107 of the Transfer of Property Act, must be signed by the lessor, and,

(2) If such instrument is signed by the lessee only, whether he can deny his liability thereunder.

S. T. Srinivasa Gopalachariar, for appellant, contended that Ss. 105 and 107 taken with S. 5 of the Transfer of Property Act, made it clear that a lease within the meaning of the Transfer of Property Act to be effective must be the act of the lessor. All registered deeds connote execution, *i.e.* signing; hence the absence of any express provision as to signing. Sections 59 and 123 provide for signing. This is because there is the provision for attestation. Could a sale be conceived of without the signature of the vendor? Answer to this question, he submitted, clenched the matter. If a sale could not be effected without the vendor's signature, neither could a lease be. Section 107 alone is to be read as a supplement to the Registration Act and not S. 105 also. This made it impossible to read the extended connotation of 'lease' in S. 3 of the Registration Act inapplicable to cases falling within the Transfer of Property Act. He referred to S. 34 of the Registration Act, to Bouvier's Dictionary for the meaning of the word "execution" and *Bhagwanji* v. *Devji*[2]. He relied upon *Kaki Subbanadri* v. *Muthu Rangayya*[3]; *Nand Lal* v. *Hanuman Das*[4]; *Kashi Gir* v. *Jogendro Nath Ghose*[5]; *Beni* v. *Puran Das*[6]; *Nilmanand Sirkar* v. *Boul Dos*[7]; *Singheeram Poddar* v. *Bhaghbet Chund*[8]. He referred to *Sheo Karan Singh* v. *Maharaja Prabhu Narain Singh*[1]; *Srinivasa Charlu* v. *Venkat Raju*[9]; *Chinnasawmi* v. *Avayambal*[10]; *Turof Sahib* v. *Esuf Sahib*[11].

1. (1909) I. L. R. 31 A. 276.
2. (1894) I. L. R. 19 B. 635.
3. (1909) I.L.R. 32 M. 532.
4. (1904) I.L.R. 26 C 368 at 369.
5. (1904) I.L.R. 27 C. at 136.
6. (1904) I.L.R. 27 Cat 190.
7. (1909) 14 C.W.N. 73.
8. (1910) 11 C. L. J. 543.
9. (1907) 17 M.L.J. 218.
10. (1910) 20 M.L.J. 298.
11. (1907) I.L.R. 30 M. 322.

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C. V. Ananthakrishna Aiyar, for respondent.—S. 105 enacted no new law but only supplies a statutory definition of a well-known legal transaction which may well have found a place in a Statute of Interpretation. The Registration Act in no way adopts a conception of lease separate from that in the Transfer of Property Act. S. 106 speaks of registered instruments by which leases can be effected. The Registration Act says what are lease-deeds. A registered lease-deed is what is required by the Transfer of Property Act. This is the effect of reading S. 3 of the Registration Act with S. 107 of the Transfer of Property Act as required by S. 4 of the Transfer of Property Act. 'Instrument' does not mean a "signed instrument"—*Hunter* v. *Parker* [1]; *Aveline* v. *Whisson* [2]; STROUD ii, p. 987. If a literal interpretation of S. 105 is to be adopted, the acceptance by the lessee also will have to appear in the deed. It may be that the registering officers will not accept sale-deeds not signed by the vendor; but if there is some way known to law of making them accept them, there is no reason why a deed not signed by the vendor should not pass title. For analogy see Article 116 of the Limitation Act and the decisions thereon ; *Ambalavana* v. *Vagaran* [3]; *Kotappa* v. *Vallur Zamindar Garu* [4]; *Seshachella* v. *Varadachariar* [5]. In the case of lease-deeds the Registration Act permits registration of documents not signed by the lessor. He referred to Ss. 130, 105, 59 and 123 to show that wherever signature is insisted upon, the Legislature expressly says so.

Anyhow he submitted that he was entitled to a decree for rent—*Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* [6]. The tenant was estopped from contending that he was not liable to pay rent—*Arolesir Bejonji Surti* v. *Syed Sirdar Ali Khan* [7]. As against the lessee the counterpart was primary evidence—Ss. 62 and 68 of the Evidence Act. The fact that the lease is not registered cannot matter so far as the tenant is concerned—*Paul* v. *Meek* [8] (case of an unstamped lease, but stamped counterpart).

T. Srinivasa Gopalachari, in reply, cited *Janki* v. *Empress* [9]; *Vairananda Nadar* v. *Miyakan Rowther* [10] as to the effect of S. 4 of the Transfer of Property Act.

1. (1840) 7 M. & W. 322.
2. (1842) 61 R. R. 662.
3. (1895) I.L.R. 19 M. 52.
4. (1901) I.L.R. 25 M. 50.
5. (1901) I.L.R. 25 M. 55.
6. (1909) L. L. R. 31 A. 276.
7. (1909) I.L.R. 33 B. 610.
8. (1828) 31 R. R. 539.
9. (1892) I. L. R. 19 C. 623.
10. (1897) I. L. R. 21 M. 109.

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Chief Justice.

This appeal coming on for hearing before a Full Bench the Court delivered the following

OPINIONS:—*The Chief Justice*:—The first question which has been referred to us is whether the registered instrument referred to in S. 107 of the Transfer of Property Act must be signed by the lessor. Section 9 of the Transfer of Property Act provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Section 107 provides that a lease to which the section applies can be made only by a registered instrument. This, I take it, is an express provision that lease to which the section applies must be in writing. Section 105 defines a lease of immoveable property as a transfer of a right to enjoy such property. I do not think that S. 107 can be relied on as enacting, either expressly or by implication, that a lease must be executed by the lessor. Can S. 105 be relied on for this purpose? I think not. By S. 105 a lease is a transfer of a right to enjoy property. I do not think, for the purposes of the question before us, any distinction can be drawn between a transfer of a right to enjoy property (S. 105) and a transfer of property (S. 9). When writing is not necessary the law requires no specific formal act for the purposes of a transfer. When writing is necessary the only specific formal act required by S. 107 is registration. The Transfer of Property Act contains express provision that in the case of a mortgage (S. 59) the registered instrument must be signed by the mortgagor, in the case of a gift (S. 123) by the donor and in the case of a transfer of an actionable claim by the transferor (S. 130). S. 107 contains no such provision. As regards Ss. 59 and 123 it may be that the provision for attestation required special mention of the signature of the mortgagor or donor (see the judgment in *Turof Sahib* v. *Esuf Sahib*.[1] In S. 130, however, where special provision is made for the signature of the transferor, there is no provision for attestation.

Then is there anything in the Registration Act which expressly or by implication enacts that a lease which requires registration must be executed by the lessor?

I think the effect of S. 4 of the Transfer of Property Act is correctly stated in the judgment in *Kaki Subbanadri* v. *Muthu Rangayya*[2]. Under S. 17 (*d*) of the Registration Act a lease,

1. (1907) I. L. R. 30 M. 322. 2. (1909) I. L. R. 32 M. 532.

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to which the paragraph applies, and which for the purposes of the Registration Act includes a counterpart (S. 3), must be registered. Under S. 107 of the Transfer of Property Act a lease, to which that section applies, must be registered. But although, we cannot import into S. 107 the definition of 'lease' contained in the Registration Act (see by way of analogy *Vairananda Nadar* v. *Miyakan Rowther*[1]) it does not follow that an instrument signed by the lessee cannot be a lease for the purposes of S. 107.

The provisions of Ss. 34 and 35 of the Registration Act as to "persons executing" throw no light on the question as they merely lay down the procedure in cases where an instrument is presented for registration.

Section 58 of the Registration Act prescribes the particulars which are to be endorsed on a document admitted to registration which includes the signature of the person admitting the execution of the document. It may be that the proper inference to be drawn from this section is that an instrument which purports to be a lease executed by the lessor cannot be admitted for registration unless it is signed by the lessor. But it does not follow that an instrument executed and signed by the lessee and registered may not be a "lease" for the purposes of S. 107.

Then as to the authorities, *Turof Sahib* v. *Esuf Sahib*[2], is a direct authority against the view that signature by the lessor is not neccessary. This case was followed in *Nilmanand Sirkar* v. *Boul Das*[3]. The reference to S. 107 at the end of the judgment in *Turof Sahib* v. *Esuf Sahib*[2] as to the signature of the lessor being required is an obvious slip which does not affect the reasoning on which the judgment is based, but with all respect I venture to dissent from that decision.

In *Kaki Subbanadri* v. *Muthu Rangayya*[4] the learned Judges accepted the decision in *Turof Sahib* v. *Esuf Sahib*[2] but they did not discuss it. In *Sheo Karan Singh* v. *Maharajah Parbhu Narain Singh*[5] a Full Bench of the Allahabad High Court would seem to have been in doubt as to the correctness of the earlier decisions of that court that the signature of the lessor was necessary, as they declined to express any opinion on the question.

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1. (1897) I. L. R. 21 M. 109.
2. (1907) I. L. R. 30 M. 322.
3. (1909) 14 C. W. N. 73.
4. (1909) I. L. R. 32 M. 532.
5. (1909) I. L. R. 31 A. 276.

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Chief Justice.

It would seem to be the law of England that signature is not necessary in the case of a lease under seal. But instruments under seal are unknown in this country and I do not think the English law affords us much assistance. The question has to be decided with reference to the provisions of the Transfer of Property Act and the Registration Act.

Although I at first found the proposition that there could be a lease enforceable against the lessor which had not been signed by him somewhat startling, after consideration of the provisions of the Transfer of Property Act and the Registration Act, I have come to the conclusion that there can be in cases where— and I desire to limit my judgment to this—there is a registered instrument in writing signed by the lessee which has been accepted by the lessor and which purports to transfer a right to enjoy immoveable property.

I think the answer to the first question which has been referred to us should be in the negative. As regards the second question, it seems to me that if a registered instrument signed by the lessee and accepted by the lessor is not a lease, the mere fact that the instrument is signed by the lessee does not preclude him from denying his liability thereunder.

Krishnaswami Aiyar J.—This reference raises the important question "whether the registered instrument referred to in S. 107 of the Transfer of Property Act must be signed by the lessor" or, in other words, whether, to constitute a valid lease in writing, the signature of the lessor appended to the writing is a necessary pre-requisite. This question has been answered in the affirmative in *Turof Sahib* v. *Esuf Sahib*,[1] *Kaki Subbanadri* v. *Muthu Rangayya*,[2] *Nand Lal* v. *Hanuman Das*[3] (by *Blair* J. only); *Kashi Gir* v. *Jogendra Nath Ghose*,[4] *Beni* v. *Puran Das*[5] and *Nilmanand Sarkar* v. *Boul Das.*[6] In the City Civil Court Appeal No. 1 of 1909 the learned *Chief Justice* and myself reserved our opinion on the point. The Full Bench of the Allahabad High Court did likewise in *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh.*[7] In *Chinnaswami Padayachi*

1. (1907) I. L. R. 30 M. 322.
2. (1909) I.L.R. 32 M. 532.
3. (1904) I. L. R. 26 A. 368.
4. (1904) I.L.R. 27 A. 136.
5. (1904) I. L. R. 27 A. 190.
6. (1909) 14 C. W. N. 73.
7. (1909) I. L. R. 31 A. 276.

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v. *Avayambal*,[1] I raised a doubt as to the correctness of the decisions in *Turof Sahib* v. *Esuf Sahib*,[2] and *Kaki Subbanadri* v. *Muthu Rangayya*,[3] while Sir Ralph Benson, J., adhered to the view which he had expressed in those cases. There is a considerable weight of authority in favour of the view already taken by this Court. But after careful consideration of the question in the light of the elaborate arguments addressed to us, I feel bound to express my dissent from that view.

Now a lease of immoveable property, whether before or after the Transfer of Property Act, is a transfer of a right to enjoy such property. In Volume II of BLACKSTONE'S *Commentaries*, p. 317, a lease is defined as "a conveyance by which a person, having an estate in hereditaments, transfers a portion of his interest therein to another, usually in consideration of a certain periodical rent or other recompense." In WOODFALL'S *Landlord and Tenant* (18th edition), p. 143, we have the following definition. " A lease is a conveyance by way of demise of lands or tenements, for a less term than the party conveying himself has in the premises. A lease is usually made in consideration of rent, or some other annual recompense rendered to the party conveying the premises—who is called the lessor or landlord—by the party to whom they are conveyed or let, who is called the lessee or tenant." S. 105 of the Transfer of Property Act defines a lease in terms closely similar to the foregoing definitions. It is " a transfer of a right to enjoy immoveable property made for a certain time in consideration of price or of money, share of crops, service or any other thing of value. The transferor is called the lessor, the transferee is called the lessee." I have omitted in the above quotation some words unnecessary for my present purpose. The idea of a transfer from one person to another is present in the conception of a lease whether before or after the Transfer of Property Act. So far as S. 105 goes there is no suggestion of the form of the transfer and no question of signature of the transferor can arise under that section, no writing itself being hinted at in the section. Before the passing of the Transfer of Property Act, a lease of immovable property could be brought into existence in this country by an oral arrangement or by

1. (1910) 20 M. L. J. 298.
2. (1907) I. L. R. 30 M. 322.
3. (1909) I. L. R. 32 M. 532.

writing setting out the terms of the tenancy and signed by the tenant or lessee only as much as by a similar writing signed by the lessor only and registered in accordance with the provisions of the Registration Act where registration is made compulsory. The fact that a lease is a transfer or that there is a transferor and a transferee who are parties to the transaction was not deemed sufficient to require that where the transfer was effected by a writing it should be signed by the transferor. Section 3 of the Registration Act, Clause 1, which provides that "a lease includes a counterpart, kabuliyat, an undertaking to cultivate or occupy and an agreement to lease," largely helped to create the view that a writing signed by the tenant only and containing the terms of the tenancy was a transfer of the right to enjoy, not merely for the purpose of the Registration Act, but also for the constitution of the jural relation of lessor and lessee. The enactment of S. 105 of the Transfer of Property Act, which has introduced no new jural conception of what constitutes a lease, cannot by itself affect the law as to the creation of leases by writings signed only by the tenant. In Sheppard's *Touchstone*, the following statement is made as regards deeds in general before the Statute of Frauds: "And by all this that hath been said, it appeareth, that the putting to or subscribing of the party's name or mark to the deed he is to seal, is not essential; for a deed may be good, albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered," 7th edition, page 60. See also Williams' *Real Property* (20th edition), page 154. In his *Landlord and Tenant*, page 218, Woodfall says: "It is a point on which authorities are at variance, whether the Statute of Frauds requires leases by deed to be signed. The preponderance of authority seems to be in favour of the signature not being necessary." In the 4th edition of Foa's *Law of Landlord and Tenant*, page 10, the learned author writes " nor does its provision " (of the Statute of Frauds) " requiring a party's signature extend to leases under seal." This was the view taken in *Aveline* v. *Whisson* [1] notwithstanding the doubt expressed in *Cooch* v. *Goodman*[2]. In *Taunton* v. *Pepler*[3], Sir John Leach, V. C., said: "There is no authority for saying that a release to be effectual must be signed as well as sealed and delivered." Deeds are unknown to this country. If the signature of the lessor was not essential to constitute a valid lease in England, there is no reason to suppose that it was in this country before the Transfer of Property Act. The question, however, is whether S. 107 of the Act has made any change in this respect. It does not expressly say, as Ss. 59 and 123 do, that the signature of the lessor is necessary. But under the section, apart from the cases in which an oral agreement accompanied by delivery of possession is sufficient, a lease must be by a registered instrument. Does the mention of a registered instrument necessitate the signature of the lessor to the writing?

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Krishnaswami Aiyar, J.

1. (1842) 61 R. R. 662, S.C. 4 Man. & G. 80.
2. (1842) 11 L.J.Q.B. 225.
3. (1820) 56 E. R. 1055.

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A Kabuliyat or a Muchilika signed by the lessee is as much an instrument as a patta or cowle executed by the lessor and, so far as the registration law is concerned, there is no difficulty in getting any of them registered. Indeed, an undertaking to cultivate or occupy for a term certain at a particular rent would be a lease under the Registration Act and registrable under that law. Unless, therefore, there is anything in the language of S. 107 which requires the signature of the lessor to constitute a valid lease, it may well be held that a writing signed by the lessee only and accepted by the lessor is sufficient to constitute the transfer known to the law as a lease. Apart, however, from there being nothing in the section which requires the signature of the lessor, the last sentence in S. 4 of the Transfer of Property Act, namely, that S. 107 shall be read as supplemental to the Indian Registration Act, seems to me a strong argument the other way. This clause was introduced by the amending Act III of 1885. The object of the amendment was not merely to make this and the other sections referred to in that clause supplemental to S. 17 of the Registration Act III of 1877, making registration compulsory in the cases specified therein, but supplemental to the entire Act so as to make it part and parcel of the Registration Act itself. S. 3 of the Registration Act III of 1877, Clause 1, must therefore be read with S. 107 of the Transfer of Property Act. Now the question may arise whether S. 107 is not governed by the definition of lease in S. 105 of the Act and whether that should not be regarded as inconsistent with the provision in S. 3, Clause 1, of the Registration Act. There are no words in the Transfer of Property Act repealing the provision in S. 3, Clause 1, of the Registration Act of 1877. There can be no implied repeal if S. 105 of the Transfer of Property Act and S. 3, Clause 1, of the Registration Act of 1877 can stand together. It seems to me that there is no difficulty whatever in reading the two provisions together without affecting S. 3, Clause 1, of the Registration Act, except perhaps as regards the part saying that an agreement to lease is itself a lease. This clause of the Registration Act of 1877 has been re-enacted without any change in the Registration Act of 1908 as S. 2, Clause 7. S. 105 of the Transfer of Proyerty Act deals with the character of the legal relation and not with its mode of creation. S. 107 of the Transfer of Property Act and S. 2, Clause 7, of the Registration Act deal with certain formal requirements. That seems to my mind to be the reason why S. 107 as well as the similar provisions of Ss. 54, 59 and 123 are to be read as supplemental to the Registration Act and not S. 105. I am therefore inclined to hold that, although optional registration has been done away with under S. 107 except in Provinces where the Local Governments have issued notifications under the proviso, that Section does not affect the creation of leases by writings signed only by the lessee and answering the requirements of S. 2, Clause 7. Such writings might amount to transfer under S. 105 of the Transfer of Property Act as they could before the enactment of that section. The

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case of sales is not quite parallel, merely because the signature of the vendor is not mentioned in S. 54, for there is no provision in the Registration Act about sales as in the case of leases.

As regards the cases, the first observation that occurs to me is that no reference is made in any of them, except in *Kaki Subbanadri* v. *Muthu Rangayya*, [1] to the provision contained in the last clause of S. 4 of the Transfer of Property Act. What the learned Judges who were parties to those decisions would have said, if their attention had been drawn to that provision, I am unable to say. In the latter case Mr. Justice *Miller*, who was not a party to the decision in *Turof Sahib* v. *Esuf Sahib*, [2] considered himself bound by that decision. The learned Judges who decided that case further say that S. 4 of the Transfer of Property Act "cannot mean that an instrument which is not referred to in S. 107 of the Transfer of Property Act becomes compulsorily registrable because it falls within the definition of a lease in S. 3 of the Registration Act." Now, with great respect, that seems to me to be arguing in a circle. Why is not the undertaking to cultivate or occupy which amounts to a lease under S. 2, Clause 7, of the Registration Act referred to by the term lease in S. 107 when it is required to be read as supplemental to the Registration Act, and why should S. 107 be read as supplemental only to S. 17 (*d*) of the Registration Act, and not to the whole Act itself including S. 2, Clause 7? As already remarked, the case in *Turof Sahib* v. *Esuf Sahib* [2] makes no reference to the last clause of S. 4 of the Transfer of Property Act. And this omission detracts considerably from the weight of its authority. That case appears to assume that it is part of the idea of a transfer that not merely is the transferor a party to the transaction, but that the words ' of transfer ' would have no operation but for the signature of the transferor. I do not think that there is any warrant for this assumption. It is again said that "sales and leases by registered instrument necessarily bear the signatures of the vendor or lessor under S. 58 of the Registration Act." There appears to me to be no foundation for this statement about the signature of the lessor. The signature of every person admitting the execution of the document is certainly required under clause (*a*) of sub-section 1. But that requirement is sufficiently complied with by the signature of the lessee who executes the writing containing the undertaking to cultivate or occupy. Again, the learned Judges say at page 324 of the report: "The section now before us (107 ?), as already pointed out, requires, that the transfer shall be in writing and *signed by the lessor*:" The last statement about the signature of the lessor appears to me an obvious mistake. For the reasons above given, I am unable to regard the decision in *Turof Sahib* v. *Esuf Sahib* [2] and part of the reasoning on which the decision in

1. (1909) I. L. R. 32 M. 532. 2. (1907) I. L. R. 30 M. 322.

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Kaki Subbanadri v. *Muthu Rangayya* [1] is based as correct. My answer to the first question referred is in the negative.

If my answer to the first question is right, the lessee who signs the instrument is clearly liable. But if I am wrong on the first point, and there is no lease created by the instrument, the question of the liability of the signatory to the instrument will depend upon the existence of consideration for his undertaking to pay. If a lease was the consideration it has failed because no valid instrument has been executed by the owner of the property. If the defendant has obtained possession of the property he would be liable as for use and occupation and his covenant to pay would be evidence of the measure of his liability. If no possession has been obtained, it is clear that the signatory to the instrument is not liable merely because he has covenanted to pay. It has, however, been suggested that the writing may be used as evidence of an oral agreement to lease and that such an agreement accompanied by delivery of possession would itself operate as a lease. The case of *Walsh* v. *Lonsdale* [2] supports this view. That case has been accepted as laying down the law correctly in later cases—*Lowther* v. *Heaver* [3] and *Manchester Brewery Company* v. *Coombs* [4]. But I do not think that view is consistent with S. 107 of the Transfer of Property Act which requires a registered instrument for the creation of a valid lease except in the limited class of cases (of which the present case is not one) where an oral agreement accompanied by delivery of possession is sufficient. It may be that an agreement to lease specifically enforceable which is followed by delivery of possession is a good defence to a suit in ejectment—(See *Bibi Jawahir Kumari* v. *Chattorput Singh* [6] and *Singheeram Poddar* v. *Bhagbet Chander Nundi* [5]—but it is another thing to attempt to give effect to it as a lease in the face of Ss. 105 and 107 of the Transfer of Property Act. It seems to me, therefore that the defendant is not liable except on footing of use and occupation. I would answer the second question accordingly.

Ayling J:—I agree in holding that the answer to the first question referred should be in the negative. On this view, the second qnestion appears unnecessary; but if an answer is required, I concur in that given in the judgment of the learned Chief Justice.

1. (1909) I. L. R. 32 M. 532.
2. (1882) L. R. 21 Ch. D. 9.
3. (1889) L. R. 41 Ch. D. 248 at 264.
4. (1901) 2. Ch. 608.
5. (1905) 2 C. L. J. 343.
6. (1910) 11 C. L. J. 543.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Mulla Vittil Seethi .. Appellant*
(*1st Defendant*).

v.

Korambath Paruthooli Achuthan Nair and others .. Respondents
(*Plaintiffs*).

Mulla Vittil Seethi *v.* Achuthan Nair.

Mortgage—Prior and puisne mortgagees—Suit by prior mortgagee without impleading puisne mortgagee and purchase by prior mortgagee of the equity of redemption—Puisne mortgagee's rights—Redemption, a right and not a liability—T. P. Act, S. 67.

A first mortgagee who has purchased the mortgaged property in execution of a decree on his mortgage is not entitled to a decree for possession against a puisne mortgagee with possession who was not impleaded in the first mortgagee's original suit, even subject to the puisne mortgagee's right of redemption.

The puisne mortgagee's rights (whatever they were) at the date of his mortgage—whether to possession (if his mortgage be one with possession and the previous mortgage without it) or to sale or foreclosure under S. 67, T. P. Act—remain altogether unaffected by the first mortgagee's suit to which the former was no party. He has also the right to redeem the prior mortgage, which is preserved in law in spite of the purchase by the prior mortgagee of the equity of redemption. But redemption is a right which the puisne mortgagee may seek to enforce and not a liability which he may be compelled to discharge; and consequently, if he is unwilling to redeem, he cannot be deprived of his original right to institute proceedings for sale or foreclosure (whatever it was) under S. 67 as second mortgagee.

A second mortgagee is entitled to the same rights as the first mortgagee with reference to his security, having regard to the nature of his mortgage.

The purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage.

These rights are unaffected by the suit of the first mortgagee to which they were not made parties or the decree therein or the sale held in pursuance of the said decree.

The purchaser in such a suit, whether it is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage, but only those that subsist in him at the date of the suit.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 515 of 1907 presented against

* S. A. No. 864 of 1908. 12th January, 1911.

Mulla Vittil Seethi *v.* Achuthan Nair.

the decree of the Court of the District Munsif of Parapanangadi in O. S. No. 111 of 1906.

This second appeal coming on for hearing in the first instance* before their Lordships Mr. Justice *Benson* and Mr. Justice *Krishnaswamy Aiyar* the Court made the following

ORDER OF REFERENCE TO A FULL BENCH :— The plaintiffs are first mortgagees. The 1st defendant has a subsequent usufructuary mortgage. In a suit upon the first mortgage, a decree for sale was passed, the 1st defendant not having been made a party. In execution of the decree, the plaintiffs have become purchasers. The present suit is for possession and in the alternative for the recovery of the mortgage money. The courts below have passed a decree for possession in default of payment of the amount due under the first mortgage. The 1st defendant appeals. It is argued for the appellant that as the 1st defendant was no party to the plaintiffs' former suit, his mortgage interest, which includes his right to possession, cannot be affected and that the present suit should be dismissed. It is not contended that the plaintiffs are not entitled to file a fresh suit for sale against the puisne mortgagee. The respondent's vakil urges that the 1st defendant is merely entitled to redeem the first mortgage as he was given no opportunity to do so in the former suit. Several cases have been cited on both sides which cannot be easily reconciled. The plaintiffs in this case have only a simple mortgage. A simple mortgagee as such is not entitled to sue for foreclosure—see S. 67 of the Transfer of Property Act. As the 1st defendant was not a party to the former suit, his interest could not be affected by it. The mortgagor's equity of redemption only amounted to the interest that remained after deduction of the 1st defendant's mortgage right. The mortgagor had no right to possession after giving a usufructuary mortgage to the 1st defendant. The mortgagor's interest that was sold did not include a right to possession. The plaintiffs therefore did not purchase such a right. But it is argued that by reason of the purchase, the plaintiffs are not in the position of mere simple mortgagees and that therefore a suit for foreclosure would lie. There does not appear to be any warrant for holding that the plaintiffs' position was improved as regards the relief of

*15th March 1910.

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foreclosure. Mr. Ramachendra Aiyar admits that the decisions in *Venkata* v. *Kannam*[1], *Rangayya Chettiar* v. *Parthasarathi Naicker*[2] and *Rangasamy Naicken* v. *Komarammal*[3] are against him. He, however, relies on *Krishnan* v. *Chadayan Kutti Haji*[4], *Govardhana Doss* v. *Veerasami Chetti*, [5] *Mohan Manor* v. *Togu Uka*[6], and *Desai Lallubhai Jethabhai* v. *Mundas Kuberdas*[7]. They appear to support him. The judgment in *Perumal* v. *Kaveri*[8] contains a dictum that the second mortgagee with possession is entitled to retain possession until redeemed by the first mortgagee who has purchased the mortgagor's equity of redemption in a suit for sale to which the second mortgagee was no party. It was held that the second mortgagee was not entitled to maintain a suit for redemption or to sell the properties subject to the first mortgage, but was only liable to be redeemed by the first mortgagee-purchaser. This case recognizes the validity of the sale in execution of the decree obtained by the first mortgagee and the purchase by him, though the second mortgagee was no party to the action, to the extent of putting an end to the second mortgagee's right of redemption and making him liable to be redeemed by the first mortgagee-purchaser. The second mortgagee's right of redemption is not lost if the mortgagor conveys the equity of redemption to a stranger, but it is said that if the mortgagor conveys the equity of redemption by private sale to the first mortgagee or if his interest is sold to the first mortgagee *in invitum*, there arises a difference and the second mortgagee loses his right of redemption in that case. In *Venkatanarasammah* v. *Ramiah*[9], the first mortgagee who purchased in execution of his decree was held entitled to possession against the second mortgagee who purchased later in execution of a decree on his own mortgage. Both the mortgages were apparently simple. This case as well as *Rangasamy Naicken* v. *Komarammal*[3], have been followed in *Kutti Chettiar* v. *Subramania Chettiar*[10]. Mr. Ramachandra Iyer makes a distinction that if the mortgagor had no interest subsisting at the

1. (1882) I. L. R. 5 M. 184.
2. (1896) I. L. R. 20 M. 120.
3. (1902) I. L. R. 26 M. 484.
4. (1892) I. L. R. 17 M. 17.
5. (1902) I. L. R. 26 M. 537.
6. (1885) I. L. R. 10 B. 224.
7. (1895) I. L. R. 20 B. 390.
8. (1892) I. L. R. 16 M. 121
9. (1879) I. L. R. 2 M. 108.
10. (1907) I. L. R. 32 M. 500.

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date of the suit by the first mortgagee, the proceeding is of no avail whatever and the second mortgagee continues to be entitled to all his rights under his mortgage unaffected by the proceeding, while if the mortgagor retained any interest in the property at the date of the suit of the first mortgagee, the proceeding is valid to the extent of passing all the interest in the property to the purchaser subject only to his being redeemed by the second mortgagee. It is difficult to rest this distinction on any principle. The question of conflict between the several cases may be stated as follows: we shall assume that one mortgagee is not a party to the suit of the other. It follows that the interest of the mortgagee who is not a party should not be affected by the suit of the other, for there can be no representation of his interest in the suit by any other person claiming an interest in the property. If the second mortgagee has no right to possession, the purchase by the first mortgagee by private or court sale must give him the right to possession. If possession goes with the second mortgagee the sale under the decree of the first mortgagee must *prima facie* leave the possession unaffected. The same result must follow in the case of the second mortgagee acquiring a right to possession under a prior sale in execution of a decree on his mortgage. It is, on the other hand, clear that the first mortgagee is entitled to sell and purchase all the interest of his mortgagor as at the date of the mortgage. This cannot, however, be done in the absence of the representatives of the subsequent interests carved out by the mortgagor after the first mortgage. The mortgagee must be entitled, if he had once failed to implead the subsequent incumbrancer, to enforce his remedy of a sale of the subsequent incumbrancer's interest by a fresh suit. Should he be driven to such a suit on the footing that the prior proceeding can in no sense affect any of the rights of the subsequent mortgagee including the right to possession however acquired, or is it open to the court in the first mortgagee's suit for possession after his purchase, to give the second mortgagee his only right in a properly instituted suit by the first mortgagee, namely, his right to redemption? We think it right to ask for an authoritative ruling of the Full Bench on the following question:—

" Whether a first mortgagee who has purchased the mortgaged property in execution of a decree on his mortgage and

sues for possession, or, in the alternative, for the recovery of his money is entitled to a decree for possession subject to redemption by a puisne mortgagee with possession who was not a party to the suit by the first mortgagee?"

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K. P. M. Menon for appellant (1st defendant).

T. R. Ramachandra Aiyar for respondents (plaintiffs).

K. P. M. Menon.—No man can suffer in any of his rights by the result of a suit to which he was not a party. The right of a usufructuary mortgagee under the T.P. Act are (1) to retain possession until he is redeemed, and (2) an option to redeem prior mortgages, if any. The suit as brought is really a foreclosure suit by a prior hypothecatee decree-holder purchaser who has, as hypothecatee, no right to foreclosure. If he stands in the shoes of the mortgagor he can only redeem me—S. 67. The rights of different morgagees *inter se* are dealt with in S. 75. The hypothecatee's rights against me are, according to S. 75, only such as he would have against the mortgagor. When a decree in a prior mortgagee's suit for sale is drawn up, the usual form is that it is 'free of all subsequent encumbrances.' This presupposes that all subsequent encumbrancers are parties to the suit. In a suit for sale the decree contemplates the taking of accounts as to the plaintiff's amount. Even after the sale I had the right to pay the decree amount under S. 310-A, C.P.C. So far as the puisne mortagee is concerned the previous proceedings are all null. I quote the following cases:—*Venkatanarasammah* v. *Ramiah*[1]; *Venkata Somayajulu* v. *Kannan Dhora*[2], a clear authority in my favour. This quotes *Radha Pershad Misser* v. *Manohur Das*[3]. *Perumal* v. *Kaveri*[4] is a decision a portion of which wrongly holds that there is a confusion of rights even where there is an intermediate mortgagee. *Krishnan* v. *Chadayan Kutti Haji*[5] is a case against the second mortgagee only on the ground of estoppel—arising from not filing a suit within 1 year after an order under S. 283. The portion against me at page 20 seems to be *obiter* and wrong. *Rangayya Chettiar* v. *Parthasarathi Naicker*[6] is completely in my favour. *Muhammad Usan Rowthen* v. *Abdalla*[7], though a decision in execution on the construction of a decree, makes some remarks in my

1. (1879) I. L. R. 2 M. 108.
2. (1882) I. L. R. 5 M. 184.
3. (1880) I. L. R. 6 C. 317.
4. (1892) I. L. R. 16 M 121, 126.
5. (1892) I. L. R. 17 M. 17, 18.
6. (1896) I. L. R. 20 M. 120, 123.
7. (1900) I. L. R. 24 M. 171, 174.

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favour at page 174. *Rangasami Naicken* v. *Komarammal*[1] fully supports me on all points. In *Govardhana Doss* v. *Veerasami Chetti*[2] the restricted right allowed for subsequent mortgagee is explicable on the existing rights of the various parties therein—*Akkati Moideen Kutty* v. *Chirayil Ambu*[3]. In *Entholi Kizhakkikandy Kanaran* v. *Villath Koyil Unnooli*[4] the only difference is that the party not originally joined was an out-and-out vendee of the equity and not a usufructuary mortgagee. Either way the basis on which he could contest was his possession—*C. Venkatarama Iyer* v. *Gompertz*[5]; *Kutti Chettiar* v. *Subramania Chettiar*[6]; *Nagammal* v. *Venkatigiri Aiyar*[7]; *Sivaraman Chetty* v. *Kuppumuthu Chetty*[8]; *Debendra Narain Roy* v. *Ramtaran Banerjee*[9]; *Aghornath Banerjee* v. *Deb Narain Guin*[10]; *UmesChandra Sircar* v. *Zahur Fatima*[11]; *Ram Nath Mukhopadhya* v. *Brahmamoyi*[12]; *Radhabhai* v. *Shamrav Vinayak*[13]; *Mohan Manor* v. *Togu Uka*[14]; *Desai Lallubhai Jethabhai* v. *Mundas Kuberdas*[15]; *Hassanbhai* v. *Umaji*[16]; *Namdar Chandri* v. *Karam Raji*[17]; *Dip Narain Singh* v. *Hira Singh*[18]; *Baldeo Singh* v. *Paggu Ram*[19] *Venkatachella Kandian* v. *Panchanadien*[20]; *Hargu Lal Singh* v. *Gobind Rai*[21]; *Madan Lal* v. *Bhagwan Dos*[22]. *Debi Singh* v. *Jai Ram*[23] lays down that a mere auction-purchaser does not get anything more than the right of a hypothecatee as against the puisne incombrancer—*Maung Tha Huyin* v. *Maung Mya S.*[24].

T. R. Ramachandra Aiyar:—The decision in *Govardhana Doss* v. *Veerasami Chetti*[2] is right. If a third party brings to sale the bare equity of redemption after the creation of puisne mortgages and the first mortgagee buys it, then his mortgage may become merged in the equity of redemption at his option or they

1. (1902) I. L. R. 26 M. 484.
2. (1902) I. L. R. 26 M. 537.
3. (1902) I. L. R. 26 M. 486.
4. (1907) I. L. R. 30 M. 500.
5. (1908) I. L. R. 31 M. 425.
6. (1909) I. L. R. 32 M. 485.
7. (1898) 8 M. L. J. 298.
8. (1902) 13 M. L. J. 772.
9. (1903) I. L. R. 30 C. 599 (F.B.)
10. (1906) 11 C. W. N. 314.
11. (1890) I. L. R. 18 C. 164.
12. (1905) 1 C. L. J. 531.
13. (1881) 8 B. 168.
14. (1885) I. L. R. 10 B. 224.
15. (1895) I.L.R. 20 B. 390.
16. (1903) I.L.R. 28 B. 153.
17. (1891) I.L.R. 13 A. 315, 318.
18. (1897) I.L.R. 19 A. 527.
19. (1900) I. L. R. 23 A. 1.
20. (1881) I. L. R. 4 M. 213.
21. (1897) I. L. R. 19 A. 541. (F.B.)
22. (1899) I.L.R. 21 A. 235 (F.B.)
23. (1902) I. L. R. 25 A. 214 (F.B.)
24. (1909) I. L. R. 37 C. 239 (P.C.)

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may be kept distinct. COOTE, Vol II, pp. 1467, 1468; cf. S. 101, T. P. Act. [*V. K. Aiyar* J.:—There is the word 'absolutely'.] Yes. Even if the equity of redemption after several encumbrances be bought by the first mortgagee he can be said to have become absolutely entitled to the estate—see GHOSE on *Mortgages*, p. 572; cf. *Gokaldas' Case*[1] and *Baldeo Prasad* v. *Uma Shankar*[2]. [*V. K. Aiyar* J.:—It is open to you to give up your right as first mortgagee.] Yes. But that is denied to me by the other side. [*V. K. Aiyar*.:—But redemption is always a right and not a duty]. I refer to Appendix D, Schedule I, Form No. 8, and to *C. Venkatarama Iyer* v. *Gompertz*[3]. [*V. K. Aiyar* J.:—The form you refer to is in a suit for redemption by a second mortgagee.] No. It is in a suit for sale. [*V. K Aiyar* J.—No. Cf. S. 92, T. P. Act; *Sivaraman Chetty* v. *Kuppumuthu Chetty*.[4] S. 75, T. P. Act, says that the puisne mortgagor has, as against the first mortgagee, only the right of the mortgagor—*Govinda Bhatta* v. *Narain Bhatta*[5]; *Mohan Manor* v. *Togu Uka*[6]; *Desai Lallubhai* v. *Mundas*[7]; *Hasanbhai* v. *Umaji*[8]; *Vanmikalinga Mudali* v. *Chitambara Chetty*[9]. What is sold at the instance of the first mortgagee is all that which the mortgagor had after the first mortgage — JONES, Vol. II, p. 1656. His only remedy is to redeem—JONES Vol II, pp. 1395, 1431; *Rama Prasad* v. *Bhikari Das*[10]; *Jugdeo Singh* v. *Habibulla Khan*[11]; *Ganga Dos Bhathar* v. *Jogandra Nath Mitra*[12]; *Har Pershad Lal* v. *Dalmardhan Sing*[13]. The cases quoted by the other side are distinguishable on the theory of extinguishment of the first mortgage when that mortgagee buys the equity of redemption. There is no right to reopen the accounts—*Sivathi Odayan* v. *Ramasubhaiyar*[14]; *Macrae* v. *Goodman*[15]; COOTE, Vol. II, p. 1032.

The Full Bench expressed the following

OPINION:—The order of reference in this case states the following question for the decision of the Full Bench:—"Whether

1. (1884) I. L. R. 10 C. 1035 (P.C.)
2. (1907) I. L. R. 32 A. 1.
3. (1908) I. L. R. 31 M. 425.
4. (1902) 13 M. L. J. 72.
5. (1906) I. L. R. 29 M. 424.
6. (1885) I. L. R. 10 B. 224.
7. (1895) I. L. R. 10 B. 390.
8. (1903) I. L. R. 28 B. 153, 162
9. (1905) I. L. R. 29 M. 37, 40.
10. (1903) I. L. R. 26 B. 464.
11. (1907) 6 C. L. J. 612.
12. (1907) 5 C. L. J. 3 15.
13. (1905) I. L. R. 32 C. 891, 905.
14. (1897) I. L. R. 21 M. 64.
15. (1846) 5 Moo. P. C. 315.

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a first mortgagee who has purchased the mortgaged property in execution of a decree on his mortgage and sues for possession or in the alternative for the recovery of his money is entitled to a decree for possession subject to redemption by a puisne mortgagee with possession who was not a party to the suit by the first mortgagee ?"

Our answer is in the negative. There are conflicting decisions of this and the other Indian High Courts on the question which it is impossible to reconcile. The source of the difficulty seems to lie mainly in arriving at a definite conception of the rights of the second mortgagee. Section 60 of the Transfer of Property Act lays down the right of the mortgagor to redeem the mortgage. Section 75 of the Act gives every second or other subsequent mortgagee the same rights as against the prior mortgagee as the mortgagor has against him as regards the redemption, foreclosure or sale of the mortgaged property. As the mortgagor is entitled to redeem the first mortgage, the second mortgagee is likewise entitled to redeem the first. As regards foreclosure and sale, they are the rights of the mortgagee and not of the mortgagor though, when a decree for foreclosure or sale is made, any rights that the mortgagor may have in the carrying out of the foreclosure or sale, may also be claimed by the second or other subsequent mortgagee. But has the second mortgagee any other right than that of redemption ? The section simply says that whatever rights he may have against the mortgagor he will have them against incumbrancers subsequent to himself in date. But what are the rights of the puisne mortgagee against his mortgagor over and above his right of redemption of the prior mortgage ? Has he the right to bring to sale the equity of redemption of his mortgagor and has he the right of foreclosure ? Discussing the rights of mortgagees, HUNTER says in his *Roman Law*, page 537 : "If the same thing has been hypothecated successively to several persons, only the first of them has the power of sale, unless a subsequent creditor has put himself in the place of the first." That is to say, it is open to the second mortgagee to redeem the first mortgage and then ask for the sale of the mortgaged property standing in the shoes of the first mortgagee. But otherwise he has no independent right of sale of the equity of redemption of his mortgagor

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DR. MACKELDY in his *Handbook of Roman Law* says on the authority of the Code and the Digest:—"A posterior hypothecatee is generally not permitted to sell the hypotheca with the consent of the prior one, unless the prior one's claim will be satisfied by the sale"—S. 354. In *Ramu Naickan* v. *Subbaraya Mudali*,[1] *Holloway*, Officiating Chief Justice, and *Kindersley* J. speaking of the second mortgagee say: "DERNBERG justly observes that the subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the prior mortgagee." This statement of the view of the continental jurist is in accordance with the strict English notion of the equity of redemption. The property mortgaged passes absolutely at Common Law to the mortgagee. The legal effect of the forfeiture on breach of the condition could not be altered at Common Law but it was relieved against in equity. Thus the mortgagor had an equity to redeem. Any transferee of that equity, as a second mortgagee, is entitled to the same equity. But the second mortgage of the mortgagor's equity to redeem with rights of sale and foreclosure must at first sight seem anomalous. But when the equity of the mortgagor is itself recognised as an estate (see *Lord Hardwick* in *Casborne* v. *Scarfe*[2]) there can be no difficulty in a mortgage of that estate attended with rights in the mortgagee similar to those of the first mortgagee. *A fortiori* where both mortgagee and mortgagor have legal estates, as in this country. But sale of the mortgaged property even at the instance of the first mortgagee was not ordered in England as a matter of course. See the judgment of *Lord Cairns* in *Heath* v. *Crealock*[3]. He said : "It appears to me that under the recent Act of Parliament, 15 and 16 Victoria, Chapter 86, Section 48, it is within the discretion of the court in a mortgage suit whether a foreclosure or a sale shall be ordered. But a sale is not to be ordered as of course." Lower down in the same page he says : "I think the court should rest satisfied with making that which would have been the ordinary form of decree before the statute and decreeing simply foreclosure and not a sale." A sale at the instance of the second mortgagee was a matter of more difficulty. In a suit by a second mortgagee of a moiety who applied for a sale (in his suit for foreclosure) the

1. (1873) 7 M. H. C. R. 229. 2. (1737) 1 Atk. 602.
3. (1874) 10 Ch. Ap. 22 at p. 32.

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conduct of the sale was given to the first mortgagee of the entirety as more convenient and less expensive—*Hewitt* v. *Nansen*[1]. The suit evidently in that case was not for sale subject to the first mortgage but free of all encumbrances. At the request of the second mortgagee in a suit by the first mortgagee an order was made for sale of the property first mortgaged or foreclosure in case sale should not be effected—see *Saul* v. *Pattinson*[2]. We have not been able to find any instance in England of a suit for sale by the second mortgagee of the mortgagor's equity of redemption merely leaving the first mortgage unaffected. In JONES on *Mortgages*, American authority is cited (S. 1580) for the view that, in case the prior mortgage is not due, a puisne mortgagee may have a decree for the sale of the equity of redemption subject to the prior mortgage; but if it is due he may redeem and sell the *whole estate.* A junior mortgagee is entitled to bring in a bill to foreclose the equity of his mortgagor. The statement in JONES, Ss. 1395 and 1431, that after foreclosure or sale by the first mortgagee the second mortgagee who had not been joined in the suit of the first has only the right to redeem is only explicable with reference to the English and American practice of not decreeing sale of the equity of redemption at the suit of the second mortgagee. But S. 25 of the Conveyancing and Law of Property Act, 1881, says "any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in the alternative." This section distinctly recognizes the right of a second mortgagee to sue for sale, but even this does not seem to warrant the sale of his mortgagor's mere right of redemption. The definition of a mortgage in the Transfer of Property Act includes the transfer of an interest in the equity of redemption to the second or other subsequent mortgagees and such second mortgagee is entitled to the same rights of sale of the interest mortgaged to him as the first mortgagee himself has under S. 67 or 68. Section 96 which speaks of a sale subject to a prior mortgage contemplates a suit for a sale by the second mortgagee without his being confined to the mere right to redeem the first mortgage. Whatever doubts there may arise on this question under the Transfer of Property Act, Order 34 of the present Code

1. (1859) 7 W. R. 5 s.c. 28 L.J. Eq. 49. 2. (1886) 55 L.J. Ch. 831.

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of Civil Procedure sets the matter at rest by the explanation to rule 1, which runs as follows:—" A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit." It was held by the Allahabad High Court before the enactment of the present code by a Full Bench in *Mata Din Kasodhan* v. *Kazim Husain*[1] that a second mortgagee's only remedy was a suit for redemption and that he could not sue for sale. It was also held by the Bombay High Court in a series of cases that a sale under a decree on the first mortgage carried with it all rights of the mortgagor as at the date of the mortgage, even though the second mortgagee was no party to the suit (see JONES on *Mortgages*, Ss. 1654 and 1656). These two principles are the foundation for many of the later judgments of those courts as regards the rights of a puisne incumbrancer with reference to the prior mortgagee who had sold in execution of a decree the property of the mortgagor without having made the puisne incumbrancer a party to the suit. But so far as this court is concerned, the uniform practice has been to recognise the right of the second mortgagee in case there was a personal covenant in his favour to sue for sale notwithstanding the contrary note sounded by the decision in *Ramu Naikan* v. *Subbaraya Mudali*[2]. In *Vencatachella Kandian* v. *Panjanadien*[3], *Gangadhara* v. *Sivarama*,[4] *Rangayya Chettiar* v. *Parthasarathi Naicker*[5], and in numerous cases unreported, this court has consistently recognised the right of the second mortgagee to sue for sale subject to the prior mortgage. The Full Bench of the Calcutta High Court has also taken the same view —see *Debendra Narain Roy* v. *Ramtaran Banerjee*[6].

The question then arises whether the right of the second mortgagee can in any way be affected by proceedings to which he was not a party. On general principles it seems impossible to understand how a person can be affected by proceedings to which he was not a party, or in which he was not in some way represented. The Privy Council has definitely pronounced upon this point. In *Brojanath Koondoo Chowdry* v. *Khelut Chunder Ghose*,[7] where a foreclosure decree was first obtained by the

1. (1891) I. L. R. 13 All. 432.
2. (1873) 7 M.H.C.R. 229.
3. (1881) I.L.R. 4 M. 213.
4. (1884) I.L.R. 8 M. 246.
5. (1896) I.L.R. 20 M. 120.
6. (1903) I.L.R. 30 C. 599.
7. (1871) 14 M.I.A. 144.

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first mortgagee without making the second mortgagee a party, *Lord Justice James* delivering the judgment of the Privy Council said: "It is difficult to see how a right of entry or cause of action against one man, in respect of his property, could be either lost or gained by proceedings against another man in respect of his property." He approved of the decision of the High Court on the point by saying: "It was of course held by the High Court that he was in no wise affected by those proceedings." In *Umesh Chander Sircar* v. *Zahur Fatima*, [1] the same tribunal observed with reference to the rights of a subsequent mortgagee at page 179 as follows:—"It was indeed argued by Mr. Mayne that the sale in 1879 (at the suit of the prior mortgagee) had the effect of shutting out all puisne incumbrancers. But their Lordships consider that the right view on this point has been taken in both the courts below. Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties." These observations are not confined to the mere preservation of the subsequent mortgagee's right to redeem the previous mortgage. If the rights of the puisne incumbrancer who was not made a party to the suit of the prior mortgagee are preserved in every respect, the right to sue for sale of the equity of redemption which existed previous to the suit by the first mortgagee must continue to remain after it. Again, in *Gobind Lal Roy* v. *Ramjanam Misser*,[2] *Lord Macnaghten* says at page 79: "As regards the plaintiffs' title to sue, the learned counsel for the appellant pointed out that the plaint on the face of it showed that the property on which the plaintiffs claimed to have a charge had been sold before the date of the Government sale, under a decree obtained by a prior mortgagee against the mortgagor; and they insisted that such a sale has the effect of displacing puisne mortgagees and leaving them with nothing but a claim against the surplus proceeds, if any. That, however, in their Lordships' opinion, is not the necessary consequence of a sale under a decree obtained by a prior mortgagee against the mortgagor in a suit to which the puisne incumbrancers are not parties." Their Lordships recognised the right of the puisne incumbrancer to proceed against the land,

1. (1890) I. L. R. 18 C. 164. 2. (1893) I. L. R. 21 C. 70. (P. C.)

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though it must be admitted that in that case the purchaser under the prior mortgage decree did not dispute it. In *Maung Tha Huyin* v. *Maung Mya Su*, [1] where the dispute was between two sub-mortgagees of a mortgage interest and the plaintiff was in point of time the second sub-mortgagee (by deposit of title-deeds) the Privy Council observed "that his rights, whatever they may have been, remained unaffected by the decree" in the suit of the first sub-imortgagee to which the second was not a party—see pp. 248 and 250.

The authority therefore of the Judicial Committee is clear for the position that whatever rights the second mortgagee as such may have at the date of his mortgage, whether to possession (if his mortgage be one with possession and the previous mortgage without it) or to sale or foreclosure under S. 67, such rights remain altogether unaffected by the suit of the first mortgagee without the second being a party to it and the sale in execution of his decree. He has also the right to redeem the prior mortgage, if it has not been extinguished by merger in the equity of redemption. Such merger is practically impossible where the prior mortgagee gets in the equity of redemption by private or public sale, for it must always be for his benefit to retain the priority of his incumbrance and shield himself against the puisne incumbrancer—see S. 101 of the Transfer of Property Act. The rule in *Toulmen* v. *Steere*[2] has been definitely abandoned in India since *Gokuldoss' Case* (*Gokuldoss Gopal Doss* v. *Rambux Sheochand* [3]) and largely discountenanced in England—*Stevens* v. *Midland Railway Co* [4], *Thorne* v. *Cann*,[5] and *Liquidation Estates Purchase Company* v. *Willoughby*.[6] Merger, on principle, is impossible, for the case of the first mortgagee acquiring the equity of redemption, when a second mortgage is still outstanding, is not one of the rights and correlative obligation coalescing in the same person (see LINDLEY's *Jurisprudence*, p. 75), or of a smaller interest getting absorbed by a larger (see LINDLEY, Appendix LVII), or of two contiguous interests carved out of property combining to form a larger whole. But if merger there should be notwithstanding, according to the older English notion (see COOTE on *Mortgages*, Vol II, p. 1467),

1. (1909) I. L. R. 37 C. 239.
2. (1817) 3 Mer. 220.
3. (1885) I.L. R. 10 C. 1,035.
4. (1873) L. R. 8 Ch. 1064. at p. 210.
5. (1895) A. C. 11 at p. 16.
6. (1896) 1 Ch. 726.

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while it leaves nothing for the second mortgagee to redeem, it elevates the second mortgagee to the position of first mortgagee enlarging his security. It cannot in any sense cut down the rights of the second mortgagee as they stood at the date of the second mortgage. As we have pointed out already, the first mortgagee preserves his priority in spite of his purchase of the equity of redemption behind the back of the second mortgagee. The second mortgagee may, if he chooses, still redeem the first. But redemption is an equitable claim or in India a legal right which he may seek to enforce and not a liability which he may be compelled to discharge. If, therefore, the second mortgagee is not willing to redeem the first mortgage after the purchase of the equity of redemption of the mortgagor in court or private sale by the first mortgagee, he cannot be deprived of his original right to institute proceedings for sale or foreclosure (whatever it was) under S. 67 as second mortgagee.

In examining the multitude of cases as regards the rights of first and second mortgagees after suit and sale by the one or the other or by each independently without impleading, in the suit, the representatives of all interests carved out of the property, it is necessary to bear in mind certain misconceptions which have arisen in the course of the growth of the law of mortgages in this country, for otherwise we shall run the risk of misunderstanding and misapplying the cases. It was supposed at one time that a first mortgagee, selling in execution of a decree on his mortgage obtained in a suit to which the second mortgagee was not a party, succeeded in putting an end to the second mortgage altogether—see *S. B. Shringarpure* v. *S. B. Pethe*,[1] *Ali Hasan* v. *Dhirja*,[2] *Sitaram* v. *Amir Begam*,[3] and *Muthora Nath Pal* v. *Chundermoney Dabia*.[4] A modification of this view was adopted in later cases, namely, that the second mortgage should not be treated as extinguished, at least when the first mortgagee had notice of the second mortgage and deliberately omitted to implead that mortgagee as a party defendant—see *Muhammad Sami-ud-din* v. *Man Singh*,[5] *Gajadhar* v. *Mulchand*,[6] and *Namdar Chaudhri* v. *Karam Raji*[7]. Whatever effect the

1. (1878) I. L. R. 2 B. 662.
2. (1882) I. L. R 4 All. 518.
3. (1886) I. L. R. 8 A. 324.
4. (1878) I. L. R. 4 Cal. 817.
5 (1887) I. L. R. 9 A. 125.
6. (1888) I. L. R. 10 All. 520.
7. (1891) I. L. R. 13 All. 315.

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non-inclusion of the second mortgagee as a party to the suit on the first mortgage might be deemed to have on the maintainability of that suit, in case he had notice, it is difficult to see how the second mortgagee could anywise be affected. And this is the position laid down by the Privy Council cases already referred to.

Some of the decisions of the Indian courts are coloured by the misconception that a second or subsequent mortgagee has no right to sue for sale or foreclosure but can only claim to redeem the prior mortgage and after such redemption sue for sale or foreclosure according to his rights under S. 67 of the Act. We have also to remember the fact that in particular cases the decision has depended upon the circumstances, sometimes expressly noticed and sometimes not, that the prior or subsequent mortgage was a mortgage with possession and that the right to possession was attached to the mortgage, and did not accompany the purchase of the equity of redemption. Oftentimes, the form of the decree has had reference to the pleadings of the parties, the second mortgagee, who was not a party to the first mortgagee's suit, being content to redeem the first instead of insisting on his right to bring the equity of redemption to sale. Or, the first mortgagee, who has bought the equity of redemption in proceedings to which the second mortgagee was not a party, has waived his right to sue a second time upon his first mortgage impleading the second mortgagee, and has been content to pay off the second mortgage as the purchaser of the equity of redemption.

Bearing the foregoing considerations in mind, let us proceed to examine the decided cases. The following Allahabad cases were relied on in the course of the argument on one side or the other: *Namdar Chaudhri* v. *Karam Raji* [1]; *Hargulal Singh* v. *Gobind Rai* [2]; *Madan Lal* v. *Bhagwan Das* [3]; *Baldeo Singh* v. *Jaggu Ram* [4] and *Ram Prasad* v. *Bhikari Das* [5]. With the exception of the first, the remaining cases will be found to have no bearing on the question under consideration, and the judgment in that case is vitiated by the erroneous view that a subsequent mortgagee has only the limited right to redeem the first mortgage as laid down in the Full Bench case in *Mata Din*

1. (1891) I. L. R. 13 All 315.
2. (1897) I. L. R. 19 A. 541.
3. (1899) I. L. R. 21 A. 235.
4. (1900) I. L. R. 23 A. 1.
5. (1903) I. L. R. 26 A. 464.

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Kasodhan v. *Kazim Husain.*[1] The first mortgagee, who purchased in execution of his decree on the mortgage, sued the second mortgagee in possession under his mortgage in ejectment, and the court gave him a decree subject to redemption within a fixed time by the second mortgagee. It was erroneously assumed that the second mortgagee was only entitled to redeem. The purchaser and first mortgagee did not sue for foreclosure, assuming he had the right to it. He did not, as purchaser, seek to redeem the second mortgagee. The second mortgagee, entitled to possession under his mortgage, had the right to continue in possession until redeemed by the purchaser and could not be ejected by the first mortgagee or compelled to redeem him. But the decision was the logical result of the view taken by the Full Bench in *Mata Din Kasodhan* v. *Kazim Husain.* [1] The Full Bench cases in *Hargulal Singh* v. *Gobind Rai*[2] and *Madan Lal* v. *Bhagwan Das* [3] simply lay down the rule that when there is a mortgage and sale of the equity of redemption by the mortgagor in execution of a money decree against him, the mortgagee, who in a subsequent suit on his mortgage to which the first purchaser is not a party purchases the mortgaged property, cannot affect the rights of the first purchaser. He cannot, on the basis of his purchase, eject the first purchaser. But if he sues to enforce his mortgage againt the first purchaser by foreclosure (*Baldeo Singh* v. *Jaggu Ram*[4]) or sale (*Ram Prasad* v. *Bhikari Das*[5]) he is at liberty to do so. Some of the observations in the last two cases may perhaps be open to exception, but the decisions themselves are in accordance with true principle. *Govardhana Doss* v. *Veerasami Chetti,* [6] which seems to be a correct decision on the facts of that case, is quoted with approval as warranting the position that the second mortgagee with possession has only the right to redeem.

Passing on to Bombay we find that, although it is not in terms anywhere stated that a *second mortgagee* is only entitled to sue for redemption but not for foreclosure or sale, it is repeatedly affirmed that the first mortgagee is entitled to sell the property as it stood at the date of his mortgage free from all subsequent

1. (1891) I. L. R. 13 A. 432.
2. (1897) I. L. R. 19 A. 541.
3. (1899) I. L. R. 21 A. 235.
4. (1900) I. L. R. 23 A. 1.
5. (1903) I. L. R. 26 A. 464.
6. (1902) I. L. R. 26 M. 537.

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encumbrances even if the subsequent mortgagee was not made a party to his suit on the first mortgage. All that is reserved to the subsequent mortgagee in such a case, according to the Bombay High Court, is a mere liberty to redeem, subject to which the purchaser under the decree on the mortgage has full rights in the property purchased. The decisions in *Mohan Manor* v. *Togu Uka*, [1] and *Desai Lallubhai Jethabhai* v. *Mundas Kuberdas*, [2] and the other Bombay cases there cited clearly express the above view. In both the cases above cited possession was given to the purchaser under the decree on the first mortgage setting aside the right of the second mortgagee to possession under his mortgage and reserving to him a mere liberty to redeem within a time fixed. *Hassanbhai* v. *Umaji*, [3] does not touch the question of the rights of the second mortgagee. It merely decides that the first mortgagee, who has foreclosed without making the second mortgagee a party to the proceeding, may redeem him by virtue of the equity of redemption acquired under the foreclosure. The decision in *Radhabai* v. *Shamrav Vinayak*, [4] however, cannot be reconciled with the current of authority in Bombay as pointed out by *Aston* J. in *Hassanbhai* v. *Umaji* [3], and by *Jacob* J. at page 175. Though it seems to stand alone so far as that court is concerned, the decision appears to be sound in principle. A stranger who purchased in execution of a decree on the first mortgage sued in ejectment the second mortgagee with possession who had not been a party to the prior suit, but the court gave him only a decree for redemption of the second mortgage on the footing that he was entitled to possession until redeemed. This case, therefore, is an authority which supports the view indicated in our answer to the reference.

The following decisions of the Calcutta High Court, namely, *Har Pershad Lal* v. *Dalmardan Singh*, [5] *Ganga Bhattar* v. *Jogendra Nath Mitra* [6], *Jugdeo Singh* v. *Habibullah Khan*, [7] were referred to by Mr. Ramachandra Aiyar. They support his contention that the first mortgagee, who has bought the property in a

1. (1885) I. L. R. 10 B. 224.
2. (1895) I.L.R. 20 B. 390.
3. (1903) I. L.R. 28 B. 153 at p. 167.
4. (1881) I. L. R. 8 B. 168.
5. (1905) I. L. R. 32 C. 891.
6. (1907) 5 C.L.J. 315.
7. (1907) 6 C. L. J. 612.

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suit upon the mortgage to which the second mortgagee was not a party, is entitled to possession as against him, though he (the second mortgagee) had previously obtained possession by a sale under his mortgage, and the second mortgagee is merely entitled to redeem the prior mortgage. It is not easy to reconcile these cases with the principle of the Full Bench decision in *Debendra Narain Roy* v. *Ramtaran Banarjee*,[1] which held the right of sale of the second mortgagee to be unaffected by proceedings to which he was not a party. It seems to be fairly deducible from that case that, if the second mortgagee had bought in execution of his decree the equity of redemption prior to the sale in execution of the decree on the first mortgage, his rights must be equally saved and cannot be cut down to a mere right of redemption. The principle of the Privy Council decisions to which reference has already been made is also opposed to these Calcutta rulings. The dissenting judgment of *Rampini* J. in *Har Pershad Lal* v. *Dalmardan Singh*, [2] refusing possession to the first mortgagee, who purchased in execution against the second mortgagee, who had previously bought the property under a decree on the second mortgage, is in accord with what appears to be the true principle as to the rights of second mortgagees. It is not easy to understand how the purchasers of the mortgagor's equity of redemption under a private sale were held liable to be deprived of possession by the first mortgagee purchaser, who did not implead those purchasers in his suit. (See *Mookerjee* J. in *Ganga Das Bhattar* v. *Jogendra Nath Mitra*[3]). Such a view would even be opposed to the rulings in *Hargu Lal Singh* v. *Gobind Rai* [4] and *Madan Lal* v. *Bhagwan Das* [5].

We pass on now to the Madras cases. In *Venkatanarasammah* v. *Ramiah* [6] it was held that the first mortgagee who was the first purchaser in execution was entitled to possession against the defendant who bought later under his second mortgage. Both mortgages were simple and the court held that the second mortgagee bought nothing after the sale of the equity in the first mortgagee's suit. (See *Kernan* J. at page 112). The court

1. (1903) I. L. R. 30 Cal. 599.
2. (1905) I. L. R. 32 Cal. 891.
3. (1907) 5 C. L. J. at p. 318 and 320.
4. (1897) I. L. R. 19 All. 541.
5. (1899) I. L. R. 21 A. 235.
6. (1879) I. L. R. 2 M. 108.

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further held that the right of the second mortgagee was not affected, though effect could not be given to it in that suit having regard to its particular frame. This is entirely in accordance with two decisions of the Calcutta High Court in *Nanack Chand* v. *Teluckdye Koer* [1] and *Dirgopal Lal* v. *Balake* [2] where the mortgagee who became first entitled to possession was adjudged it against the other. *Akatti Moidin Kutty* v. *Chirayil Ambu* [3] was a similar decision where the second mortgagee who was the first purchaser was maintained in possession against the latter purchaser under the first mortgage. So also was the case of *Kutti Chettiar* v. *Subramania Chettiar*[4]. In *Venkatachella Kandian* v. *Panjanadien*[5] there was no sale under the first mortgage and the second mortgage was one with possession. The second mortgagee was held entitled to hold possession against a purchaser of the mortgagor's equity of redemption under a money decree. The case has no bearing on the particular question now under consideration, though the remarks of *Turner* C. J. on the rights of a second mortgagee to sue for sale are instructive. In *Venkata* v. *Kannam*[6] the second mortgage was with possession. The purchaser under the decree on the first mortgage, which was simple, sued to eject the second mortgagee. It was held that the suit was liable to be dismissed, but, as the second mortgagee, who was respondent in the appeal, did not object to the direction of the lower court to redeem the prior mortgage or be for ever foreclosed, that was not disturbed. (See page 188). In *Rangasamy Naicken* v. *Komarammal*[7] the same decision was pronounced on similar facts. The decision in *Sivaraman Chetty* v. *Kuppumuthu Chetty*[8] has no bearing on the present controversy. There the second mortgagee who bought nothing under his subsequent decree and sale against the mortgagor after the first mortgagee had bought in execution of his decree was held entitled to redeem the first mortgage which was treated as still in law subsisting. That was the plaintiff's prayer and it was granted. There are a few more cases which, however, require a more minute examination. *Perumal* v. *Kaveri* [9] rests on the view, which we cannot accept, that a

1. (1879) I. L. R. 5 C. 265.
2. (1879) I. L. R. 5 C. 269.
3. (1902) I. L. R. 26 M. 486.
4. (1899) I. L. R. 22 M. 485.
5. (1881) I. L. R. 4 M. 213.
6. (1882) I. L. R. 5 M. 184.
7. (1902) I. L. R. 26 M. 484.
8. (1902) 13 M. L. J. 72.
9. (1892) I. L. R. 16 M. 121.

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sale under the first mortgagee causes a merger of the mortgage in the equity of redemption so that the second mortgagee becomes disentitled to sue for redemption of a mortgage which no longer subsists. This case is against the whole trend of authority in India which repudiates the doctrine of merger, at all events since *Gokuldoss's* case (*Gokuldoss Gopaldoss* v. *Rambux Sheochand* [1]). The second mortgagee was usufructuary. The suit brought by him for redemption was dismissed, but it was held that he was entitled to remain in possession till he was redeemed. This case is no authority for the respondent's position that the second mortgagee loses his right to possession by the sale under the first mortgagee's decree and has only the privilege of redemption. The learned judges made no reference to the second mortgagee's right of sale as there was apparently no covenant to pay. The actual decision in *Krishnan* v. *Chadayan Kutti Haji*[2] is not in conflict with the true principles as to the right of a second mortgagee. Both the mortgages were usufructuary. The first mortgagee was entitled to possession but the mortgagor gave possession to the second. The first mortgagee, having sued and obtained a decree for sale and sold the equity of redemption, was clearly entitled to possession when he sued the second mortgagee in ejectment, apart from the question dealt with in the case as to the effect of the order rejecting his claim under S. 278. It is, however, observed at page 20 that all that he (defendant) can ask as puisne mortgagee is that he shall be allowed an opportunity of redeeming, and the decisions in *Radha Pershad Misser* v. *Manohar Das* [3], *Naru* v. *Gulab Sing*[4] and *Radhabai* v. *Shamrav Vinayak*[5] are cited in support of the observation. None of those cases negatives the right of a second mortgagee to sue for sale whether before or after the first mortgagee's decree and sale. It may be the second mortgagee had no right of sale under the terms of his mortgage, and as a usufructuary mortgagee he could only seek redemption, the right to possession having gone with the first mortgagee. This decision also does not support the respondent. *Rangayya Chettiar* v. *Parthasarathi Naickar* [6] has been already referred to

1. (1884) I. L. R. 10 C. 1035.
2. (1893) I L. R. 17 M. 17.
3. (1881) I. L. R. 6 C. 317.
4. (1879) I. L. R. 4 B. 83.
5. (1881) I. L. R. 8 B. 168.
6. (1896) I. L. R. 20 M. 120.

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as recognising the right of a second mortgagee to sue for sale contrary to the doctrine in *Mata Din Kasodhan* v. *Kazim Hussain.* [1] *Muhammad Usan Rowthan* v. *Abdulla*[2] turned on the construction of the decree in the suit of the second mortgagee which was expressed to be subject to the rights of purchase under the first mortgagee's decree. Moreover the first mortgagee being the first purchaser in possession could not be turned out in execution of his decree by the second mortgagee, who had merely bought subject to the rights of the first purchaser. The second mortgagee had not obtained a decree for sale of the equity of redemption, that is, the interest of his mortgagor which had passed to the purchaser under the first mortgagee's decree. *Shephard* J. quotes with approval *Venkata Narasammah* v. *Ramiah*[3], *Nanack Chand* v. *Teluckdye Koer*[4] and *Venkata* v. *Kannam*[5]. Having once sued for sale, making the mortgagor and the purchaser under the first mortgagee's decree parties, the second mortgagee could not sue them a second time for sale. The observation, therefore, that the right of redemption and no other was all that remained to the second mortgagee in the circumstances of the case was perfectly right. No general proposition was laid down that a second mortgagee had a mere right to redeem and after redemption to sell, nor that, after the first mortgagee's suit and sale without making the second mortgagee party, the right of redemption was all that could remain in him. *Rangayya Chettiar* v. *Parthasarathi Naickar*[6] is not dissented from, though the language employed in that case is stated to be open to exception. *Mallikarjunadu Setti* v. *Lingamurti Pantulu*[7] decides that a second mortgagee who is not made a party to the first mortgagee's suit for sale cannot apply under S. 310-A, Civil Procedure Code, to set aside the sale. It is authority for the position that no interest of his (in which must be included his right to bring the equity of redemption to sale) passes by the sale under the decree of the first mortgagee. Mr. Ramachandra Aiyar relied very strongly on two decisions of this court—*Govardhana Doss* v. *Veerasami Chetti*[8] and *Venkataramana Iyer*

1. (1891) I. L. R. 13 A. 432.
2. (1900) I. L. R. 24 M. 171.
3. (1879) I. L. R. 2 M. 108.
4. (1879) I. L. R. 5 C. 265.
5. (1882) I. L. R. 5 M. 184.
6. (1896) I. L. R. 20 M. 120.
7. (1902) I. L. R. 26 M 332.
8. (1901) I. L. R. 25 M. 537.

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v. *Gompertz*[1]. As regards the first, if the facts are carefully examined there is nothing in the decision which can be invoked in support of the respondent, though certain observations are not reconcilable with the principle that the second mortgagee who was not a party to the first mortgagee's suit remained unaffected in every respect. *Mohan Manor* v. *Togu Uka*[2] and *Desai Lallubhai Jethabhai* v. *Mundas Kuberdas*[3] which we have already pointed out as not in accordance with the true principles as to the rights of second mortgagees, are cited in this case with approval, and the remarks of *Shephard* J. in *Muhammad Usan Rowthan* v. *Abdulla*[4] are treated as laying down a general rule with reference to the rights of second mortgagees without reference to the particular facts of that case. The facts, however, in *Govardhana Doss* v. *Veerasami Chetti*[5] fully justified the decision in that case. Both the mortgages were usufructuary. The first mortgagee sued first for sale apparently upon a covenant to pay and purchased in execution of his decree behind the back of the second. He now sued the second mortgagee for the amount of his decree and in default for foreclosure. The second mortgagee had apparently no right of sale under his mortgage. The first mortgagee had the right to possession and it could not therefore pass to the second. The only remedy left to the second mortgagee was redemption, and this was recognized as unaffected by the prior proceedings. Any observations tending towards a limitation of the second mortgagee's rights in all cases to the mere privilege of redemption must be regarded as unsupported by principle or the general trend of authority in this court. The decision in *Venkataramana Iyer* v. *Gompertz*[1] does not appear to us to help the respondent. Indeed it expressly follows the decision in *Rangayya Chettiar* v. *Parthasarthi Naicker*[6]. The suit itself was by the second mortgagee and a person who had acquired the rights of the first mortgagee and the mortgagor's equity of redemption behind the back of the second was the defendant in the suit. The plaintiff asked for a decree for sale subject to the first mortgage, or, in the alternative, for redemption of the first mortgage. The decision did not negative the

1. (1908) I. L. R. 31 M. 425.
2. (1885) I. L. R. 10 B. 224.
3. (1895) I. L. R. 20 B. 390.
4. (1900) I. L. R. 24 M. at p. 175.
5. (1902) I. L. R. 26 M. 537.
6. (1907) I. L. R. 30 M. 129.

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right of sale subject to the first mortgage, but in view of the alternative prayer to redeem and the right of the purchaser of the mortgagor's equity of redemption, it was thought that the better form of decree was to give the plaintiff redemption and a sale of the mortgaged property after redemption of the prior mortgage on failure of the defendant to redeem the plaintiff in his turn. There can be no doubt that this form of decree effectually disposes of the claim of all parties interested in the mortgaged property. If, instead, a mere decree for sale of the equity of redemption on failure of the purchaser of it to redeem the plaintiff had been made, it would have left the rights of the same defendant *qua* first mortgagee undetermined. It is certainly a wise rule as far as possible and consistently with the frame of the suit to adjust the rights of all parties interested in the mortgaged property. One more case deserves to be noticed and that is the decision in *Nagammal* v. *Venkatagiri Aiyar*[1]. There the second mortgagee's suit for sale after the first mortgagee's sale under his decree was dismissed as against the purchaser on failure to redeem the prior mortgage. It seems to us that in case the purchaser of the equity of redemption was not willing to redeem the plaintiff he was entitled to a decree for sale subject to the prior mortgage. There was no reason why that prayer should have been refused when the first mortgagee was not suing the second for foreclosure or sale.

On a full review of the decided cases the following propositions appear to be established :—

(1) A second mortgagee is entitled to the same rights as the first mortgagee with reference to his security, having regard to the nature of his mortgage.

(2) The purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage.

(3) Those rights are unaffected by the suit of the first mortgagee to which they are not made parties and the decree passed therein and the sale made in pursuance thereof.

1. (1898) 8 M. L. J. 298.

(4) The purchaser in such a suit, whether it is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage but only those that subsist in him at the date of the suit.

It follows that the question referred must be answered as stated already against the plaintiffs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Iyer.

Muthu Chetty .. Appellant*
v. (*Defendant*)
Sinna Velliam Chetty *alias* Sinna Karuppan Chetty .. Respondent (*Plaintiff*).

Muthu Chetty *v.* Karuppan Chetty.

Vendors and purchasers—Interest on purchase money when payable—T. P. A., S. 55, Cl. 4 (b), scope of.

S. 55, Cl. 4 (*b*) of the Transfer of Property Act does not give the vendor an absolute right to interest on the purchase money irrespective of the equities and circumstances of each case. The object of the clause is to give the vendor a lien in respect of interest if only the interest is payable.

In the absence of express and distinct stipulation, the vendor cannot "have both money and mud." Where the parties intend that both the payment of purchase money and the delivery of possession of the property should be carried out contemporaneously, interest on the purchase money is not payable so long as the vendor is in possession of the land. [*Leggatt* v. *Metropolitan Railway Co.*[1] dist.; *Velayutha Chetty* v. *Govindasami Naicker*[2] commented on; *Subrahmania Ayyar* v. *Poovan*[3] referred to.]

Appeal from the decree of the Subordinate Judge's Court of Madura, East, in O. S. No. 62 of 1906.

This is a suit for possession and mesne profits by a purchaser of immoveable property who after the completion of the sale delayed paying the price. The principal contest in the appeal was whether the vendor was entitled to interest on the price amount so long as he was enjoying the lands. The lower court set off the mesne profits due to the vendee against the interest.

S. Srinivasa Aiyangar for appellant.

K. Srinivasiyengar and *R. Rangasami Aiyengar* for respondents.

S. Srinivasa Aiyangar.—Even if the vendor is in possession of property sold and gets rents and profits owing to the default of the

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*A. No. 72 of 1908. 2nd February, 1911.

1. (1870) 5 Ch. Ap. 716. 2. (1910) M. W. N. 637.

3. (1902) I. L. R. 27 M. 28.

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vendee he is entitled to interest on the purchase money. Interest is given by S. 55, T. P. Act, and the Interest Act. Until payment of purchase money the vendor is not bound to give up possession. —*Leggatt* v. *Metropolitan Ry. Coy.*[1]. S. 55 of the T. P. Act enunciates only mutual rights. It does not state that one party's right can or cannot be dependent upon another's.

K. Srinivasa Aiyangar.—If the above argument is correct then the vendee who sues is entitled to possession *unconditionally*. But that this is not so will appear from *Velayuda Chetty* v. *Govindasami*,[2] the decision in which was reviewed in *Velayudan Chetty* v. *Govindasami Naicken*[3]. I refer also to *Subramania Aiyar* v. *Poovan*[4]. S. 55, T. P. Act, gives only a charge for interest. It does not create a right to interest and it does not also say that in all cases a party will be entitled to interest under such circumstances. FRY on *Specfic Performance*, p. 591, Art. 1399, shows enjoying mesne profits will oust the vendor's right to interest on purchase money. He explained *Leggatt* v. *Metropolitan Ry. Coy.*[1] as relating to a case of occupation rent, as in FRY, Art. 1449; DART on *Vendors and Purchasers*, p. 656. Under the Interest Act interest will not be due, there being no day certain.

S. Srinivasa Aiyangar in reply.—Unless interest is intended to be given no charge would be given by S. 55, Cl. 4 (*d*). I refer to *Shib Lal* v. *Bhagwan Das*[5]. *Velayudan Chetty* v. *Govindasami Naicken*[3] does not refer to very many previous cases. This being a suit for specific performance, interest must be given to me before a decree as prayed for is given. Even if the suit is one in ejectment, compensation can be given to me as in Malabar.

The Court delivered the following

JUDGMENT:—In this appeal the 1st defendant is the appellant. The plaintiff sued to recover possession of a tope half of which was sold to him by the 1st defendant with the profits thereof from the 4th July 1903, the date of the conveyance, Exhibit C. The plaintiff's case is that as the defendant failed to execute a conveyance according to the agreement, Exhibit A, dated the 28th April 1903, within the time fixed, the plaintiff demanded performance of the agreement, and after some negotia-

1. (1870) 5 Ch. A. 716.
2. (1907) I.L. R. 30 M. 524.
3. (1910) M. W. N. 637.
4. (1902) I. L.R. 27 M. 28,
5. (1888) I.L.R. 11 A. 244

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tions between the parties it was agreed that the plaintiff should pay the purchase money, Rs. 2,600, before the Registrar of Assurances at the time of registration of the conveyance after the defendant made an endorsement of discharge on a hundi for the amount which the plaintiff had previously executed in the defendant's favour and deposited with one Muthia Chetti. The plaintiff alleges that as the defendant refused to register the deed he applied for compulsory registration of Exhibit *C*, which had been previously executed by the defendant and handed over to the plaintiff. Before the Registrar the execution of Exhibit *C* was admitted by the defendant, but he stated that the sale could not be completed as the plaintiff had failed to pay the purchase money. The defendant contended in this suit that the understanding between the parties was that the property should not pass to the plaintiff and Exhibit *C* should not have any legal operation until the plaintiff paid the purchase money which he was bound to do at the Registration office before the registration of Exhibit *C*. He repudiated all obligation under Exhibit *C*, and if he was held bound by it, he claimed payment of not only the sum of Rs. 2,600, the amount of the purchase money, but also interest on it at 12 per cent; at the same time he disclaimed any liability for the payment to the plaintiff of the profits of the land until the payment of the purchase money.

The lower court found that the defendant was not to blame in the matter of the non-payment of the purchase money and that the plaintiff, if he was entitled to have payment endorsed on the hundi, ought to have had it produced at the Registrar's office. It therefore refused to award to the plaintiff the profits claimed. With regard to the defendant's claim for interest the Subordinate Judge held that he was not entitled to it, as he remained in possession of the land and got the income accruing therefrom.

It is contended before us by the appellant that he is entitled to interest from the date of Exhibit *C* when, according to him, the ownership of the property vested in him. The respondent contended before us that according to the agreement between the parties the ownership had not passed to the plaintiff as he failed to pay the purchase money. We do not consider it necessary to go into this question as we agree with the learned vakil for the respondent that the appellant is not entitled to interest in this case. For the same reason we do not deal with the contention that the plaintiff is entitled to an unconditional decree for possession and the court was not justified in making its decree in the plaintiff's favour conditional on his paying the purchase

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money to the defendant ; but we may point out that the case of *Velayutha Chetty* v. *Govindasawmi Naicken*,[1] relied on in support of this position, appears to be in conflict with *Subramania Aiyar* v. *Poovan*,[2] which does not seem to have been brought to the notice of the learned judges who decided *Velayutha Chetty* v. *Govindasamy Naicken*.[1]

The claim for interest is based by the learned pleader for the appellant on S. 55, Cl. 4 (*b*), of the Transfer of Property Act. That clause, in our opinion, does not give the vendor an absolute right to interest on the purchase money irrespective of the equities and circumstances of each case. The object of the clause is to give the vendor a lien on the property for unpaid purchase money and it declares that the lien will enure for the interest as well as for the principal of the purchase money, assuming that interest is payable. It does not enact that the vendor is entitled to interest in every case.

The only case relied on by the appellant, *Leggatt* v. *Metropolitan Railway Co.*[3], does not support his contention. In that case, the agreement between the parties expressly provided for payment of interest by the vendee and of an occupation rent by the vendor till delivery of possession which was to take place on a certain day. The vendor was obliged to remain in possession against his will after the time fixed for delivery and he had to sue for specific performance. The question raised was whether the vendee was entitled to occupation rent till delivery of possession and no question was raised as to the vendor's right to interest on the purchase money, which was conceded, the parties having expressly provided for it. *Sir William James* L. J. held that the vendee was not entitled to occupation rent as the vendor continued in occupation of the premises "under a pressure arising from the purchaser's default." As observed in FRY on *Specific Performance*, p. 591, 4th Edition, it is obviously inequitable, in the absence of express and distinct stipulation, that either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase-money. The estate and purchase money are things mutually exclusive. "You cannot," said *Knight Bruce* V. C., in a case arising out of

1. (1910) M. W. N. p. 637. 2. (1902) I. L. R. 27 M. 28.
3. (1870) L. R. 5 Ch. App. cases, p. 716.

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the sale of some slob lands in Chichester harbour "have both money and mud." It is not alleged that there was any such express stipulation in this case. On the other band, we think that the parties must have intended that the payment of purchase money and the delivery of possession of the property should be carried out contemporaneously and that interest on the money would not be payable so long as the defendant was in possession of the land.

We confirm the lower court's decision and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Thandayuthapani Kangiar and others	..	Appellants*
v.		(*Defendants*)
Ragunatha Kangiar and others	..	Respondents
		(*Plaintiffs*).

Hindu Law—Partition decree, effect of—Appeal, effect of, on decree—Subsequent deaths and births, effect of.

Partition may be effected by consent or by decree; and, in both cases, once it is properly effected, either by consent or by decree, it is not affected by subsequent births or deaths among the parties to the partition. Decrees which are right at the time when they are passed, whether for partition or otherwise, are not varied by reason of subsequent events; and severance effected by a partition decree correct at the time it was passed, is not affected by the subsequent filing of an appeal therefrom.

Where the legal representative (the mother of a deceased party to an appeal from a partition decree) applied to be brought on the record and the other sharers objected to it on the ground that the share survived to them: *Held* :—(1) that the legal representative should be brought on the record for the adjudication of the very question of the deceased's share surviving to the rest of the sharers; (2) that the severance between the parties was effected by the partition decree of the first court; and (3) that the legal representative (the mother) became entitled to the deceased's share irrespective of the pendency of the appeal. [*Subbaraya Mudali* v. *Manicka Mudali*[1] followed. *Sakharam Mahadev* v. *Harikrishna Dangha*[2] not followed. *Joy Narain Giri* v. *Girish Chunder Myti*[3] and *Chidambaram Chettiar* v. *Gauri Nachiar*[4] referred to. *Sangili* v. *Mookhan*[5] doubted].

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* S A. 1734 of 08. 8th February 1911.

1. (1896) I.L.R 19 M. 345.
2. (1881) I.L.R. 6 B. 113.
3. (1878) I.L.R. 4 C. 434; s.c. 5 I. A. 228.
4. (1879) I.L.R. 2 M. 83.
5. (1893) I.L.R. 16 M. 350 & 353.

Thandayuthapani Kangiar v. Ragunatha Kangiar.

Second appeal from the decree of the District Court of Tanjore in A. S. Nos. 109 and 131 of 1907 presented against the decree of the Court of the Subordinate Judge of Tanjore in O.S. No. 27 of 1904.

The plaintiff brought a suit for partition and obtained a decree. The defendants appealed. Plaintiff also preferred a cross-appeal. The District Judge dismissed the appeal of the defendants and in plaintiff's appeal modified the lower court's decree. Against the decree of the District Judge the defendants preferred a second appeal. Pending this the plaintiff died, leaving his mother and no male issue. He had made several alienations. The alienees applied to be brought on the record as representatives of the deceased plaintiff. The defendant's appellants objected to their being brought on record on the ground that there was no severance of joint status. But they were brought on record subject to any objections at the time of hearing.

S. Srinivasa Aiyangar for the *Advocate-General* (*G. S. Ramachandra Aiyar* with him) for appellants :—The institution of a suit for partition by itself does not put an end to the joint status of a Hindu family. On the death of the plaintiff after decree and pending appeal no legal representative can continue the suit. The suit abates. Coparcenary is not put an end to by the will of a single coparcener. Coparcenary can be put an end to in three ways: (1) by agreement of parties; (2) by action of the courts; (3) by action of creditors who seize and sell the share of the co-parcener—*Madho Prasad* v. *Meherham Singh* [1]; *Sudarsan Maistry* v. *Narasimulu* [2]. A decree puts an end to the undivided status if not appealed against. If an appeal is preferred against the decree there is no severance. It is then perfectly open to the plaintiff to withdraw the suit in appeal. Till an actual final decree the coparcenary is not severed. There can be no severance so long as it is under appeal, for then the appellate court is seized of the whole case and the decree of the court below is valueless. Further any one of the following things may happen:— The plaintiff may withdraw his suit or compromise the matter. The appellate court can reverse or modify the decree. The decree

1. (1890) I. L. R. 18 C. 157, 161. 2. (1901) I. L. R. 25 M. 149.

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will not operate as *res judicata*. If the decree operated as a severance of the joint status it cannot be altered by the appellate court. The following cases were relied on :—*Krishnamachari* v. *Mangammal*[1];*Joy Narain* v. *Girish Chundar*[2];*Sakharan Mahadev* v. *Hari Krishna Dangha*[3] ; *Sangli* v. *Mookan*[4] ; *Padartha Singh* v. *Raja Ram*[5] ; *Vinayak* v. *Krishna Rao*[6] ; *Raja Ratan Sahu* v. *Mohant Sahu*[7]; *Gorakala Kanakayya* v. *Janardhana Radhi*[8]. The decision in *Subbaraya Mudali* v. *Manika Mudali*[9] is against me. This and *Ramanadhan Chetti* v. *Pulikutti Servai*[10] commented on. The following cases also were referred to:—*Jotindra Mohan Tagore* v. *Bijoy Chand*[11]; *Madit Narayan* v. *Ranglal Singh*[12]; Tagore Lectures; MITRA on *Joint Family and Partition*, p. 381; TREVELYAN on *Hindu Family Law*, pp. 349-350; *Muhamad Husain* v. *Kusalu*[13].

T. R. Ramachandra Iyer (*M. Subramania Aiyar* with him) for respondents:—As soon as a preliminary decree for partition is passed there is a severance of the joint status whether an appeal has been preferred or not. A decree is something more than a mere cause of action. Take for instance the case of a right of a person to sue for damages and a decree for damages. Both are not the same thing. He referred to the following cases in support of his contention :—*Paraman Chetty* v. *Sundararaju Naick*[14]; *Gopal* v. *Ramachandra*[15]; *Rajah Bhaskara Setupati* v. *Narayanasami Gurukhal*[16]; *Vakkalagudda Narasimham* v. *Vahizulla Satuli*[17]; *Subbaraya Mudali* v. *Manicka*[9] ; *Ramanadhan Chetti* v. *Pulikutti Servai*[10]; *Narayan Bin Bahaji* v. *Nathaji Durgabai*[18] and commented on *Sakharam Mahadev* v. *Hari Krishna Dangha.*[3]

S. Srinivasa Aiyangar replied.

The Court delivered the following

JUDGMENT.—*Wallis* J :—The plaintiff obtained a preliminary decree for partition which was confirmed with modifi-

1. (1902) I. L. R. 26 M. 91, 95, 96.
2. (1878) I. L. R. 4 C. 434 (P. C.)
3. (1881) I. L. R. 6 B. 113.
4. (1893) I. L. R. 16 M. 350, 353.
5. (1882) I. L. R. 4 A. 235, 236.
6. (1901) I. L. R. 25 B. 625.
7. (1907) 6 C. L. J. 74, 78.
8. (1910) M. W. N. 840, 844.
9. (1896) I. L. R. 19 M. 345.
10. (1898) I. L. R. 21 M. 288.
11. (1904) I. L. R. 32 C. 483.
12. (1902) I. L. R. 29 C. 797, 801.
13. (1886) I. L. R. 9 A. 132.
14. (1902) I. A. R. 26 M. 499.
15. (1902) I. L. R. 26 B. 597 at pp. 601, 602, 606.
16. (1901) 12 M. L. J. 360.
17. (1905) I. L. R. 28 M. 498.
18. (1903) I. L.R. 28 B. 201.

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cation on appeal and died while a second appeal was pending. His legal representatives have petitioned to be brought on record and the petition is opposed on the ground that the plaintiff's share passed on his death by survivorship and that there is nothing for the representatives to succeed to. Whether this be so or not is a question to be decided in the appeal itself after hearing both sides. The legal representatives deny that the plaintiff's share passed by survivorship on his death and say they are entitled to be brought on the record for the purpose of contesting the point. We therefore overrule the objection and direct the legal representatives to be brought on the record.

On the main question it was held by this court in *Subbaraya Mudali* v. *Manicka Mudali*[1], differing from *Sakharam Mahadev* v. *Hari Krishna Dangha*[2], that a decree for partition effects a severance of the joint family ; that this severance is not affected by the subsequent filing of an appeal from the decree. Our attention was, however, called to certain observations in *Gorakala Kanakayya* v. *Janardana Radhi*[3] (where the point did not arise for decision) in which *Sakharam Mahadev* v. *Hari Krishna Dangha*[2] was referred to with approval. We have accordingly reconsidered the question, but after listening to the able and exhaustive argument addressed to us by Mr. S. Srinivasa Aiyangar I see no reason to differ from the previous decision of this court. Partition may be effected by consent and in proper cases by decree. When it is effected by decree, I can see no reason why the decree should not hold good as other decrees do unless and until it is reversed. It is not a feature of our law, or any other legal system so far as I know, that the filing of an appeal should affect the operation of a decree ; and unless the court intervenes to stay proceedings the property may be partitioned and distributed in the shares fixed by the decree before the appeal is finally determined, possibly years before in cases where there are a series of appeals. Where a decree for partition has been properly made and has directed the division of the property in appropriate shares, I can see no reason for altering this portion of the decree on appeal by reason of births or deaths afterwards supervening in the family. A partition by consent in certain

1. (1896) I.L.R. 19 M. 345. 2. (1881) I.L.R. 6 B. 113.
3. (1910) M.W.N. 841 at p. 844.

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shares when once made is not affected by subsequent births or deaths in the family and there does not appear to be any reason why it should be otherwise when it is made by decree.

The ordinary rule admittedly is that decrees which were right at the time they were passed are not varied by reason of events which subsequently happen, and I can see no reason why an exception should be made in the case of decrees for partition, or why partitions by decree should be put on such an unfavourable footing as compared to partitions effected by consent. Assuming alienees would not be prejudicially affected, it would still be a hardship to the parties themselves to make their rights on partition to depend on their surviving the appeal proceedings.

In *Joy Narain Giri* v. *Girish Chunder Myiti* [1] their Lordships of the Judicial Committee after construing a decree of the District Court not then under appeal as a decree for partition observe:—"That being so, their Lordships are of opinion that although the suit is not actually in terms for partition, yet that the decree does effect a partition, at all events, of rights, which is effectual to destroy the joint estate under the doctrine laid down in the case, which has been quoted, of *Appovier* v. *Ramasubba Aiyar* [2], where it was held that a mere agreement to divide effects a severance of the joint family without waiting for a partition by metes and bounds." What their Lordships appear to lay down in the passage cited is that a decree directing partition has the same effect as an agreement to divide. In the particular case the decree-holder who had obtained the decree above referred to died while an appeal was pending to the Privy Council, but the decree was nevertheless confirmed by their Lordships on a judgment which is not reported. The report deals with two consolidated appeals, one against an order in execution of the previous decree and another against the dismissal by the High Court of an appeal from a decree of the District Court dismissing a fresh suit filed by the defendant in the previous suit on the ground that the previous decree had not served the joint family, and that consequently the property passed to him by survivorship on the death of the plaintiff in the previous suit. It does not appear to have occurred to any one in this hotly contested litigation that, assuming the first decree effected a

1. (1878) I.L.R. 4 C. 434; s. c. 5 I.A. 228. 2. (1866) 11 M.I.A. 75.

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severance, the subsequent death of the plaintiff pending an appeal made any difference. And assuming the law to be correctly laid down by their Lordships that the decree of the court of first instance effected a severance, there does not appear to be any reason why the subsequent filing of an appeal should be held to effect a reunion and justify the appellate court in making a fresh distribution of shares according to the condition of the family at the date of the decision of the appeal, and so depriving parties or their representatives of the shares originally allotted to them. In *Chidambaram Chettiar* v. *Gauri Nachiar*[1] which also came before the Privy Council, the District Judge tried the first issue as to whether the Zemindari was partible first, and in his judgment held that it was, and that, this being so, the plaintiff was admittedly entitled to partition. It was not clear if any decree or order had been drawn up on this judgment, but on appeal from the decree of the High Court affirming the final decree of the District Court, their Lordships held that the judgment of the District Judge on the first issue was equivalent to a declaratory decree and rendered the parties separate in estate, if they had not already been so, and that the subsequent death of the plaintiff before the final decree of the District Court did not make any difference or cause the suit to abate. Their Lordships, no doubt, observed that the defendant had not appealed from the judgment of the District Court on the first issue and appeared to have acquiesced in it, but these remarks were probably due to the fact already mentioned that no decree or order directing partition was forthcoming, and it does not appear that the result would have been different if these features of the case had been absent. The ruling in *Sangili* v *Mookan*[2] that the plaintiff's share must be determined with reference to the condition at the date of the final decree in the suit, is opposed to both of the Privy Council decisions above mentioned although the actual decision may possibly be supported on other grounds, as in that case the only decree passed by the lower court was set aside. As regards *Sakharam Mahadev Dange* v. *Hari Krishna Dange*[3] the decision rests on the proposition that the decree of the Subordinate Judge in that case did not operate as a severance so long as it remained

1. (1879) I.L.R. 2 M. 83.
2. (1893) I.L.R. 16 M. 350 at 353.
3. (1881) I.L.R. 6 B. 113.

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under appeal. For the reasons already given, I prefer to follow the decision of this court in *Subbaraya Mudali* v *Manicka Mudali*[1] and dismiss the second appeal with costs.

Sankaran Nair J.:—I agree and I have only to add that I believe the practice in this Presidency has always been in accordance with the law as laid down in *Subbaraya Mudali* v. *Manicka Mudali*[1].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Benson, Mr. Justice Munro and Mr. Justice Sankaran Nair.*

Chinnu Pillai, minor, by guardian Ramachandram Pillai .. Appellant* (*3rd Defendant*)

v.

Kalimuthu Chetti .. Respondent (*Plaintiff*).

Ramachandram Pillai v. Kalimuthu Chetti.

Hindu Law—Joint family—Alienation of undivided share—Alienee's rights—Fluctuation of share.

The mortgagee of a Hindu is entitled to proceed against the share of a son subsequently born in the family property mortgaged to him. An alienee of the interest of an undivided co-parcener in a joint Hindu family takes the co-parcener's interest as it stood on the date of alienation.

Second appeal from the decree of the District Court of Coimbatore in A. S. No. 113 of 1906, presented against the decree of the Court of the District Munsif of Udumalpet in O. S. No. 671 of 1905.

T. Ethiraja Mudaliar for appellant.

The Advocate-General (*P. S. Sivasawmi Aiyar*) for respondent.

This second appeal coming on for hearing in the first instance† before Mr. Justice *Benson* and Mr. Justice *Krishnaswami Aiyar*, their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH:—The suit is on a mortgage executed by the 1st defendant. It is found that at the date of the mortgage he was entitled to a fifth share in the family properties. Subsequent to the mortgage the 1st defendant had a son, the 3rd defendant. There appears to have been

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* S. A. No. 736 of 1908. 27th January 1911.

† 30th March 1910. 1. (1896) I.L.R. 19 M. 345.

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a partition under which the 3rd defendant got half of one-fifth or a tenth share in the family properties. He objects to a decree being passed against his half share in the one-fifth of the properties which belonged to his father. The District Judge having decided against this contention, the appellant relies on *Rangasami* v. *Krishnayyan.*[1] There the vendor was entitled to a third at the sale. Two brothers and a son were subsequently born. The Full Bench held that the purchaser did not take the share as it stood at the date of sale but the diminished share to which the vendor was entitled at the date of the partition in the purchaser's suit. The vendor's share would be reduced to a fifth by the birth of two brothers, and to a tenth by the further birth of a son to himself. The Division Bench was of opinion that the result of the decision of the Full Bench was that the purchaser could only take a tenth.

It is argued by the learned Advocate General that the Full Bench had overlooked the decisions of the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Singh*[2], *Suraj Bunsi Koer* v. *Sheo Persad Singh*[3] and *Hardi Narain Sahu* v. *Ruder Perkash Misser*[4]. Those decisions appear to proceed on the view that the share taken by the vendee or mortgagee from one member of the undivided family is what the vendor or mortgagor was entitled to at the date of the sale or mortgage. It was pointed out by Sir *V. Bashyam Ayyangar* J. in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramaya*[5] that the decision of this court in *Rangasami* v. *Krishnayyan*[6] was inconsistent with the decisions of the Privy Council above referred to though the other learned Judges, the *Chief Justice* and *Moore* J. refrained from expressing any opinion on the question. It seems difficult to contend in the case of a son born subsequent to a mortgage by the father that he takes more than the equity of redemption in a moiety. See *Bholanath Khettry* v. *Kartick Kissen Das Khettry*[7] and *Ajodhya Roy* v. *Hardwar Roy*[8]. We might have rested our decision on this narrower ground and supported the decree of the District Judge by holding that as against the son subsequently born the mortgagee could sell the whole of the father's interest at the date of the

1. (1890) I. L. R. 14 M. 408.
2. (1877) I. L. R. 3 C. 198.
3. (1878) I. L. R. 5 C. 148.
4. (1883) I. L. R. 10 C. 626.
5. (1902) I. L. R. 25 M. 690.
6. (1890) I. L. R. 14 M. 408.
7. (1907) I. L. R. 34 C. 372.
8. (1909) 9 C. L. J. 485.

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mortgage but for the fact that in *Rangasami* v. *Krishnayyan*[1], the Division Bench held that the son's interest did not pass by the sale of the father's interest before the son was born. It is not easy either to see how, if the father's interest could be reduced by the birth of brothers, it should remain unaffected by the birth of a son. The interests of the subsequently born brothers were carved out of their father's interest as much as the interest of the son was carved out of his own father's share. We feel therefore constrained to think that the birth of brothers as well as the birth of a son must lead to the same consequences as regards the effect of a prior sale or mortgage. As we think the doubts entertained by *Bhashyam Ayyangar* J. are well founded about the correctness of the decision in *Rangasami* v. *Krishnayyan*[1], we must refer to the Full Bench the following question :—

Whether the mortgagee of a Hindu is entitled to proceed against the share of a son subsequently born in family property mortgaged to him.

T. Ethiraja Mudaliar.—By a mortgage by a father, only his share passes and not the share or shares of the sons, and that too, as it will be at the time the creditor's right is worked out by a partition suit. [*V. K. Aiyar* J.—If so all the Privy Council decisions from the earliest times which have held that the son's share also is available at execution are wrong. If the share of the son living at the date of the mortgage be held to pass at the execution it does not stand to reason that the unborn son's share should not pass.] The question in each case is what was actually bargained for and alienated—*Rangaswami* v. *Krishnayyan* [1]. Otherwise it is a fluctuating interest [*V. K. Aiyar* J.—Then does the share come to zero if the alienor dies before partition?] No. The alienee has a vested interest, and he stands in the position of his alienor only taking such share as his alienor would get had he been alive at the time of partition. This is the view of the above mentioned Full Bench case at p. 419. [*V. K. Aiyar* J.—It is an elementary rule that if one joint-tenant alienates his share then the joint-tenancy is at an end. Then why should there be any fluctuation?] *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*[2] decides that

1. (1891) I. L. R. 14 M.408. (F. B.) 2. (1902) I. L. R. 25 M. 690.

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the death even of the alienor does not divest the interest vested in the alienee by the alienation; but as it was not necessary to decide in that case the share of the alienee as it was the same on the date of alienation and on the date of sale, it is no authority on the point now in question. On the facts of *Deen Dyal Lal* v. *Jugdeep Narain Singh*[1] and *Suraj Bunsi Koer* v. *Sheo Persad Singh*[2] the decisions therein are not inconsistent with my view. I explain *Hardi Narain Sahu* v. *Ruder Perkash Miser*[3] as the shares were the same at both dates and moreover this point was not necessary to be decided by the Privy Council, the appeal being by the purchaser. [*V. K. Aiyar* J.—Look at the words at top of page 637: "the sons are parties to the appeal in respect of her (mother's) share". That shows that the mother's third share was carved out already though she died between the date of the High Court judgment and that of the Privy Council. It does not say that the father's share was reduced by the birth of a new son.] I rely strongly on the answer given to Mr. Doyne at page 636 in *Hardai Narain's case*. [*The Advocate-General* drew the attention of the court to the words "as if the sale was to operate as a partition at that time" in p. 636 and to a passage in *Balgobind Das* v. *Narain Lal*[4] at the top of page 348.] I refer to *Gurulingappa* v. *Nandapa*[5].

The Advocate-General—quoted *Virayya* v. *Hanumantha*[6] to show that an increased share was given on account of deaths in the family. The share of the alienee would be the share as on the date of alienation. I explain the answer given by the Privy Council to Mr. Doyne, at p. 636 in *Hardai Narain's case*, as referring to the father's share not when a partition is worked out but as to his share if no partition is made. This is so if we refer to Mr. Doyne's argument. [*V. K. Aiyar* J.—In the case of alienation of one member's share in one single property why should the alienee sue for general partition and not for partition of that property alone if the alienation is to be a transfer of a definite share?] That depends upon the equity in favour of other coparceners, that will have to be worked out only in a general partition. [*V. K. Aiyar* J.—The Privy Council itself talks of the fluctuating interest of a member from the time of *Appuvier* v. *Ramasubbier*[7].]

1. (1877) I. L. R. 3 C. 198 (P.C.)
2. (1879) I.L.R. 5 C. 184 (P.C.)
3. (1883) I. L. R. 10 C. 626 (P. C.)
4. (1893) I. L. R. 15 A. 339 (P.C.)
5. (1896) I. L. R. 21 B. 797, 806.
6. (1890) I. L. R. 14 M. 456.
7. (1866) 11 M. I. A. 75.

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T. Ethiraja Mudaliar referred to *Parvati* v. *Naunihal Singh*[1] which referred to *Lord Westbury's* dictum in *Appoovier's case.*[2]

This second appeal coming on for hearing* before a Full Bench consisting of Sir Charles Arnold White, Chief Justice, Mr. Justice Benson, Mr. Justice Munro, Mr. Justice Sankaran Nair, and Mr. Justice Krishnaswami Aiyar and the case having stood over for consideration till this day, and the case having been posted for judgment this day, and on the Advocate-General raising a question as to the validity of the judgment in consequence of Mr. Krishnaswami Aiyar's resignation of office before delivering the judgment, the Chief Justice made the following

ORDER :—I directed the question raised in this order of reference to be argued before a Bench of 5 Judges. The question was argued before a Bench of 5 Judges of whom the Honourable Mr. Krishnaswami Aiyar was one. The Honourable Mr. Krishnaswami Aiyar has now resigned his office. After the hearing of the arguments, he wrote what he intended to deliver as a judgment. The Advocate-General has suggested that the judgment or opinion of the Honourable Mr. Krishnaswami Aiyar cannot be treated as a legal judgment since he resigned office before it could be delivered. The Advocate-General has also suggested that a question might be raised as to the validity of the judgment of a Bench consisting of four judges, since the tribunal would not be constituted as directed by my order.

To prevent the possibility of any difficulty arising, I now direct that the question raised in the order of reference be heard before a Full Bench consisting of the four judges who with the Honourable Mr. Krishnaswami Aiyar constituted the Full Bench on the previous occasion. The Advocate-General and Mr. Ethiraja Mudaliar argued† the question on the previous occasion. They are now present, but they say they do not desire to add anything to their arguments.

The Judgment of the Full Bench will accordingly be delivered.

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1. (1909) I. L. R. 31 A. 412 at 421 (P C.) 2. (1866) 11 M.I.A. 75.

* 6th January 1911. † See page 248 *et seq.*

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This second appeal accordingly coming on for hearing before the Bench as constituted above, the Court expressed the following

OPINION :—*Chief Justice* :—I would answer the question which has been referred to us in the affimative.

As pointed out by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*[1] an alienation by a co-parcener of his joint interest in family property is inconsistent with the strict theory of a joint and undivided Hindu family. But the doctrine recognizing this right is well established in this Presidency, and it seems to me to be only the logical development of this doctrine that, for the purpose of ascertaining the quantum of interest alienated, the test to apply should be the state of the family, as regards the number of co-parceners, at the time the alienation is made, and not the state of the family when the owner of the interest seeks to reduce his interest into possession. Seeing that the right of alienation is really inconsistent with the theory of the undivided family, it is perhaps not unnatural that the courts have shrunk from recognising the development of the doctrine to what seems to me to be its logical conclusion. The question came before a Full Bench of this court in *Rangasami* v. *Krishnayyan*[2]. In the order of reference in the case the learned Judges observe :—"He (that is, the member of the family who alienates his joint interest) cannot put his alienee in a better position than himself, and thereby prejudice his co-parceners, and the alienee, therefore, must be liable, until he obtains partition, to the same fluctuations in the amount and value of the share caused by changes in the number and circumstances of the family, as his alienor would have been liable to, had the alienation not taken place. It was pressed upon us in argument that if this be so, the purchaser might in some cases take nothing, for his vendor might die before anything was done to enforce the purchase, and also that if the purchaser is to be liable to have what he has purchased diminished by changes in the family he must also have the benefit if such changes should increase the share of his vendor. It seems to us that both these consequences logically follow from the legal position which the alienee occupies, and we do not see that they involve any absurdity. He

1. (1879) I. L. R. 5 C. 184. 2. (1890) I.L.R. 14 M. 408.

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who purchases the interest of a member of an undivided family in the family property purchases that which is from its nature uncertain, and the purchase must always partake of the nature of a speculative transaction; but he knows perfectly well what he is buying, and is not to be pitied if he gets less than he hoped for, any more than he is to be blamed if he gets more."

This seems to me a perfectly logical and intelligible position, but it is a position which the Full Bench declined to accept. In the Full Bench case the doctrine is stated thus:—"The purchaser, who can only take what can be lawfully sold, must be taken to purchase an uncertain and fluctuating interest with the right of converting it at any moment after the purchase by partition into definite separate property." But the learned Judges were not prepared to apply this doctrine to a case where the interest alienated increased by reason of a diminution in the number of coparceners. On principle, it is very difficult to see why it should not be so applied. If the interest is liable to fluctuate one way, why should it not fluctuate the other? In dealing with the contention that, if the vendor dies before the purchaser effects a partition, the purchaser will take nothing, their Lordships observe:—"If it is necessary to notice it as an objection to the rule of decision indicated above, the answer is that the interests carved out by the sale vest in the purchaser at once and that the vendor being competent to sell, his subsequent death is an event which cannot divest the interest which has once vested; and for the purpose of giving effect to his contract of sale the purchase must be dealt with as if the seller were alive when the purchaser demands partition." With the greatest respect, it seems to me that if this proposition is effective as an answer to the contention as to the right of survivorship on the death of the alienor, it is just as effective as an answer to the contention that after an alienation the quantum of the interest alienated is liable to be affected by a change, whether by way of increase or decrease in the number of co-parceners.

In *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya*[1] a Full Bench, of which I was a member, held that the death of the co-parcener who had the alienation did not divest the interest of the alienee. The question whether the decision in

1. (1902) I. L. R. 25 M. 690.

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Rangasami v. *Krishnayyan*[1] was right was raised in this case; but as we were able to answer the question referred to us without expressing an opinion on this question, *Moore* J. and I did not think it necessary to discuss it. But it seems to me that when once it has been held that the death of the alienor does not create any right of survivorship in the other co-parceners, it follows, almost as a necessary corollary, that the quantum of the interest which vests in the alienee is not affected by subsequent changes in the number of co-parceners.

The general question is discussed by Sir *Bhashyam Iyengar* in his judgment in *Ayyagari Venkataramayya* v. *Aiyyagari Ramayya*,[2] and I am prepared to accept the conclusions at which he arrives as containing the true exposition of the law of this Presidency upon the subject.'

As I have said, I would answer the question in the affirmative.

Benson J.:—I am of the same opinion. The question is really concluded by the decision of the Privy Council in the case of *Hardi Narain Sahu* v. *Ruder Perkash Misser*.[3] As pointed out by Sir *Bhashyam Iyengar* "in that case a creditor obtained a decree for money against the father only and in execution attached, caused to be put up for sale, and himself bought, the right, title and interest of the judgment-debtor in certain property which belonged to him and to his minor son jointly, and obtained possession. Shortly afterwards, the judgment-debtor made a gift of his interest in the family property in favour of his minor son. A suit was thereupon brought on behalf of the minor son to recover the whole of the property purchased by the decree-holder. During the pendency of the suit another son was born to the judgment-debtor and it was contended before the High Court that a share should be allotted to such son also. The High Court, however, following the decision of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Pershad*[4] overruled this contention and held that the property which passed to the defendant—the purchaser—was the share and interest of the father which would have been allotted to him if a partition of the family

1. (1890) I. L. R. 14 M. 408.
2. (1902) I. L. R. 25 M. 690.
3. (1883) I. L. R. 10 C. 626.
4. (1878) I. L. R. 5 C. 148.

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property had taken place just before the execution sale and that as the family at that time consisted only of the father, his wife and one son, the father was entitled to one-third share and that such one-third share ought to be allotted to the defendant—the purchaser—and the other two-thirds, to the minor plaintiff and his mother. The case was carried in appeal to the Privy Council by the defendant—the purchaser—principally on the ground that the sale should be upheld in its entirety as it was not shown that the decree debt was contracted by the father for any illegal or immoral purpose. The Judicial Committee affirmed the decision of the High Court, holding that the purchaser became entitled only to one-third which would have been the share that would have been allotted to the father if a partition had taken place *at the time of the sale.* Pending the appeal to the Privy Council the mother died, but the decision of the Privy Council proceeds on the footing that "neither the birth of the second son after the date of the execution sale, nor the subsequent death of the mother before a partition was effected, affected the share to which the purchaser became entitled *at the date of the execution sale.*" (*Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya*[1]). In the Full Bench case of *Rangasami* v. *Krishnayan*[2] there was no reference to the decision of the Privy Council summarized above. In my opinion the latter cannot be reconciled with it. Their Lordships indicate clearly enough that the alienee takes the interest of the alienor as it exists at the time of the alienation, not at the time of partition. This conclusion also seems to be the logical and almost necessary consequence of the rule established in this Presidency by a long course of decisions that an alienation by sale, mortgage or otherwise, by an undivided member of his interest in the whole or any part of the joint family property in favour of a purchaser for value is valid as between the transferor and the transferee. Any other conclusion than that above stated would lead to great practical inconvenience and injustice. It is, however, unnecessary to dwell on this line of argument as the matter is concluded by the authority of the Privy Council. I would answer the reference in the affirmative.

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1. (1902) I.L.R 25 M. at p. 709. 2. (1890) I.L.R. 14 M. 408.

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Munro & Sankaran Nair J. J.

Munro J. :—I agree that the question should be answered in the affirmative and have nothing to add.

Sankaran Nair J. :—The question is whether the alienee of the interest of a co-parcener is entitled to enforce his claim against the co-parcener's share as it stood at the time of the alenation or the share that the vendor is entitled to at the time he brings his suit for partition.

If, as argued on behalf of the appellant, he is only entitled to recover the reduced share that the vendor may be entitled to at the time of the partition on the ground that, according to the theory of the Hindu Law, a co-parcener's interest is liabl to fluctuation, to increase by death, decrease by birth of other co-parceners, to extinction by his own death, then it appears to me that, on the death of the co-parcener, the alienee is not entitled to enforce the alienation in his favour at all, as the alienor's interest survived to the others on his death. On the other hand, it is only right that the purchaser must in that case have the benefit of an increase, if any, in the share of his vendor.

As pointed out by the Judicial Committee all alienations by a co-parcener, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family, and the law recognizing the validity of the alienation as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights to a partition—see *Suraji Bunsi Koer* v. *Sheo Persad Singh* [1]. I do not think, as the alienation itself is inconsistent with the theory of Hindu law, we are likely to derive much help from a consideration of the Hindu law texts in the determination of this question. The creditor's equity which is the basis of the Madras and Bombay decisions subsists even after the death of the coparcener ; and I entirely agree therefore, if I may say so, with the Full Bench decision in *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*,[2] which follows prior decisions that the mortgagor or vendor is entitled to enforce his claim after the coparcener's death. Further I do not see how it can be said that his equity does not subsist to the same extent as before.

1. (1878) I. L. R. 5 C. 148 at p. 166. 2. (1902) I. L. R. 25 M. at 690.

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Again it would be entirely against the principle of equity on which these decisions are based to give the alienee anything more than the value of the consideration advanced by him; or in other words, the principle of the decisions would not justify the courts in giving him the increased share to which the co-parcener may have become entitled. This shows that we have to reject the strict theory of the Hindu Law in the ascertainment of the share; and if the purchaser is not to be entitled to an increased share, I do not see how we are to say he can get only the reduced share in the other contingency.

As the doctrine is based on equity, it is more consistent with equitable principles to hold that the purchaser gets the share which his vendor was entitled to at the time of alienation rather than that he gets a fluctuating share with the result that it will depreciate the value of property and impart to the alienation the nature of a gambling transaction. I have not referred to the cases decided by the Privy Council referred to in the argument, as I do not think there is any final decision by their Lordships or that the question was before them for decision. However, the opinions incidentally expressed by their Lordships in some cases are of very great weight and, as they accord with the view I have expressed, I do not propose to refer to them in detail. I accordingly hold that the plaintiff, the alienee, is entitled to enforce his claim against the share to which the vendor was entitled at the time of the alienation and in the case before us the mortgagee is therefore entitled to proceed against the share of the son subsequently born.

Note.—Appended under the orders of the Chief Justice:—The following was written by the Honourable Mr. Krishnaswami Aiyar, as a judgment to be delivered, before he resigned his office as a Judge of this Court.

The statement of facts made in the order of reference is somewhat inaccurate. The mortgagor would at the date of the mortgage be entitled to a fourth and not a fifth share in the family properties. A brother and a son were subsequently born. The plaintiff who is the mortgagee is content to have a decree on a fifth share in the mortgaged property. The lower appellate court has given that decree and he has not

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chosen to appeal against it. The son, who is the 3rd defendant, contends that his one-tenth share should be exonerated from liability. If the son were alive at the date of the mortgage, his share in the property would be bound by it, as the mortgage was apparently for an antecedent debt and not tainted with illegality or immorality. His interest is *a fortiori* liable if he was not in existence at the date of the mortgage. He succeeds only to a moiety of the father's equity of redemption. See *Bholanath Khettry* v. *Kartick Kissen Das Khettry* [1] and *Ajodhya Roy* v. *Hardwar Roy*.[2] This aspect of the matter appears to have been overlooked by the Full Bench in *Rangasami* v. *Krishnayyan*,[3] and by the Division Bench that finally disposed of that case. The vakil for the appellant fairly admitted before us that he had no answer to this view of the case.

The more important question raised by the order of reference is practically whether the decision of the Full Bench in *Rangasami* v. *Krishnayyan* [3] is right. It appears to me that we are bound to answer it in the negative. That case decided that the share to which the mortgagee or purchaser is entitled should be determined as at the date of the suit for partition. What the alienor would be entitled to, whether alive or not, at the date of the suit for partition, is according to the Full Bench what the alienee is entitled to, subject to this reservation that, if the alienor's share would then be more than at the date of the alienation, the alienee, if he had bargained for less, would not be entitled to the increased share. In other words, the alienee gets a fluctuating share actually ascertainable only at the date of the suit for partition, though such fluctuation can only be to reduce but not ordinarily to increase the share of the alienee.

It is in the first place not easy to understand why the date of the suit for partition and not the date of the decree for partition should settle the share of the alienee. In an ordinary suit for partition the sharers in existence at the date of the decree, and not at the date of suit, determine the share of each. The same rule must apply to the case of an alienee suing for partition, if the date of the alienation itself be not the determining factor as regards the quantum of the alienee's interest.

1. (1907) I.L.R. 34 C. 372. 2. (1909) 9 C. L. J. 485
3. (1890) I.L.R. 14 M. 408.

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What is the principle on which the date of the alienation is not to determine the share of the alienee? It is said "that the alienee cannot be in a better position than the alienor" and that "the purchaser must be taken to purchase an uncertain and fluctuating interest with the right of converting it at any moment after the purchase by partition into definite separate property." I admit that the alienee should not be in a better position than the alienor, but when? I answer, at the date of the alienation and not at some subsequent date when the alienor's share might be reduced by the birth of other members into the co-parcenary if he had not made the alienation. What ground is there for supposing that the alienee purchases a fluctuating interest? The interest would no doubt fluctuate if there was no alienation. That is an incident of co-parcenary property. But the very fact of alienation by a co-parcener puts an end to the fluctuating character of the property alienated. Joint tenancy is destroyed by severance and an alienation by a joint tenant effects a severance. The fluctuating character of a joint tenant's interest ceases in the hands of his alienee—WILLIAMS' *Real Property*, 20th Edition, page 138; *Jogeswar Narain Deo* v. *Ramchund Dutt*[1]. The alienee becomes a tenant in common—*Kallapa Bin Girimallapa* v. *Venkatesh Vinayak*[2]; *Undaram Sitaram* v. *Ranu Panduji & Venku Panduji*[3]; *Mahabalaya Bin Parmaya* v. *Timaya Bin Appaya*[4]. *Appuvier's case*[5] no doubt held: "According to the true notion of an undivided family in Hindu Law, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property, that he—that particular member—has a certain definite share until partition." That is the law still—see *Parbati* v. *Naunihal Singh*[6]. But it does not follow from this that if a co-parcener alienates his interest in family property the alienee has until actual partition no definite share in the property. Like the alienee from a joint tenant in England the alienee from a co-parcener in India has a fixed share in the common property with reference to the date of alienation. Where the alienor dies before the alienee institutes a suit for

1. (1896) I.L.R. 23 C. 670 (P.C.)
2. (1878) I.L.R. 2 B. 676.
3. (1874) 11 B. H. C. R. 76 at p. 81.
4. (1875) 12 B.H.C.R. 138.
5. (1866) 11 M. I. A. 75.
6. (1909) I. L. R. 31 A. 412 at p. 421.

partition the alienee's share does not dwindle into nothing. The Full Bench in *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya*[1] has settled that. The learned judge who delivered the judgment of the Full Bench in *Rangasami* v. *Krishnayyan* [2] took the same view and explained it by saying that "the interest carved out by the sale vests in the purchaser at once" and "the purchase must be dealt with as if the seller were alive when the purchaser demands partition." If this be so with reference to a seller dying before the purchaser sues for partition, why should it be different when the co-parcenary is enlarged by the birth of other members. It is difficult to see why the interest of the co-parcener who makes the alienation should not vest likewise in the purchaser to the extent of whatever share he would then have on a partition. With reference to the case of the co-parcenary being reduced in numbers subsequent to the alienation it is said that the alienee may not get an increased share if he bargained for less. The decision in *Virayya* v. *Hanumanta* [3] is not opposed to this view, for it proceeded on the provision contained in S. 43 of the Transfer of Property Act of "interest feeding the estoppel." If a fluctuating interest may dwindle, parity of reasoning would require that it should also expand. This, apparently the learned judges in *Rungasami* v. *Krishnayyan* [2] were not prepared to accept, though the referring judges in that case were of that opinion. Mr. Justice *Shephard*, one of the judges who composed the Full Bench, is not apparently prepared to stand by *Rangasami* v. *Krishnayyan*,[2] for he says in his Commentaries on S. 44 of the Transfer of Property Act, VIth Edition, page 144: "In the case of a sale by a co-parcener of his share of the family property, the better opinion seems to be that the extent of the interest purchased must be determined with reference to the state of things at the date of the sale", and he relies on the observations of Sir *Bhashyam Iyengar* J. in *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya*. [1] The whole question is fully threshed out in the exhaustive judgment in that case. It is difficult to add anything to the trenchant reasoning of the learned judge. *Gurulingappa* v. *Nandappa*[4] has quoted *Rangasami* v. *Krishnayyan*,[1] with approval, and in fact the proposition

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1. (1902) I. L. R. 25. M. 690.
2. (1890) I. L. R. 14 M. 408.
3. (1890) I. L. R. 14 M. 459.
4. (1197) I.L.R. 21 B. 797.

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is in terms laid down "that the purchaser like the alienor is liable to have his share diminished upon partition by the birth of other co-parceners." But, beyond following the decision of this court on the point now under consideration, that case adds nothing to the reasoning on which the decision rests.

There are numerous difficulties in accepting the view of the Full Bench as correct. In the case of a mortgage by a co-parcener of his interest, if the date of the mortgage does not determine the *quantum* of interest of the alienee, why should the date of the suit on the mortgage determine it? The suit does not separate the share nor the decree in the suit. The interest of the mortgagor may be bought in court sale, but the purchase also does not separate the share. The purchaser may sue for partition, but the suit itself does not operate as a severance. The share of the alienor might be fluctuating backwards and forwards in these several stages from the mortgage to the decree for partition.

Again, it is anomalous to hold that the alienor's share may go on dwindling but cannot vanish. The authority of the Privy Council is clear that the purchaser must have the alienor's share though he may be dead when the purchaser sues for partition *as if he were then alive*. Suppose the alienor is dead but further additions have been made to the co-parcenary; is the share of the alienee to be taken as at the date of the alienor's death or as at the date of the suit for partition when there are more co-parceners?

It appears to me that the only sound rule to adopt in the matter is to fix the share of the alienee as at the date of the alienation. The authority of the Privy Council may also be invoked in support of this view. It is no doubt true, as contended by the learned vakil for the appellant, that in none of the cases relied on—*Deendyal* v. *Jugdeep Narain Singh*,[1] *Suraj Bunsi Koer* v. *Sheo Persad Singh*,[2] *Hardi Narain Sahu* v. *Ruder Perkash Misser*[3] and *Balgobind Das* v. *Narain Lal*[4]—did the question arise for decision. But the language of the Privy Council does not leave any room for doubt as to their meaning.

1. (1878) I.L.R. 3 C. 198. (P. C.) 2. (1879) I.L.R. 5 C. 148. (P. C.)
3. (1883) I.L.R. 10 C. 626. (P. C.) 4. (1893) I.L.R. 15 A. 339. (P. C.)

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In *Deendayal* v. *Jugdeep Narain Singh*,[1] they say at page 209: "The right of the purchaser at the execution sale (of the father's interest) may be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, *before the alienation of his share took place*." This language may perhaps be explained by saying that the period anterior to the alienation is referred to, because the debtor could only then have sued for partition of the property. In *Suraj Bunsi Koer* v. *Sheo Persad Singh* [2] their Lordships of the Judicial Committee state at p. 164: "An intermediate proposition between the extreme contentions on both sides is that the sale would be operative upon the right, title and interest of the judgment-debtor in the property put up for sale, so as to pass the share to which, upon a partition effected during his life-time, he would have been entitled." At page 174 they proceed to say: "The mortgage executed by Adit Sahai in his life-time, as a security for the debt, might operate after his death as a valid charge upon Mouza Bissumbhurpur to the extent of his own *then* share." This may mean the share to which she was entitled either at the date of the mortgage or during his life-time. It does not appear that the share varied afterwards. The Privy Council does not speak of the share of Adit Sahai as if he were alive at the date of the partition. Adit Sahai was dead at the date of the court sale. They made a declaration in favour of the purchaser that he was entitled to the 3rd share of Adit Sahai which he possessed in his life-time and which he also mortgaged. *Hardi Narain Sahu* v. *Ruder Perkash Misser* [3] is a stronger case. The purchaser at the court sale of the father's interest was held entitled to his one-third (he had at that time a wife and one son) treating it as if the sale was to operate *as a partition at that time*. The appeal to the Privy Council was by the purchaser claiming the whole property. The Privy Council negatived that claim. He then asked for a moiety instead of the third which the High Court gave him on the footing of partition as at the date of sale. Mr. Doyne who appeared for the appellant contended that the mother was no co-parcener and he was therefore entitled to a moiety. The Privy Council did not say that, the mother having died and

1. (1878) I.L.R. 3 C. 198. 2 (1879) I.L.R. 5 C. 148.
3. (1883) I. L. R. 10 C. 626.

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another son having been born pending the appeal to their Lordships, he was only entitled to a third as a purchaser from one of the three co-parceners, but that the purchaser only obtained the share which the father would take if a partition took place at the date of the sale. They added that the two sons were parties to the appeal in respect of the share which the mother was entitled to take at a partition. I am inclined to think that there is an express pronouncement in this case which is against the view taken by the Full Bench in *Rangasami* v. *Krishnayyan*[1]. The observation in *Balgobind Das* v. *Narain Lal*[2] is a mere repetition of the remark in *Deendyal* v. *Jugdeep Narain Singh*[3], to which reference has already been made and may be similarly explained.

The purchaser from a co-parcener of his share in all the family property or in one of several items belonging to the family may not succeed in a suit for partition in getting the share allotted to him or the item that he purchased. But that is because there may be liabilities which attach to the share of the co-parcener making the alienation. The equities between the co-parceners may reduce the share of the alienating co-parcener in the property alienated. But such equities or liabilities must only be determined with reference to the date of alienation. Future contingencies of births and deaths do not stand on the same footing as conditions and liabilities existing at the date of the alienation which are referred to in S. 44 of the Transfer of Property Act. These latter incidents of a co-parcenary interest do not conflict with the principle that an alienee from one of several co-parceners takes the interest which may be carved out at the date of alienation.

I would answer the question referred to the Full Bench in the affirmative.

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1. (1890) I.L.R. 14 M. 408. 2. (1893) I.L.R. 15 A. 339 at p. 348.
3. (1878) I.L.R. 3 C. 198.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Tellapragada Surya Narayana Rao .. Appellant* (*Plaintiff*)

v.

Tellapragada Sarabhaiah .. Respondent (*Defendant*).

Arbitration—Award—Appeal—Invalid award—C. P. C, XIV of 1882, *Ss.* 522, 520, 521, 523, 525.

Per *Curiam* :—Where an agreement to refer matters in dispute to five named arbitrators is filed under S. 523 of C. P. C. of 1882 and, on the refusal of two arbitrators to act and their subsequent death, the court appoints new arbitrators in their stead and three of the old and the two new arbitrators make an award and the court passes a decree in accordance with it, no appeal lies on the ground that the award is illegal.

Per *Chief Justice* and *Ayling* J.:—The very object of S. 522 seems to have been to prevent the question of the validity or otherwise of the award being raised when matters have reached the stage of judgment according to the award.

Semble.—Obiter.—Under S. 520, C. P. C. (1882) an alleged defect in the tribunal which gave the award is no ground for remitting it nor is it a ground for setting aside the award under S. 521.

Per *Krishnaswami Aiyar* J:—The *ratio decidendi* of the decision in *Ghulam Khan* v. *Mahomed Husain* [1] is that in cases of awards in pending suits the language of the last clause of S. 522 limited the right of appeal. As regards cases falling under Ss. 523, 525, C. P. C. (1882), the judgment of the Privy Council is clear that the order filing the agreement or the award, or refusing to file it is a decree and appealable under S. 540 without reference to anything in S. 522. If after such filing of the agreement or award, and in the former case after the award is delivered, no objection is allowed under S. 520 or 521 and a decree is made in pursuance of the award, the last clause of S. 522 would seem to apply as a matter of course.

Second appeal from the decree of the Subordinate Judge's Court of Kistna at Ellore in A. S. No. 377 of 1906, presented against the decree of the Court of the District Munsif of Narasapur in O. S. No. 566 of 1905.

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* S. A. No. 346 of 1909. 20th December, 1910.

1. (1901) I. L. R. 29 C. 167 (P. C.)

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This second appeal coming on for hearing in the first instance before Mr. Justice *Munro* and Mr. Justice *Krishnaswami Aiyar*, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.†—*Munro J.*—I adhere to the opinion expressed by *Abdur Rahim* J. and myself in *Kanakku Nagalinga Naik* v. *Nagalinga Naik*,[1] but as my learned brother desires it, the question he propounds wll be referred to a Full Bench.

Krishnaswami Aiyar J.—There was an agreement to refer matters in difference between two brothers to arbitration. One of them applied to the court to file the agreement under S. 523 of the code. The court ordered the agreement to be filed and referred the suit to the arbitrators named. Five arbitrators had been named, but two of them refused to act. The remaining three made an award. This was clearly illegal—*Thammiraju* v. *Bapiraju* [2] and *Nand Ram* v. *Fakir Chand*.[3]. It was not a legal award. (See *Little* v. *Newton* [4], *Stalworth* v. *Inns* [5] and *United Kingdom Mutual Steamship Assurance Association* v. *Houston & Co.* [6]; also RUSSELL on *Arbitration*, pp. 154 and 155 (Edition 1900). But the Munsif accepted the award and passed a decree in accordance with it. The defendant appealed. No question was raised whether the appeal was competent. The District Judge reversed the Munsif's decree, holding that the Munsif should appoint additional arbitrators under S. 510 in the place of those that had refused, and remanded the case. This order was apparently wrong. The arbitrators who refused never having consented, there was no power to appoint new arbitrators in their stead. See *Bala Pattabhirama Chetti* v. *Seetharama Chetti* [7] which was also a case under S. 523, and *Pugardin* v. *Moidin* [8] and *Bepin Behari Chowdhry* v. *Amuda Prosad Mullick*, [9] which were references under S. 506. After remand two arbitrators died. It appears they were the same two who had refused to act. The Munsif appointed two arbitrators in their stead. In the case of one of them the appointment was apparently left to the court by the parties, and in the case of the

† 11th October, 1910.

1. (1909) I. L. R. 32 M. 510.
2. (1888) I. L. R. 12 M. 113.
3. (1885) I. L. R. 7 A. 523.
4. (1841) 2 M. and G. 351.
5. (1844) 13 M. and W. 466.
6. (1896) I. Q. B. 567.
7. (1894) I. L. R. 17 M. 498.
8. (1882) I. L. R. 6 M. 414.
9. (1891) 18 C. 324.

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other the defendant opposed the appointment. But before these new appointments on the 25th April 1905 there was an order of the Munsif revoking the reference. It does not appear why. Nor does it appear how the case came to be sent back to the arbitrators again. It is not shown that there was any order cancelling the revocation. There was an award by the five arbitrators consisting, it is said, of three of the old, and the two new arbitrators. If the revocation was uncancelled, it was a superseded arbitration and no award could be legally made. If the appointment of two more arbitrators in the place of those that had refused to act was legally bad, and we are entitled to say so now, notwithstanding the remand order from which no appeal was prefered (for see *Majoram Ojha* v. *Raja Nilmoney Singh Deo*[1], *Cheda Lal* v. *Badullah*[2], *Savitri* v. *Ramji*[3], *Mohesh Chandra Das* v. *Jamiruddin Mollah*,[4] *Subba Sastri* v. *Balachandra Srstri*[5], though *Subba Lakshmamma* v. *Venkatrayadu*[6] is against this view) there could be no valid award by the five arbitrators. As regards the making of the award after supersession of the arbitration, objection could have been taken under Clause (*c*) of S. 521, though none could be raised as regards the invalidity of the award by the three old and the two new arbitrators under any of the clauses of S. 521. It is difficult to see how the award of the five could be treated as misconduct of the arbitrators, when they had acted in the reference under the authority of the court. But no objection was raised within the time limited by Article 158 of the Limitation Act. A later application to set aside the award was rejected and the Munsif passed a decree in accordance with the award of the five arbitrators. On appeal by the defendant the Subordinate Judge reversed the Munsif's decree and dismissed the suit. On second appeal the plaintiff contends that no appeal lay to the Subordinate Judge and relies on the decision of the Privy Council in *Ghulam Khan* v. *Muhammed Hassan*[7] followed by this court in *Kannakku Nagalinga Naik* v. *Nagalinga Naik*.[8]

There has been considerable difficulty in understanding this decision of the Privy Council. There were great differences of

1. (1869) 13 B. L. R. 198.
2. (1888) I. L. R. 11 A. 35.
3. (1889) I. L. R. 14 B. 232.
4. (1901) I. L. R. 28 C. 324.
5. (1894) I. L. R. 18 M. 421.
6. (1908) I. L. R. 32 M. 318.
7. (1901) I L. R. 29 C. 167.
8. (1909) I. L. R. 32 M. 510.

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opinion as regards the competency of an appeal in the case of orders under S. 523 and 525 as well as in the case of decrees passed under S. 522 upon a submission in a pending suit. Their Lordships of the Privy Council clearly intended an exposition of the law so as to clear the confusion for the future. But, speaking with all humility, it appears to me that the result has not been altogether successful. Dividing the cases of arbitration under three heads, cases of reference in a pending suit, of an agreement to refer being asked to be filed in court, and of an award under a private submission being filed in court, they dealt with the question of appeal in each case. In the first case their Lordships seemed to think, the whole proceedings having been under the supervision of the court, S. 522 limited the right of appeal from the decree following the award to the only two cases of its being in excess of, or not in accordance with, the award. In the cases falling under heads Nos. 2 and 3 their Lordships treated the order causing the agreement to be filed or refusing it and the order causing the award to be filed or refusing the application to file it as a decree from which an appeal lay: see also *Ponnusami Mudali* v. *Mandi Sundara Mudali* [1] and *Thiruvengadathaiyengar* v. *Vaidianatha Aiyar* [2]. The appeal from an order under S. 523 treated as a decree would deal with the truth and validity of the agreement to refer. But once that question is settled, the further stages of the award and of objections to its validity would stand practically on the same footing as upon a reference in a pending suit under S. 506. As pointed out by Mr. Justice *Muthuswami Aiyar* in *Bala Pattabhirama Chetti* v. *Seetharama Chetti* [3], there is nothing inconsistent in the agreement to refer with the application of the provisions enacted as governing the case of a reference in a pending suit to an agreement filed under S. 523. As regards head No. 3, the Privy Council decided that, objections under Ss. 520 and 521 being dealt with by the court to which the application is made for filing the award, an appeal was competent against the order refusing to file the award. But if the original court had overruled the objections and passed the decree in accordance with the award the appeal would apparently be limited to the question of the decree

1. (1903) I. L. R. 27 M. 255. 2. (1905) I. L. R. 29 M. 303.
3. (1894) I. L. R. 17 M. 498.

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being in excess of or not in accordance with the award. It seems difficult to cut down the generality of the language employed by the Privy Council at page 183 of the report, more especially as their Lordships expressed their entire concurrence (see page 185) with the decision of the Chief Court of the Punjab. It may be said that the case before the Privy Council was not itself one which raised a dispute as to the factum of the submission or as to the reality of the award (see pages 177 and 178) and that the general observations of the Privy Council though intended as a guide to the courts in India cannot be treated as an authoritative decision governing a case where the question raised is whether there is an award in law. The decision of the Punjab Chief Court, in which full concurrence is expressed by their Lordships, deals expressly with the cases where a dispute is raised as to the factum of the submission or the existence of an award in law.—see pages 174, 175 and 176. Their Lordships of the Privy Council cannot therefore be deemed to have been unaware of the exact limits to which their decision would be extended.

But the chief difficulty in defining the exact scope of their Lordships' decision lies in the previous decision of the Judicial Committee in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*[1] to which no reference appears to have been made in the argument, and which is not alluded to in the judgment of their Lordships in *Ghulam Khan* v. *Mahammad Hassan*[2]. In that case upon a reference to arbitration in a pending suit an award was delivered by the arbitrators after the time limited by the court. It was an invalid award under the last paragraph of S. 521. But the court passed a decree in accordance with the award without objection by either party as regards the delivery of the award being beyond time, and on appeal the decree was confirmed by the High Court. The Privy Council set aside the decree passed in accordance with the award, apparently holding that an appeal lay, though no particular observations are found in the judgment of their Lordships on the question of the competency of an appeal. Lord *Morris*, delivering the judgment of the Judicial Committee, pointed out at page 304 that, although no objection was taken by the parties, the statute was there and the judges were bound to take judicial notice of it. It is true there is no reference to the provisions of S. 522 but their Lordships quote from a judgment of Mr. Justice *Oldfield* in *Chuha Mal*

1 (1891) I.L.R. 13 A. 300. 2. (1901) I.L.R. 29 C. 167.

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v. *Hari Ram*[1] which dealt with the scope of an appeal under S. 522, and expressed their entire approval of it. See *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*[2]. The question of the competency of an appeal where the decree was in accordance with the award though it was delivered beyond time must therefore have been present to their Lordships' minds when they delivered the judgment in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* [2]. Though there is a fuller exposition of the principles upon which the scope of an appeal under S. 522 rests in *Ghulam Khan* v. *Mahammad Hassan*[3], I find it difficult to suppose that the later decision of their Lordships proceeded on the footing that the earlier one was erroneous, when there is no reference whatever to it in the later judgment. My learned brother has drawn my attention to the references in *Ghulam Khan* v. *Muhammad Hassan*[3], at page 185, to the decision in 84 P. R. 1901 in wich the Chief Judge Mr. *Clark* and Mr. Justice *Chatterjee* pointedly refer at pages 280 and 286 to the Privy Council ruling in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* [2] in support of their view in favour of extended right of appeal. One of these references was to the dissent of the Punjab Chief Court in the later case from their earlier ruling then under appeal to their Lordships. The other was to the view of the Chief Judge that revision was more objectionable than an appeal. I am unable to hold that these are sufficient to get rid of the authority of *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*[2]. The decision in 84 P. R. 1901 dealt with such a number of points that their Lordships' disapproval of it on the question on which it differed from 74 P.R. 1894, cannot be taken to throw doubt upon *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*[3] cited in the judgments of the Chief Court. In the case of conflicting decisions of the same tribunal the general rule undoubtedly applies "that the authority which is at once the more recent and the more consistent with general principles ought to prevail'—*Campbell* v. *Campbell*[4]. But the principle laid down as regards decisions of the House of Lords is also true of other tribunals of last resort like the Privy Council, that " it is your Lordships' duty to maintain as far as you possibly can the authority of all former decisions of this House, and, although later decisions may have interpreted and limited the application of the earlier, (which

1. (1886) I.L.R. 8. A. 548.
2. (1891) I.L.R. 13 A. 300.
3. (1901) I.L.R. 29 C. 167.
4. (1880) 5 A.C. 787.

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Ghulam Khan v. *Muhammad Hassan*[1] has not attempted to do) they ought not, without some unavoidable necessity, to be treated as conflicting." Such a necessity does not appear to me to exist as regards *Raja Har Narain Singh* v. *Chaudrain Bhagwant Kuar*[2] and *Ghulam Khan* v. *Muhammad Hassan*[1]. What are the consequences then of *Raja Har Narain Singh* v. *Chaudrain Bhagwant Kuar*[2] being reckoned with as good law? The award being delivered beyond time is not a case of the decree being in excess of or not in accordance with the award under S. 522. If we recognise that as an exception, is that to be the solitary case outside the last clause of S. 522? Now an award remitted under S. 520 becomes void on the refusal of the arbitrators to reconsider it. See the first clause of S. 521. But suppose in such a case the court passes a decree in accordance with the void award (and the decree in such a case would not be in excess of or not in accordance with the award) can it be said that no appeal lies? It is certainly a worse case than the one falling within the last clause of S. 521. If both these cases then are exceptions not covered by the last clause of S. 522, how can we distinguish from them in principle the cases of no submission at all and of no award in law, which before the Privy Council decision were treated as raising questions fundamental with reference to the jurisdiction of the court passing a decree and therefore open to appeal apart from the grounds mentioned in the last clause of S. 522. In the present case which is one of agreement to refer to arbitration being asked to be filed in court, the order having been made to file the agreement and that having become final, there is no further question of the validity of the agreement to refer. The questions that arise are only with reference to there being an award in law, *i.e.*, whether after supersession a valid award could be made, and whether the two new arbitrators were validly appointed and an award by them and three of the old was a valid award? The first question falling under Clause (*c*) of S. 521 may be deemed to be concluded. But the next raises more difficulty. The courts in India have been considerably exercised over the real import of the Privy Council decision in

1. (1902) I. L. R. 29 C. 167. 2. (1891) I. L. R. 13 A. 309.

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Ghulam Khan v. Mahommed Hassan[1]. In *Romesh Chandra Dhar* v. *Karunamoyi Dutt*[2] it was held that two out of three arbitrators named alone having signed the award and the third only in court after it was filed, an appeal lay from the decree passed on the award, and the decision of the Privy Council was explained as not affecting the right of appeal. In the same volume, however (*Chairman of the Purnea Municipality* v. *Siva Sankar Ram*[3]) *Maclean* C. J. and *Mukerjee* J. held that no appeal lay, following the decision of the Privy Council, though it was contended that the submission under S. 506 was not valid, it having been made only by the plaintiff and the 1st defendant and defendants Nos. 2 to 5 not having joined in it. It may be that defendants Nos. 2 to 5 were unnecessary parties as pointed out at page 902. But the decision itself proceeds on the broad ground that the appeal from the decree was limited to the cases mentioned in the last clause of S. 522. It may also be pointed out that in the case of *Chintamni Aditya* v. *Haladhar Maitai*,[4] which Chief Justice *Maclean* followed, Mr. Justice *Mukerje* expressed himself in doubtful language as regards the limitation of the right to appeal to the grounds mentioned in S. 522 in cases falling under Ss. 523 and 525. See page 161. Chief Justice *Maclean* himself in *Nadirchand Shaha Bonik* v. *Gobindchand Shaha Bonik*[5] expressed his inclination not to limit the appeal to the ground mentioned in S. 522 at page 65 of the Report. The value, therefore, of the decison in *Chiarman of the Purnea Municipality* v. *Siva Sankar Ram*[3] is somewhat impaired by the two decisions in 2 C. L. J. The Allahabad Court in Full Bench (*Bihari Lal* v. *Chunni Lal*[6]) following the decision of the Privy Council held that no appeal lay from the decree following the award on the ground of the misconduct of the arbitrators. They did not pronounce the decision in *Sham Lal* v. *Misri Kunwar*[7] erroneous, but distinguished that case on the ground that it recognised the right of appeal, as the plea was that there was no award in fact. In *Walji Mathuradas* v *Ebji Umersey*[8]. Chief Justice *Jenkins* and

1. (1902) I.L.R. 29 C. 167.
2. (1906) I.L.R. 33 C. 498.
3. (1906) I.L.R. 33 C. 899,
4. (1905) 2 C.L.J. 153.
5. (1903) 2. C. L. J. 61.
6. (1907) I. L. R. 29 A. 457.
7. (1907) I. L. R. 29 A. 426.
8. (1909) I. L. R. 29 Bom. 285,

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Batchelor, J. followed the decision of the Privy Council in holding that on the ground of the misconduct of the arbitrators there was no appeal against the decree in accordance with the award. But the learned *Chief Justice* distinguished the Bombay cases where an appeal was held to lie on the ground that " the award was illegal *ab initio* or in other words where in law there was no award." See page 290. The *Chief Justice* added "obviously if there is no award, there is no basis for a decree." If this observation is right he would certainly seem to be in favour of engrafting an addition to the limitations contained in S. 522. In this court the decision in *Indur Subbarami Reddy* v. *Kandadoi Rajamannar Ayyangar*[1], though it is open to the remark made in *Kanakku Nagalinga Naik* v. *Nagalinga Naik*[2] that no reference is made therein to the decision of the Privy Council, is in favour of not confining the right of appeal to the cases dealt with in the last clause of S. 522. An appeal was entertained also in *Thiruvengadathiengar* v. *Vaidiga Ayyar*,[3] though *Gulam Khan* v. *Mohamad Hassan* [4] was referred to. In this state of conflict of authority I think a reference to a Full Bench is necessary, as my own inclination, notwithstanding the apparent tenor of the decision in *Ghulam Khan* v. *Muhammad Hassan*,[4] is in favour of the view that the right of appeal is not confined to the two cases mentioned in the last paragraph of S. 522. I have considered whether, having regard to the several changes in the law under the new Procedure Code (the effect of them may have to be considered on a future occasion), the matter now in controversy under the old code may not be disposed of finally by this bench. But as I understand my learned brother adheres to the view which he has expressed in *Kanakku Nagalinga Naik* v .*Nagalinga Naik*,[2] with the concurrence of Mr. Justice *Abdur Rahim*, and as my judgment will prevail as that of the Judge who agrees with the court below (*vide* S. 98 of the new Procedure Code) in case we pronounce our separate judgments, it is desirable that the following question should go before a Full Bench :—

1. (1903) I. L. R. 26 M. 47.
2. (1909) I. L. R. 32 M. 510.
3. (1905) I. L. R. 29 M. 303.
4. (1909) I. L. R. 29 C. 167.

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" Whether where an agreement to refer matters in dispute to five named arbitrators is filed under S. 523 of the Code of 1882 and on the refusal of two arbitrators to act and their subsequent death the court appoints new arbitrators in their stead and three of the old and the two new arbitrators make an award and the court passes a decree in accordance with it, an appeal lies against the decree on the ground that there was no legal award."

The facts are given in the order of Reference.

P. Narayana Murthi for appellant.

P. Nagabhushanam for respondent.

In addition to the cases cited in the order of Reference the following cases were cited during the argument before the full Bench.

P. Narayana Murthi.—The question is whether there is an appeal when a decree is passed in accordance with the award when the award is not in law an award. I refer to *Gulam Khan* v. *Mahommad Hussan*,[1] and particularly to the page where the distinction is drawn between the sections of Act of 1859 and those of Act of 1882 on the matter. [*V. K. Aiyar* J.—Refer to *Husanna* v. *Linganna*,[2] which shows that there could be an appeal even in cases coming outside S. 522, C.P.C., on the grounds that there was no submision to award or that there was no award in law.) In the first item class of cases stated in *Gulam Khan's case*[1], as everything has to be done under the superintendence of the court, an appeal will lie only on the grounds stated in S. 522, C. P. C. But in the two classes of cases dealt with in Ss. 523 to 526 there is not only an appeal on the ground mentioned in S. 522 but also on grounds which attack anything not done under the superintendence of the court, *i.e.*, in the second case grounds which attack the agreement to refer to arbitration and in the third case the agreement and the award. [*V. K. Aiyar* J.—Suppose in the first case there is a forged award but there is a decree in accordance therewith overruling the objection of forgery? Is there no appeal ?] There is none; for the Privy Council says there must he a finality to everything which has been done under the supervision of the court. I refer

1. (1901) I.L.R. 29 C. 167 (P.C.) 2. (1894) I.L.R. 18 M. 423 (F.B.)

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to *Hansraj* v. *Sundar Lal.*[1] [*V. K. Aiyar* J.—Refer to *Raja Har Narain* v. *Choudrani Bhagwant* [2] and *Chuha Mal* v. *Hari Ram.*[3]] The observations of the Privy Council on classes 2 and 3 are *obiter*. In *Raja Har Narain* v. *Choudrani Bhagwant* [2] the point whether there was an appeal was not directly raised but that was raised and discussed in *Ghulam Khan* v. *Muhammad Hussain*[4], and the observations therein being later, govern us, they being considered ones though *obiter*.—[*V. K. Aiyar* J.—Why is not the case of a void award mentioned in S. 522, C.P.C.?] [*C. J.*—Can it be said in this case that any express provision of law has been overlooked as in *Raja Har Narain* v. *Choudrani Bhagwant* ? [2]] No. There is no provision which speaks of an award by some incompetent arbitrators as being in violation of any section. [*C. J.*—It may be that the Legislature intended that when once the parties agreed to refer to arbitrators, they cannot go back upon it on the ground that one of the arbitrators is not to the liking of one party or the other.] The award is good. S. 510 has been construed as referring only to a case where there is no reference to arbitration at all and not to subsequent disagreements of parties to a particular arbitrator or to the case of arbitrators agreeing to act. [*V. K. Aiyar* J.—S. 510 takes away the ordinary right of parties. It must be construed strictly.]—*Pugardin Ravuthan* v. *Modinsa Ravthen* [5], *Bala Pattabhirama* v. *Seetharama*, [6] *Bepin Behari* v. *Annoda Prosad* [7], *Fayazuddin* v. *Aminuddin.*[8] There is no prohibition in S. 522 of maintainability of an appeal in cases falling under the first and last causes of S. 521. Where the court sees cause to remit an award and the arbitrators refuse, no judgment can follow under S. 522 as there can be no award on the refusal. Vide the first and second paras of S. 522. [*V. K. Aiyar* J.—Can it not be said that S. 522 applies only to cases in which an application to set aside an award is possible? Vide 'such decrees,' 'judgment to be given' in S. 522.] *Tiruvengadathiengar* v. *Vaidinatha Aiyar* [9], *Kanakku Nagalinga Naik* v. *Nagalinga Naik*[10],

1. (1908) I.L.R. 35 C. 648 (P.C.)
2. (1891) I.L.R. 13 A. 300 (P.C.)
3. (1886) I.L.R. 8 A. 548.
4. (1901) I.L.R. 29 C. 167 (P.C.)
5. (1882) I. L. R 6 M. 414.
6. (1894) I. L. R. 17 M. 498.
7. (1891) I. L. R. 18 C. 324.
8. (1909) 6 A. L. J. 351.
9. (1905) I. L. R. 29 M. 303.
10. (1909) I. L. R. 32 M. 510.

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Jankee Nath Guha v. *Brojeslal Guha* [1]. [*C. J.*—What do you say to the case *Luchmendas* v. *Abpagakash* [2]?]. That simply follows the dicision of the Privy Council in *Raja Har Narain Singh* v. *Chaudrani Bhagvant* [3] under a wrong idea as to no time being fixed for the award. There is a distinction between an order in accordance with an award and the rest—*Chintamoni Aditya* v. *Haladar Maiti*[4]. An appeal will lie against the latter and not against the former.

P. Nagabhushanam.—S. 510 does not apply to a case where the arbitrators have not orginally consented. I refer to Ss. 507 and 508; *Fayazuddin* v. *Amiruddin*[5]; *Pugardin Ravuthan* v. *Moidinsa Ravuthan*[6]; *Balapattabhiramia* v. *Seetharamia.*[7] [*Court.*—There is no decision to the contrary. So you may assume that it is an illegal award. Argue the question of appeal.] [*V. K. Aiyar* J.—Has the Privy Council really overruled the decision of the full Bench in *Hasanna* v. *Linganna*?[8]] No; an appeal will lie even on grounds not mentioned in the last clause of S. 522—*Amret Ram* v. *Dasarat Ram* [9]. The decisions subsequent to the Privy Council are *Rangasami Aiyar* v. *Sami Aiyar*[10]; *Sham Lal* v. *Musri Kunwar* [11]; *Bihari Lal* v. *Chunni Lal* [12]; *Nazruddin* v. *Albert Peech*[13]; *Lachman Das* v. *Abparkash* [2]; *Negi Paran* v. *Hira Singh* [14]; *Romesh Chandra Dhar* v. *Karunamoyi Dutt*[15]; *Nand Ram v. Fakir Chand*[16]; *Walji* v. *Ejbi*[17]. S. 522 refers only to such objections as can be urged under Ss. 520 and 521—*Thulsi Das Narsi* v. *Madan Subbanna Chetty* [18]. There is no distiuction between an order directing an award to be filed and a decree drawing up in accordance with the award—*Hari Mohan Singh* v. *Kali Prasad Chalika* [19]. The P. C. case of *Raja Hari Narain Singh* v. *Chaudrani Bhagwant*[3] is followed in *Lachman Das* v. *Abparkash* [2], *Romesh Chandra Dhar* v. *Karunamoyi*

1. (1906) I. L. R. 33 C. 757. (F.B.)
2. (1908) I. L. R. 30 A. 169.
3. (1891) I. L. R. 13 A. 300 (P. C.)
4. (1905) 2 C. L. J. 153.
5. (1909) 6 A. L. J. 351.
6. (1882) I. L.R. 6 M. 414, 416.
7. (1894) I. L. R. 17 M. 498.
8. (1894) I. L. R. 18 M. 423 (F.B.)
9. (1894) I. L. R. 17 A. 21 (F.B.)
10. (1907) 17 M. L. J. 394.
11. (1906) I.L.R. 29 A. 426.
12. (1907) I.L.R. 29 A. 457 (F.B.)
13. (1907) I.L.R. 29 A. 584.
14. (1909) 6 A.L.J. 333.
15. (1906) I.L.R. 33 C. 498.
16. (1885) I.L.R. 7 A. 523.
17. (1904) I.L.R. 29 B. 285.
18. (1909) 19 M. L. J. 394.
19. (1905) I.L.R. 33 C. 11.

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Dutt [1], *Negi Paran* v. *Hira Singh* [2] and *Debendra Nath Chatterji* v. *Sarbamangola Debi* [3].

P. Narayanamurthi in reply:— Certain orders made under sections coming between S. 510 to 522 are made appealable by the code itself and if there is no appeal provided against other orders we must take that the legistature did not mean to give any appeal.

The Court expressed the following

OPINIONS :—*Chief Justice.*—The question referred to us appears to assume that an award made in the circumstances stated in the question would not be a valid award. In the course of the argument the question was raised whether, under the provisions of the Code of Civil Procedure, an award made in the circumstances stated would not be valid, notwithstanding the refusal of two of the arbitrators nominated by the parties to act, and the fact that the court had appointed arbitrators in the place of those who had refused to act without the parties "desiring" (see S. 507 of the Code of Civil Procedure of 1882) that the nomination of fresh arbitrators should be made by the court. As to this I am not prepared to dissent from the view taken by this court in *Pugardin* v. *Moidin* [4] and *Bala Pattabhirama Chetti* v. *Seetharama Chetti*, [5] and by the Allahabad High Court in *Fayazudin* v. *Amiruddin* [6] and in *Bepin Behary Chowdry* v. *Annoda Prosad Mullick* [7]. In his judgment in the Allahabad case *Stanley* C. J. refers to the statement of the law in RUSSELL on *Arbitration*, (see Edition 9, p. 92) that the acceptance of the office by an arbitrator seems necessary to perfect the appointment. But the question of course is, not whether the original appointment of arbitrators who refuse to act was good, but whether an award given in the circumstances stated in the question is a good award. I share the doubts expressed by *Banerji* J. in the Allahabad case, but, as I have said, I am not prepared to dissent from the cases to which I have referred. Accordingly, I deal with the case on the footing that the award was bad.

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1. (1906) I.L.R. 33 C. 498
2. (1909) 6. A.L.J. 333.
3. (1904) 8 C.W.N C. 916.
4. (1889) I.L.R. 6 M. 414.
5. (1882) I. L. R. 6 M. 498.
6. (1909) 6 A.L.J. 351.
7. (1891) I. L. R. 18 C. 324.

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Chief Justice.

The general right of appeal which would otherwise exist from a decree given in pursuance of an award is expressly cut down by S. 522, which provides that no appeal shall lie from a decree following a judgment under that section except in so far as it is in excess of, or not in accordance with, the award. There is thus a double limitation—a limitation as to the ground of appeal, and a limitation as to the extent of the scope of the appeal where an appeal lies. Even when the decree is in excess of the award, there is only an appeal against so much of the decree as *is* in excess of the award. The intention of the legislature seems to be clear that, where there is a reference to arbitration and an award, if the court sees no cause to remit the award, and there is no application to set aside the award, or an application to set aside the award has been refused, the validity of the award cannot be impugned. The grounds on which an award may be remitted are set out in S. 520. It seems clear that under this section an alleged defect in the tribunal which gave the award is no ground for remitting it. It also seems clear that this is no ground for setting aside the award under S. 521. As I read the provisions of the old code it seems to me that if there was no appeal under S. 522 on the ground there was no award in law, there were no means of impugning an award (except where there is an application to file an award under S. 526) on the ground that the award was bad in law. This being so one would be disposed if possible to construe S. 522 so as to supply these means. This, in effect, in the numerous decisions to which we have been referred, is what the courts in this country have done. They have held that 'award' in S. 522 means a good 'award' but the very object of S. 522 seems to have been to prevent that question being raised when matters have reached the stage of judgment according to the award.

The question came before the Privy Council in *Ghulam Khan* v. *Muhamad Hassan*.[1] In that case their Lordships observed: "Those words" (the words in S. 522 limiting the right of appeal) "appear to be perfectly clear. Their Lordships would be doing violence to the plain language and the obvious intention of the code, if they were to hold that an appeal lies

1. (1901) I. L. R. 29 C. 167.

from a decree pronounced under S. 522, except in so far as the decree may be in excess of, or not in accordance with, the award. The principle of finality which finds expression in the code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the courts of this country showed any disposition to sit as a court of appeal on awards in respect of matters of fact or in respect of matters of law." In the earlier Privy Council case, *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*,[1] the award was made after the period allowed by the court had expired. The Privy Council held that an appeal lay from a decree in pursuance of the award. S. 521 expressly provides that no award shall be valid unless made within the period allowed by the court. In that case the tribunal which made the award was *functus officio* when the award was made and the award was invalid by the express enactment of the legislature. That seems to me to be a different case from the present where the award is sought to be impugned by way of appeal from a decree given under S. 522 on the ground that certain of the arbitrators were appointed by an order which the court had no jurisdiction to make. In any case, we are governed by the later decision. In *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* [1] the Privy Council no doubt express their entire approval of the judgment of the Allahabad High Court in *Chuha Mal* v. *Hari Ram* [2] and in that judgment the Allahabad judges made the general observation that as the award was invalid the decree was not a decree in accordance with an award from which no appeal lies. But it seems to me the observation by the Allahabad judges and the approval of their judgment by the Privy Council must be read with reference to the facts of the case in the Allahabad High Court, and not as a pronouncement that in all cases where an award is bad in law there is a right of appeal notwithstanding the express limitation on the right of appeal contained in S. 522.

The numerous authorities are collected and discussed in the order of reference. I do not propose to go through them. With all respect to the learned Judges who have taken the view which is suggested by *Krishnaswami Aiyar* J. as the right view in the

1 (1891) I. L. R. 13 A. 300. 2. (1886) I.L.R. 8 A. 548.

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order of reference, in my opinion the question is governed by the decision of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* [1] and I do not think we could hold that there is a right of appeal in the circumstances related in the order of reference without doing violence to the express language of S. 522.

I think the case of *Kanakku Nagalinga Naik* v. *Nagalinga Naik* [2] was rightly decided and I would answer the question which has been referred in the negative.

It is satisfactory to note that the difficulties which have given rise to this order of reference have been removed by the new code.

Krishnaswami Aiyar J.—I have had the advantage of reading the judgment of the learned *Chief Justice.* I entirely agree with him that no reason has been shown for reconsidering the decision in *Pugardin* v. *Moideen*[3] followed in *Bala Pattabirama Chetti* v. *Seetharama Chetti*[4] and *Bepin Behary Chowdhry* v. *Annoda Prosad Mullick*[5]. Section 507, which speaks of the arbitrator *refusing to accept* the arbitration and requires the court to nominate a fresh arbitrator only when the parties desire that the nomination shall be made by the court, contrasted with S. 510, which enables the court in its discretion, when the arbitrator named by the parties dies or *refuses* or neglects or becomes incapable to act, either to appoint a new arbitrator or to make an order superseding the arbitration, leaves no room for doubt as to the correctness of the decision in *Pugardin* v. *Moideen*[3]. It follows upon the facts stated in my referring judgment that the award in this case was invalid, not having been made by the tribunal constituted in accordance with the agreement of the parties.

The question, however, remains whether a decree having been made in accordance with the award an appeal lies from the decree except in so far as it is in excess of, or not in accordance with the award. In my order of reference I overlooked the fact that S. 522 had no application to a case where the award was remitted for reconsideration and it became void on the refusal of the arbitrators to reconsider it. A decree passed in

1. (1901) I.L.R. 29 C. 167.
2. (1909) I.L.R. 32 M. 510.
3. (1883) I. L. R. 6 M. 414.
4. (1899) I.L.R. 17 M. 498.
5. (1891) I. L. R. 13 C. 324.

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Krishnaswami Aiyar J.

accordance with an award which has so become void is not a decree under S. 522, and the limitation contained in it of the right of appeal has no application. But the difficulty remains with reference to a decree passed in accordance with an award invalid under the last clause of S. 521 by reason of its not having been made within the time allowed by law. In such a case there could be no application to set aside the award as it could not fall within clauses *(a)* *(b)* or *(c)* of S. 521. It can hardly be contended that S. 522, Clause 1, deals only with cases to which S. 520 and clauses *a)* *(b)* and *(c)* of S. 521 in terms apply. If it be so limited the cases of no submission, of no award in law and of awards bad for any irregularity in the reference, would lie outside S. 522 and the decree passed in accordance with the award in such cases would be appealable without reference to the limitation contained in the last clause of S. 522. If no application has, as a matter of fact, been made to set aside the award as in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* [1] whether the case be one in which there is scope for such an application or not or if the court has refused an application to set aside the award, S. 522 seems to be applicable. It would no doubt be an unmeaning formality for the court to wait until the period prescribed by Article 158 of the Limitation Act has expired as provided by the second Clause of S. 522, if no application would lie under S. 521. This is perhaps a strong argument in favour of the view that the case of an invalid award under the last clause of S. 521 is not intended to be dealt with by S. 522. I feel bound to hold that the decision of the Privy Council in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*[1] is unaffected by the later decision of the same tribunal in *Ghulam Khan* v. *Mahammad Hassan*[2]. I think it unnecessary to repeat the reasons for this conclusion which I have already given in the order of reference. I may add, however, that the judgment of the Privy Council in *Hansraj* v. *Sundar Lal* and *Hansraj* v. *Dwarka Das* [4] contains no word of disapproval or doubt with reference to the decision in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* [1] treated as perfectly good law in the judgment of the Chief Court of the Punjab (at page 655), from which the appeal came to the Privy Council. Whatever difficulty there may be in reconciling the decision of the Privy

1. (1891) I. L. R. 13 A. 300. 2. (1901) I.L.R. 29 C. 167.
3. (1908) I. L. R. 35 C. 648.

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Council in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*[1], with their Lordships' view as to the meaning of the last clause of S. 522, there appears to be no doubt as to their interpretation of that clause as applied to cases of arbitration in pending suits. It appears to be their Lordships' conclusion that, if the first two clauses of S. 522 are complied with) the decree passed in accordance with the award is final except as provided in the last clause. It is perhaps a matter for regret that in their exposition of the law in *Ghulam Khan* v. *Muhammad Hassan*[2], there is no word dealing with the practically unanimous decision of the Indian High Courts (See *Husananna* v. *Linganna*[3], *Amrit Ram* v. *Dasrat Ram*[4], *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee*[5] *Mahomad Wahibuddin* v. *Hakiman*[6] and *Nandram Daluram* v. *Nemchand Jadavchand*[7] which held that there was a right of appeal though the decree was in accordance with the award, if there was no submission or there was no award in fact or in law. I am, however, satisfied that the *ratio decidendi* of their Lordships in *Ghulam Khan* v. *Muhammad Hassan*[2], in cases of awards in pending suits, was that the language of the last clause of S. 522 limited the right of appeal. As regards the other cases of application to file a submission under S. 523 or to file an award under S. 525, the judgment of the Privy Council is clear that the order filing the agreement or the award or refusing to file it is a decree and appealable under S. 540 without reference to anything in S. 522. If after such filing of the agreement or award, and in the first case after the award is delivered, no objection is allowed under S. 520 or S. 521 and a decree is made in pursuance of the award, it would seem to follow that the last clause of S. 522 applies as a matter of course. It is unnecessary to consider other difficulties under Ss. 525 and 526 as to whether it would be competent to the court to entertain objections not mentioned in S. 520 or 521. All that we are now required to decide is whether after the decree in accordance with the award an appeal may be entertained except in so far as the decree is in excess of, or not in accordance with the award. I agree, though with some hesitation, in the conclusion arrived at by the learned *Chief Justice*.

Ayling J:—I concur in the view taken by the learned Chief Justice, and in the answer proposed by him.

1. (1891) I. L. R. 13 A. 300.
2. (1901) I. L. R. 29 C. 167.
3. (1895) I. L. R. 18 M. 423.
4. (1894) I. L. R. 17 A. 21.
5. (1898) I. L. R. 25 C. 141.
6. (1898) I. L. R. 25 C. 757.
7. (1892) I. L. R. 17 B. 357.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present :—Mr. Justice Abdur Rahim, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

In re Solai Naick and others ... Appellants.*

In re Solai Naick.

Evidence Act, S. 91—Cr. P. C., S. 103—"Matter required by law to be reduced to the form of a document—Search list—Other evidence admissible—S. 91 of the Evidence Act does not apply to a search list prepared under S. 103, Cr. P. C.

When a search has been conducted under S. 103, Cr. P. C., other evidence than the search list is admi ssible regarding the things seized in the course of the search and regarding the places in which they were found.

Appeal from the sentence of the Court of Session of the Tinnevelly Division in Calendar Case No. 46 of 1910.

This appeal coming on for hearing in the first instance †before their Lordships Mr. Justice *Munro* and Justice Mr. *Sankaran Nair*, the Court made the following.

ORDER OF REFERENCE TO A FULL BENCH :—In this case a search was made by an officer in charge of a police station in a place not within the limits of his police station and evidence was given of this search. It is contended that under S. 166, Criminal Procedure Code, the officer had no power to make the search himself; that the search list drawn up is therefore not evidence, and that no evidence can be given of the search. If, when a search is conducted, the search list drawn up as directed in S. 103 (2), Criminal Procedure Code, is the only evidence that can be tendered as to the facts which such a document should contain according to the section, then the contention must apparently prevail by reason of the provisions of S. 91 of the Evidence Act. But on this point there is a conflict of rulings. Thus in the case of *Abdul Khadir and others* v. *Queen-Empress*, [1] it was held that a search list prepared under S. 103, Criminal Procedure Code, is the proper and only evidence admissible of the facts which ought to be contained in the search list. On the other hand, in the case of *The Public Prosecutor* v. *Sarabu Chennayya* [2], it was held that a search list is not evidence of the facts stated therein for the purposes of S. 91 of the Evidence Act and that oral evidence

* Cr. A. No. 290 of 1910. 24th October, 1910.

† 27th September, 1910

1. Weir's Cr. Rul., Vol. II, p. 515. 2. Weir's Cr. Rul., Vol. II., p. 776.

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was admissible. Again in Criminal Revision Case No. 498 of 1909 a bench of this Court refused to follow the earlier of the above cases and followed the later case. As the matter is one of great importance and continually arising, we think it should be definitely decided. We therefore refer to a Full Bench the question whether when a search has been conducted under S. 103, Criminal Procedure Code, any evidence can be given regarding the things seized in the course of the search and regarding the places in which they were respectively found other than the list which the law in the section directs to be drawn up containing these particulars.

M. D. Deva Doss, for appellant, relied upon Weir, p. 515, Vol. ii; conceded Weir, Vol. ii, p. 776, was against him, but submitted that the earlier ruling was right; that the search list was analogous to statements and confessions taken under S. 164, Criminal Procedure Code, or depositions taken down in court; that it was the only evidence that was allowable by law of the search, though, S. 92 not applying to the case, evidence *dehors* was admissible to contradict the contents of the search list. He relied upon *Queen-Empress* v. *Viran*[1] and *Jai Narain Rai* v. *Queen-Empress*[2].

C. F. Napier, for the Crown—referred to WOODROFFE, p. 465, (4th Edn.), and contended that a search list was analogous to the entry in the birth or marriage register, the act of search being an act at the conclusion of which a search list is directed by law to be prepared.

This appeal coming on for hearing before the Full Bench * the Court expressed the following

OPINION.—We answer the question referred to us in the affirmative. Section 91 of the Evidence Act lays down: "When the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

1. (1886) I. L. R. 9 M. 229. 2. (1890) I. L. R. 17 C. 862. at 871.

* 24 October, 1910.

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In our opinion the words 'any matter required by law to be reduced to the form of a document' could not have been intended by the Legislature to apply to mere observations of physical facts which under the ordinary law have to be proved by testimony in court. All the instances in which this section has been applied are cases in which the matter required to be reduced to the form of a document consisted of spoken words or other expressions of the human will. We do not, however, express any positive opinion that the application of the words is to be confined to such cases, but we are quite clear that, as laid down in *Jivandas Keshavji* v. *Framji Nanabhai*, [1] if the narrative of an extrinsic fact, as in this case, has been committed to writing, it may be proved by parol evidence, and this would be so even though such writing is required by law. We need hardly point out that if the provisions of S. 91 were to apply to the case of a search list prepared under S. 103, Criminal Procedure Code, the results would be startling and there would be grave risks of miscarriage of justice in many trials in criminal cases.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair.

[ON A DIFFERENCE BETWEEN MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE AYLING].

P. V. Vyasa Rao .. *Petitioner* *

(Accused in C. C. No. 15 of 1910 on the file of the Head-Quarters Deputy Magistrate of Coimbatore).

Evidence Act, I of 1872, *Ss.* 133, 114, *Ill* (*b*)—*Accomplices' evidence—Corroboration—How far essential—Court's department to practitioners—Cr. P. C.* 257.

Per Curiam :—It is open to a Magistrate even after a case has been closed and at any time before judgment is pronounced to give an opportunity to the accused to cross-examine the witnesses for the prosecution and to examine the witnesses for the defence even if the accused had to avail himself of such opportunity even at an earlier stage of the proceedings. And it always depends upon the circumstances of each case whether a belated application should be granted or not. Where the accused's attitude is deliberately designed to harass the Court, the Magistrate will not be acting improperly by refusing his application.

* Cr. R. P. No. 255 of 1910; Cr. R. C. No. 318 of 1910. 6th March 1911.

1. (1870) 7 B. H. C. R. 45 at p. 63.

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Per *Sankaran Nair* and *Abdur Rahim J.*—(*Ayling* J. dissenting) :—A conviction based upon the uncorroborated testimony of an accomplice is, in the absence of special circumstances, unsustainable, and the High Court can interfere in revision. The existence of special circumstances is a matter into which the High Court can go in revision.

Per *Ayling* J.—Where the lower court convicts an accused on the uncorroborated testimony of an accomplice, the matter is not one for revision by the High Court, but one of appreciation of evidence by the lower court.

Per *Abdur Rahim* J.—The evidence of one accomplice is not sufficient corroboration of the evidence of another accomplice; and previous statements made by an accomplice are not such corroboration of his evidence in court as to justify a conviction by itself. The corroboration required is corroboration by means of untainted evidence.

Magistrates and other judicial officers cannot be too careful in their deportment towards the practitioners of their courts, whether they were qualified vakils or private pleaders, so as not to give any cause to the public for thinking that one practitioner is favoured at the expense of others.

Petition, under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sessions Court of Coimbatore in Cr. A. No. 46 of 1910 preferred against the conviction and sentence by the Head-Quarters Deputy Magistrate of Coimbatore in C. C. No 15 of 1910.

L. A. Govindaraghava Aiyar for petitioner.

The Public Prosecutor (*C. F. Napier*) for the Crown.

This case coming on for hearing before Mr. Justice *Abdur Rahim* and Mr. Justice *Ayling*, the Court made the following.

ORDER :—*Abdur Rahim* J. :—The petitioner, Vyasa Rao, who was Sub-Magistrate of Karur has been convicted under S. 161, Indian Penal Code, for having received illegal gratifications on three different occasions, the 13th August 1908, the 6th February 1909, and the 30th April 1909, and he asks us to revise the order, firstly, because he was not given a proper opportunity to cross-examine the witnesses for the prosecution before the Deputy Magistrate who tried the case, and, secondly, because the conviction rests upon the evidence of accomplices and there is no corroboration of that evidence in material particulars.

As regards the first question the facts upon which it arises are set forth in paragraph 12 of the Deputy Magistrate's judgment, and I am not prepared to hold on these facts that the Deputy Magistrate was wrong in refusing the petitioner's

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application for re-summoning the witnesses for purposes of cross-examination. The petitioner was distinctly told that his case would not be committed to the Sessions, and yet he would not cross-examine the prosecution witnesses, leaving no option to the Magistrate but to close the case. No doubt it is open to a Magistrate, even after a case has been closed and at any time before judgment has been pronounced, to give an opportunity to the accused to cross-examine the witnesses for the prosecution and to examine witnesses in defence even if the accused had failed to avail himself of such opportunity which he had at an earlier stage of the proceedings. And it will always depend upon the circumstances of each case whether a belated application should be granted or not. But the Deputy Magistrate in this case says that the petitioner's attitude was deliberately designed to harass the court, and I cannot say, having regard to the facts, that this view is wrong. That being so, the first ground of the application for revision fails.

I am, however, of opinion that the conviction ought to be set aside on the second ground. The facts of the case are as follows:—

On the first of the three occasions mentioned above, the petitioner is alleged to have received Rs. 150 in connection with Calendar Case No. 656 of 1908 in which one Manickam Pillai was the complainant and one Muthuswami Pillai was the accused. The complaint was one of trespass and assault and the Sub-Magistrate found the accused guilty of the charges and sentenced him on the 23rd September 1908 to imprisonment till the rising of the court and a fine of Rs. 50. The conviction was set aside on appeal by the Sub-Divisional Magistrate on the 17th October 1908. The evidence as regards the first charge is that prosecution witness No. 1, Tandoni Rao, who was a private pleader and practised before the Sub-Magistrate, suggested to prosecution witness No. 3, uncle of Manickam Pillai, and prosecution witness No. 4, a younger brother of Manickam Pillai, while the case was still pending trial, that if he paid Rs. 150 to the Magistrate the case would be decided in Manickam Pillai's favor ; otherwise there would be no conviction inasmuch as the accused in that case had already paid the Magistrate Rs. 100. Prosecution witness No. 1, who is the leading figure in the case

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of the prosecution and is alleged to have acted as the intermediary of the Sub-Magistrate and the parties in all the three cases and also in other cases in connection with which the Magistrate is said to have received illegal gratifications, has been tried and convicted of an offence of cheating for having obtained money from different persons, falsely pretending that it was wanted for bribing the petitioner in a case in which the petitioner was also tried for receiving illegal gratification but acquitted. This man, upon his own shewing, is not only an accomplice in many transactions of bribery, and as such an unusually infamous witness, but a person of extremely unscrupulous character otherwise. Prosecution witnesses Nos. 3 and 4 raised Rs. 200 with the assistance of a neighbour, prosecution witness No. 5, whom they told that the money was wanted in order to bribe the Magistrate. Prosecution witness No. 5 took them to prosecution witness No. 6 who advanced Rs. 200 on a promissory-note, Exhibit T, dated the 13th August 1908, which was executed by prosecution witnesses Nos. 3 and 4 and attested by prosecution witness No. 5. The next day prosecution witness No. 5 was informed by prosecution witness No. 3 that he had paid the money to the Magistrate. Prosecution witness No. 6 does not say whether he was told what the money was wanted for, but the promissory note itself states that the money was borrowed for the *Valai Muthuvali* expenses and family expenses of the executants. It appears from the evidence of prosecution witness No. 6 that he had before this occasion also lent money to prosecution witness No. 3 on the recommendation of prosecution witness No. 5. Prosecution witnesses Nos. 3 and 4 say that on the very day the money was raised they went with Rs. 150 out of the Rs. 200 to the Magistrate and paid him the amount at about 8 or 9 P. M. in the front verandah or street pial of his house. There can be no doubt, in my opinion, that prosecution witnesses Nos. 1, 3, 4, and 5 are all accomplices and, speaking for myself, I am unable to draw any substantial distinction between the complicity of prosecution witness No. 1 and that of the others in this transaction. Prosecution witness No. 6 is not an accomplice, and the question which I shall have to consider presently is whether his evidence and the execution of the promissory-note, Exhibit T, by prosecution witnesses Nos. 3 and 4 supply sufficient corroboration of the accomplices' evidence. Some reliance has been placed

by the Public Prosecutor on the fact that the petitioner in his judgment convicting the accused, Muthusami Pillai, of house-trespass based an argument against the truth of the defence on an alleged discrepancy between certain dates which was found to be without foundation by the Deputy Magistrate who reversed the conviction in appeal. Supposing the appellate court's view right, I am quite unable to draw any sort of adverse inference against the petitioner on that ground. I should be very loth, because the trying Magistrate has committed what appears to be an obvious error to the appellate tribunal, to fasten upon that fact as a circumstance raising suspicion of misconduct against the Magistrate.

The allegations on which the second charge is based are these:—

Prosecution witnesses Nos. 7 and 8 were implicated as the accused in a case of cheating which was tried by the Magistrate. These men were told by prosecution witness No. 1 that if they paid Rs. 100 to the Magistrate and Rs. 15 for himself they would be discharged, but at the intervention of prosecution witness No. 19, a neighbour and friend of prosecution witness No. 1, the Rs. 100 intended for the Magistrate was reduced to Rs. 50. This sum was actually paid by prosecution witness No. 19 to prosecution witness No. 1 in the latter's house, and prosecution witnesses Nos. 7 and 8 saw the payment being made to prosecution witness No. 1. Prosecution witness No. 1 went away with the money saying that he was going to the Magistrate, and afterwards returned and said that they (prosecution witnesses No. 7 and 8) would be discharged that day. Prosecution witnesses Nos. 7 and 8 were discharged that day. Prosecution witness No. 1 himself was paid Rs. 15 for his part in the transaction, and the evidence is that this sum was paid out of Rs. 30 which prosecution witnesses Nos. 7 and 8 borrowed from a Chetti (prosecution witness No. 9) with whom they had dealings. The entry showing the loan of Rs. 30 in the Chetti's books of account has been proved. That prosecution witnesses Nos. 1, 7 and 8 are all accomplices I hold to be beyond doubt, and the proof of payment to the Magistrate depends upon the testimony of prosecution witness No. 1 alone. The question then, with reference to this charge, as in the case of the first

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charge, is, how far the evidence which is not of accomplices, namely, that relating to the raising of the Rs. 30, out of which Rs. 15 was paid to prosecution witness No. 1, can be said to furnish material corroboration of the story told by the accomplices.

The evidence regarding the third charge is as follows:—

The father, mother, and brother of prosecution witness No. 18 and several other persons were implicated in a charge of murder (Register Case No. I of 1909) which was being inquired into by the Sub-Magistrate, and it is alleged that he received Rs. 250 about the 24th April and a further sum, Rs. 250, about the 30th April in connection with that case, in which he discharged the accused on the date last mentioned. Prosecution witnesses Nos. 16 and 17, who are neighbours and friends of prosecution witness No. 18 and helped him generally in the conduct of the defence along with prosecution witness No. 18, carried on negotiations with prosecution witness No. 1, the usual intermediary, settled the terms, raised the money and were all equally concerned in making the payments. They paid Rs. 250 on the first occasion to prosecution witness No. 1 at his house, and the latter alone says that he afterwards paid the amount to the Sub-Magistrate. The second instalment was also paid by those witnesses to prosecution witness No. 1 at his house, but prosecution witness No. 16 says that he went with prosecution witness No. 1 who took the money with him to the Magistrate's house, where the Magistrate was seated on the pial. Prosecution witness No. 1 and the Magistrate went inside the house together, but soon afterwards the prosecution 1st witness returned with the cloth in which the money had been tied, emptied of its contents, and made over the cloth to prosecution witness No. 16, saying that the accused would be discharged that day. The accused were in fact discharged on that day. That prosecution witnesses Nos. 16, 17 and 18 must be treated as accomplices admits to my mind of no doubt. The Rs. 500 was part of the money (Rs. 650) received by prosecution witness No. 18 from prosecution witness No. 13, who owed the amount on a hypothecation bond executed by him in favour of prosecution witness No. 18's father on the 19th February 1906. The endorsements on the bond, Exhibit EE, shew that on the 6th April Rs. 350, and on the 20th April the balance of Rs. 300,

were paid to prosecution witness No. 18. Both the endorsements are signed by prosecution witness No. 18 and were written by prosecution witness No. 14, and the first endorsement is attested by prosecution witness No. 15 and several other persons who have not been examined. There can be no doubt as to the fact of prosecution witness No. 18 having received Rs. 650 from prosecution witness No. 13 on the dates mentioned. In the endorsement of the 6th April the purpose for which the money was wanted is not mentioned, but in the second endorsement it is stated that the money was needed as a vakil had to be engaged in the case against prosecution witness No. 18's father and other expenses had to be met. Prosecution witness No. 13, before the Magistrate who tried the present case, stated that he did not know what the money was wanted for, but the prosecution tendered in evidence a previous statement (Exhibit FF) made by the witness before Mr. H. W. Gillman, Acting Collector and District Magistrate. It does not appear that the statement was made in presence of the petitioner and whether he had any opportunity of cross-examining the witness, and the only legitimate use that can be made of the statement is to contradict thereby the statement made by the witness to the contrary at the trial. Exhibit FF cannot be used as substantive evidence in the case. The next class of evidence consists of statements made by prosecution witnesses Nos. 16, 17 and 18, who bribed the Sub-Magistrate, to other persons who have been examined as witnesses for the Crown. Prosecution witness No. 14, who wrote the endorsements on the bond, Exhibit EE, says that at the time of payment of the second instalment by prosecution witness No. 13, *i.e.*, on the 22nd April, prosecution witness No. 18 told him (prosecution witness No. 14) that he wanted the money for court expenses and to pay the Magistrate, but that he does not know who was the Magistrate alluded to. Prosecution witness No. 15 says that at the time of the payment of the first instalment of Rs. 350 by prosecution witness No. 13, prosecution witness No. 18 told him that he (prosecution witness No. 18) wanted the money to pay to the Sub-Magistrate. Prosecution witness No. 12 says that on the day the accused in the murder case were discharged, prosecution witnesses Nos. 16, 17 and 18 told him that they had given the Sub-Magistrate money through Tandoni Rao, the 1st prosecution witness. These statements made by prosecution

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witnesses Nos. 16, 17 and 18 are sought to be used to corroborate the evidence of these witnesses, but I have no hesitation in holding that that is not the nature of corroboration of an accomplice's testimony which the courts have always required. It is well established that the evidence of one accomplice is not sufficient corroboration of the evidence of another accomplice, and I have no hesitation in holding, upon the same principle, that previous statements made by an accomplice are not such corroboration of his evidence in court as to satisfy the requirements of the rule. The corroboration which the courts have insisted on is corroboration by means of untainted evidence. I entirely agree in the statement of the law on this point as contained in *Reg.* v. *Malapa Bin Kupana and others*[1].

Then, it has been argued by the learned Public Prosecutor that some of the adjournments of the enquiry in the murder case were unnecessary, and he asks us to infer that they were made for indirect purposes. He says, for instance, that the evidence shows that the Village Munsif was never asked to produce a plan of the locality, and the statement in the diary to that effect is false. But we find that summons was issued to the Village Munsif and as a matter of fact he did appear at the next hearing, and a plan was actually filed by the Police officer though not by the Village Munsif. In my opinion, these adjournments throw no light on the question before us. In fact it does not appear to me that the enquiry was unduly prolonged, and it is quite possible that the Sub-Magistrate could not find time to take up the inquiry on some of the dates fixed, and that was also one of the grounds for adjournment on those dates, and not merely what is stated in the diary. I for one would not be too eager to seize upon every little supposed irregularity in the trial of a case by a Magistrate as a circumstance of suspicion against him because the Magistrate happens to be charged with misconduct in the discharge of his judicial duties in connection with that case. The danger of being too suspicious in such matters is well exemplified in this very case; for instance, the Deputy Magistrate who tried the Sub-Magistrate is of opinion that the accused in the murder case ought to have been discharged at a much earlier stage of the inquiry as there was not sufficient

1. (1874) 11 B. H. C. R.

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evidence against them, while the Sessions Judge in appeal thinks that the Sub-Magistrate ought to have committed the case to the Sessions instead of discharging the accused. The Public Prosecutor has also laid much stress on the fact that the pleader of Erode (prosecution witness No. 20), who appeared for prosecution witness No. 18's father, was discarded on the 30th March for no apparent reason, and he asks us to believe that the reason for this must have been that the accused's friends had come to an arrangement with the Magistrate. But I find that there were other pleaders engaged for the other accused persons, two of whom were prosecution witness No. 18's mother and brother, and on the last day of the hearing, when arguments were heard, another pleader was in fact engaged to appear for prosecution witness No. 18's father. But it is suggested that this was done at the instance of the Sub-Magistrate for the sake of appearances. The whole of his argument, to my mind, proceeds again on the merest suspicion as if parties to a case do not often change their pleaders and sometimes for no sufficient reason. It is also urged that there was no necessity for raising such a large sum of Rs. 700. But I am not at all sure that it is too large a sum to spend in a case of such gravity as that in which prosecution witness No. 18's parents and brother were implicated. That is how the evidence stands as regards the third charge.

We have also been asked in connection with all the three charges to take into account the fact that Tandoni Rao, who is a mere private pleader, appeared in a large number of cases before the Sub-Magistrate and that they were intimate with each other. These facts again, to my mind, do not bring us any nearer to a decision on the present charges against the Sub-Magistrate. No doubt Magistrates and other judicial officers cannot be too careful in this country in their deportment towards the practitioners of their courts, whether they were qualified vakils or private pleaders, so as not to give any cause to the public for thinking that one practitioner is favoured at the expense of the others, but I am not sure that this is always borne in mind. In fact, in this country, it is a very prevalent notion that certain practitioners are unduly favoured by certain judicial officers, though I am sure that in many cases the notion is unfounded. At all events I would refuse to treat a matter of this nature

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as a circumstance telling against the integrity of a Magistrate or a Judge. Some argument is also sought to be based on the fact that a number of vakalats were found in the house of prosecution witness No. 1 when it was searched, and the suggestion is that, when the Sub-Magistrate was called upon by his superior authorities to give an explanation with regard to the allegations made against him, he allowed these documents to be removed from the record. But there is no evidence of this, and the vakalats themselves, so far as it appears in the evidence, do not bear the court's stamp.

I now come to the general question, which is common to all these three cases, namely, what is the exact scope of the rule regarding the evidence of accomplices? I should have thought that there was no room for misconception on the point at the present day, but, since the Public Prosecutor has argued with considerable emphasis that the courts have gone too far in insisting on corroboration of the testimony of accomplices, I shall state the effect of the rulings on the subject. The rule regarding the testimony of accomplices is the same in this country as in England and is expressed in S. 133 and S. 114, Ill. (*b*), of the Indian Evidence Act, which merely reproduces the law on this point as enunciated both by English and Indian Judges. Section 133 declares, what has always been held by the courts, that an accomplice is a competent witness and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, and S. 114, Ill. (*b*), says 'the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.' Reliance has been placed by the Public Prosecutor on *Emperor* v. *Shrinivas*,[1] as if that case shewed that these provisions of the Evidence Act have changed the law on the subject from what was laid down by Sir *Barnes Peacock* in *Elahee Buksh's case* [2] in accordance with the law in England. But I find nothing in Chief Justice *Jenkins'* judgment to support that contention. What he says is that S. 133 is the only absolute rule of law while S. 114, Ill. (*b*), lays down the rule of guidance, but that it would be an error of law to disregard the latter rule, though what effect is to be given to this rule must be determined by the circumstances of each case.

1. (1905) 7 Bom. L. R. 969. 2. (1866) 5 W. R. Cr. 80.

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In *Queen-Empress* v. *Deodhar Singh*, [1] one of the latest cases in which the law is discussed, the effect of the enactment in the Evidence Act is stated in these words : " But the presumption stated in Illustration (*b*) of S. 114 of the Evidence Act that an accomplice is unworthy of credit unless he is corroborated in material particulars has become a rule of practice of almost universal application." There can thus be no doubt that S. 114, Ill. (*b*), is meant to embody what has been called by *Lord Abinger* a rule of practice which deserves all the reverence of law, namely, that no respect ought to be paid to the testimony of an accomplice unless he is corroborated in some material circumstances, and that the corroboration ought to consist of some circumstance that affects the identity of the party accused. (See *Elahee Buksh's case* [2] where this well-known passage from *Lord Abinger's* summing up in *Regina* v. *Farler*[3] is cited). In *Rex* v. *Wilkes and Edwards*[4], also cited in *Elahee Buksh's* case[2] Baron *Alderson* said : "You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony ; but I advise Juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence." In *Rex* v. *Stubbs*[5], Mr. Baron *Parke* said : " My practice has always been to tell the Jury not to convict the prisoner unless the evidence of the accomplice is confirmed not only as to the circumstances of the crime, but also as to the person of the prisoner." Again in *Rex* v. *Noakes*[6], *Littledale* J. told the Jury that he could not advise them to convict the prisoner ; that it was not usual to convict on the evidence of one accomplice without confirmation, and that, in his opinion, it made no difference whether the evidence was that of one accomplice only or of more than one." (*Elahee Buksh's Case*[2].) As for the reason for the rule this is how Sir *Barnes Peacock* states it: "The danger of acting upon the evidence of an accomplice, who is admitted to give evidence for the Crown, arises not merely from the fact of his having committed or been convicted of a crime—for that would go to the credit of every witness who had recently committed or been convicted of a crime,—but from the fact of his giving his evidence under the hope or expectation

1. (1899) I. L. R. 27 C. 144 (at p, 152.)
2. (1866) 5 W. R. Cr. R, at p. 84, 83.
3. (1837) 8 C. and P. 106.
4. (1836) 7 C. and P. 272.
5. (1855) 25 L. J. M. C. 16.
6. (1832) 5 C. and P. 326.

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of pardon, and of his obtaining immunity from punishment if his evidence be believed."

Further on he observes: "The danger of acting upon the uncorroborated evidence of accomplices is at least as great here as it would be in England, for here, as in England, the accomplices are not actually pardoned before they give evidence," and then he goes on to point out, that in England, by confessing and giving evidence, they acquire an equitable right to a recommendation for the mercy of the Crown and that in this country an accomplice who gives evidence having accepted the offer of a pardon is liable, if he has given false evidence or has concealed an essential particular, to be committed for trial for the same offence in respect of which the pardon was tendered. "The witness, therefore," he remarks, "does not give his evidence under an absolute certainty of immunity." In the present case there is no evidence to show whether pardon was or was not offered to the accomplices, but there cannot be the least doubt that they are giving evidence in the expectation that they will not be put on their trial for abetment of the offences of which the petitioner has been found guilty. It has also been argued on behalf of the Crown that there are gradations in the moral culpability of different accomplices. So there are. For instance, suppose an ignorant villager is kept under arrest by a Police officer on a false charge and is compelled to pay money to the Policeman as the price for his release, or suppose a money lender advances money to a person who wishes to bribe a public servant knowing the purpose for which the money is wanted, or a man sees a public servant being bribed but makes no protest nor takes any steps to inform the authorities, the moral culpability of such persons is undoubtedly not so great as that of a man who deliberately sets about to influence a public servant in the discharge of his official duties by offering him bribes. It is not possible to say with respect to the witnesses in this case, who, according to their own evidence, negotiated and took part in the payment of illegal gratifications to the petitioner, that the moral turpitude of their conduct is not such as to bring their evidence within the full scope of the rule regarding the testimony of accomplices.

As regards the men who advanced the money not knowing the purpose for which it was wanted, it cannot be said that they

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are accomplices, but, in my opinion, their evidence does not advance the case of the Crown substantially further than that of the witnesses who were concerned in the giving of the bribes. Persons involved in criminal cases often have to raise money to meet the incidental expenses, and I fail to see how the mere raising of the money gives rise to any probability that the money so raised or any portion of it was intended for, and paid to, the Magistrate who tried the cases. That persons who actually pay bribes or co-operate in such payments or are instrumental in the negotiations for the purpose are accomplices of the person bribed admits of no doubt, and has been laid down by a series of rulings (see *Queen-Empress* v. *Maganlal and Motilal*,[1] where the question is fully dealt with, and *Queen-Empress* v. *Deodhar Singh*[2]) and their evidence requires corroboration as that of other accomplices. It is, no doubt, observed in *Emperor* v. *Shrinivas*[3] that an accomplice who testifies that he has bribed the accused does not attempt to shift the offence from himself, for it is by making himself out to be a briber that he shows another has been bribed. But the important consideration relating to an accomplice's evidence is, is he or is he not giving evidence in the hope that he will be pardoned, and that consideration applies to cases of bribery as to other cases. However that may be, the learned Judges in *Emperor* v. *Shrinivas*[3] fully recognised the applicability of the rule requiring corroboration of an accomplice's evidence not merely as to the general truth of the story but also so far as it affects each person thereby implicated in cases of bribery as in other cases.

Much reliance has also been placed by the Public Prosecutor on *Deo Nandan Pershad* v. *Emperor*[4], but while the learned Judges in that case point out the extravagance of the contentions urged on behalf of the accused they fully recognise the force of the rule requiring corroboration of the testimony of persons giving or co-operating in the giving of the bribes. But they hold, following *Akhoy Kumar Chuckerbutty* v. *Jagat Chunder Chuckerbutty*[5], that persons from whom bribes are extorted, if accomplices at all, are accomplices to a very slight

1. (1889) I. L. R. 14 B. 115. 2. (1899) I. L. L. 27 C. 144.
3. (1905) 7 Bom. L.R. B. 969. 4. (1906) I. L. R. 33 C, 649.
5. (1900) I. L. R. 27 C. 925.

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extent and that persons who witnessed payment of the bribes cannot be treated as accomplices simply because they did not protest or inform the authorities; they regarded the evidence of such witnesses as sufficient corroboration coupled with the evidence of the man who lent the money to the complainant without knowing the purpose for which it was wanted. But they do not lay down that the evidence of the man who lent the money which was paid as bribe would by itself be sufficient corroboration to satisfy the rule. If indeed they intended to lay down such a proposition I should respectfully, but without hesitation, dissent from it. Much use is also sought to be made on behalf of the Crown of certain general criticisms of *Bhashyam Ayyangar* J. in *Ramaswami Gounden* v. *Emperor*[1] on the wisdom of the law regarding the testimony of accomplices, but I confess, with all deference to that learned Judge, that my confidence in the soundness of the rule, which has been long established by consensus of authority of most eminent Judges in England as well as in India and recognised by the Indian Legislature, is not in any way weakened by those remarks. He says that the rule requiring corroboration of the testimony of accomplices 'is one of the instances in which the law of the country has been utilized for the protection of individuals (including notably corrupt officials) and not for furtherance of justice.' It is somewhat difficult to follow the drift of this observation, which sounds rather harsh, but perhaps all that the learned Judge meant to convey was that the rule stands in the way of some officials who are actually guilty of corruption being convicted. On the other hand it may well be urged that the danger to the cause of good government in the country would be much greater if charges of corruption against public servants could legally be supported on the uncorroborated testimony of unscrupulous and infamous persons. Indeed, if this were allowed, it would tend to discourage public servants, especially those in the subordinate ranks, in the fearless and honest discharge of their duties, which are often such as to arouse feelings of resentment and hostility in a certain class of the public affected thereby. However that may be, the case in *Ramaswami Gounden* v. *Emperor*[1] does not lay down that the rule as regards the testimony of accomplices as

1. (1903) I. L. R. 27 M. 271.

established by the decision is different from what I have stated, *viz.*, "that it is the settled course of practice not to convict a person except under very especial circumstances upon the uncorroborated testimony of an accomplice." See *Rex* v. *Tate.*[1] There are no exceptional circumstances in this case.

As all the three charges rest on the uncorroborated testimony of persons who are undoubtedly accomplices, the convictions must be set aside and the accused acquitted and released from custody.

Ayling J.—The petitioner in this case was Sub-Magistrate of Karur in the Coimbatore District in 1908 and has been convicted by the Head-Quarter Deputy Magistrate of Coimbatore of receiving bribes in three cases then pending before him. The conviction was confirmed on appeal by the Sessions Judge of Coimbatore : and the present petition is for the revision of the latter's judgment under Ss. 435 and 439, Cr. P. C.

The first point taken by the learned vakil for the petitioner is that, as there was no cross-examination of the prosecution witnesses, his client was unfairly prejudiced, and that the case should have been remanded for the recall and cross-examination of these witnesses.

* * * *

His Lordship after detailing the facts relevant to this question said :—

I am certainly not prepared to say that the Magistrate was wrong. Even if the petition above referred to be regarded as an application under S. 257, Cr. P. C., (though it contains no request for the issue of process) the foregoing circumstances, in my opinion, fully warranted the Magistrate in considering that it should be refused as made for the purpose of vexation and delay or defeating the ends of justice : and he has given satisfactory reasons for so holding. The conduct of petitioner on the 24th May amounted to an attempt to bluff the Magistrate into pursuing a course which he had very properly declined to pursue ; and it is impossible to view his subsequent petition without reference to the events which preceded it. The petitioner is entitled to the less consideration, as he is himself a Magistrate and must be presumed to have some knowledge of law. He had

1. (1908) 2 K. B. 680, p. 682, 686.

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been treated with great consideration, and allowed ample facilities for obtaining the services of the pleader. The adjournment to the 24th May was in fact made on the representation of the pleader whom he had engaged that he would be free after the 22nd. I cannot therefore regard the absence of a vakil on the 24th as material: and no request was then made for a short adjournment on account of the latter's absence.

Every case in which a petition under S. 257, Cr. P. C., is refused must be judged on its merits: and the circumstances of the cases quoted by the petitioner's vakil (*Narayana Mudali* v. *Emperor*[1] and *In the matter of Inder Rai* v. *The Emperor*[2]) are so dissimilar as to deprive them of any value in the present connection. I find no ground for interfering with the conviction on the ground of the Deputy Magistrate's procedure.

The second ground on which the petition is sought to be supported is that the conviction is bad in law in that it is based on the evidence of accomplices, uncorroborated, or insufficiently corroborated, in material particulars.

The theory that a conviction based on the uncorroborated evidence of an accomplice is bad in law, and must *necessarily* be set aside on that ground alone, finds no support, to my mind, in any ruling that has been quoted before us. It is not only absolutely opposed to the distinct provisions of S. 133 of the Indian Evidence Act, but also to the expositions of the law in the well-known case of *R.* v. *Elahee Buksh*[3], the leading case quoted and relied on by the learned vakil for petitioner. Numerous cases have been adduced on both sides, dealing with the question of the value of an accomplice's evidence and the application of Illustration (*b*) to S. 114 of the Indian Evidence Act: but, as it seems to me, the general effect is simply this. The general rule that an accomplice should be corroborated in material particulars is a mere rule of practice, the application of which is for the discretion of the court by which the case is tried. It is a point which should never be lost sight of in weighing the evidence of such a man, and which, in cases tried by a Jury, it is always the duty of a Judge to draw the Jury's attention to. But, while a most important consideration, it is only

1. (1907) I. L. R. 31 M. 131. 2. (1909) 14 C. W. N. 280.
3. (1866) 5 Suth. W. R. 80.

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one of many which may have to be taken into account in deciding whether a witness should be believed or not.

"Where the Judge after making due allowance for these considerations and the probabilities of the story comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to convict"—*vide Edge* C. J. in *R.* v. *Govardhan*[1]. The strength of the presumption which the court *may* (not "shall") draw under the Illustration referred to varies with each individual case: and in some may be very slight, or even non-existent. There are accomplices and accomplices. "In the application of the rule much depends on the nature of the crime and the extent of the complicity of the witnesses in it. If the crime is a very deep one and the witness so far involved in it, as to render him apparently unworthy of credit, he certainly ought to be corroborated. On the other hand, if the offence be a light one, as in *Rex* v. *Hargrave*[2] where the nature of the offence and the extent of his complicity could not much shake his credit, it is otherwise." (*Vide* remarks of *Hill*, J. in *Rex* v. *Boyes*[3] quoted at page 278 of *Ramasami Gounden* v. *Emperor*[4].) Practically the same view is expressed by *Peacock*, C.J. in the case of *Elahee Buksh*[5]. He remarks: "When the Judges speak of the danger of acting upon the uncorroborated evidence of accomplices, they refer to the evidence of accomplices who are admitted as evidence for the Crown in the hope or expectation of a pardon." It will be easy to show how different is the position of the chief witnesses in the present case. Most valuable guidance on the special application of the doctrine to charges of bribery is to be obtained from the cases *of Emperor* v. *Shrinivas*[6] and *Ramasawmi Gounden* v. *Emperor*[4]. (Per *Bhashyam Ayyangar* J).

It is no doubt true, as has been laid down more than once, that the giver of the bribe as well as everybody who knowingly assists in raising or conveying the money to the bribe-taker must technically be regarded as an accomplice of the latter; but the degree of discredit attaching to their evidence on that account may be very slight indeed. Accomplice's evidence has been held untrustworthy for three reasons: (*a*) because an

1. (1887) I. L. R. 9 A. 528 at 554.
2. (1831) 5 C. and P. 170.
3. (1861) 9 Cox C. C. 32 1 B. and S. 322.
4. (1903) I.L.R. 27 M. 271.
5. (1866) 5 W. R. 80.
6. (1905) 7 Bom. L.R. 969.

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accomplice is likely to swear falsely in order to shift the guilt from himself; (*b*) because an accomplice as a participator in crime and consequently an immoral person is likely to disregard the sanctum of an oath; and (*c*) because he gives his evidence under promise of a pardon or in expectation of an implied pardon, and this hope would lead him to favour the prosecution.

In the case of the bribe-giver and his abettors, as pointed out in *Emperor* v. *Shrinivas*[1] (*a*) is entirely absent. So is (*c*): for it will hardly be suggested that the bribe-giver by keeping silent runs any risk of prosecution. As to (*b*) the immorality of the act varies with the circumstances of the case. Whereas, in the third count of the present charge, the bribe is given to secure the acquittal of a close relation on a charge of murder: however such conduct may be condemned, it can hardly be said, having regard to the ideas which commonly prevail in this country on the matter, that the act necessarily stamps the bribe-giver as much less scrupulous or less deserving of credit than the average witness.

Now, in the present case, it is clear from a perusal of the judgments of the Deputy Magistrate and Sessions Judge, that each of those officers, while recognising the fact that the chief witnesses were accomplices, came to the deliberate conclusion that their evidence was nevertheless true, and elected to accept it. We have to deal, therefore, not with a point of law conclusive of the impropriety of the conviction, but with a question of appreciation of evidence, on which we should not disturb in revision the decisions of those courts without clear and ample ground.

* * * *

On the third count his Lordship after detailing the evidence said: I consider that the above evidence is sufficient to justify the finding of the Deputy Magistrate and Sessions Judge on this count.

On the second count his Lordship agreed with Mr. Justice *Abdur Rahim* that the conviction on this count should be set aside.

On the first count, his Lordship said: "The case on this count is weaker than on the third count: but after careful consideration I do not feel prepared to say that there is anything in

1. (1905) 7 Bom. L.R. 969 at 975.

the evidence of those men which *imperatively* calls for its rejection: or that the Magistrate was wrong in basing a conviction upon it: or that we should now set that conviction aside in revision." Vyasa Rao v. The King-Emperor. Ayling J.

With great deference to the view taken by my learned brother, I consider that there are no grounds for interference with the convictions and sentence on the first and third counts: I agree that the conviction on the second count should be set aside.

Abdur Rahim J.:—My learned brother is also of opinion that the petitioner should be acquitted of the 2nd charge. His conviction and sentence will be set aside on that charge. As regards the 1st and 3rd charges, the case will be placed before a third Judge.

This case coming on for hearing before Mr. Justice *Sankaran Nair*, his Lordship made the following

ORDER:—The petitioner, Vyasa Row, was convicted of having received bribes on three occasions, the 13th August 1908, the 6th February 1909 and the 30th April 1909. The conviction for having received illegal gratification on the 6th February has been set aside by *Abdur Rahim* and *Ayling* JJ. As to the other two charges, *Abdur Rahim* J. was of opinion that the conviction is based only on the evidence of accomplices, and as such uncorroborated testimony cannot be accepted except under special circumstances which do not exist in this case, the conviction should be set aside. Mr. Justice *Ayling*, on the other hand, was of opinion that the conviction on such uncorroborated testimony is not illegal, though ordinarily it should be corroborated, and therefore there is no reason for this court to interfere in revision.

Both the learned Judges held that the appellant is not entitled to a fresh trial and the conviction is not illegal on the ground that the petitioner was not allowed to cross-examine the witnesses.

On account of this difference of opinion the case has been placed before me.

It will be observed that with reference to both these charges the lower courts have not based their conviction on what they consider to be the uncorroborated testimony of accomplices. Under S. 133 of the Indian Evidence Act, a conviction, even if

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based only on such testimony, is not illegal. In a Jury case a Judge does not *direct* a jury to acquit if the case depended only on such evidence, but *advises* them not to give credit to it, and, if they convict, even after they are told they ought not to believe it, the conviction will not be disturbed. So, if the lower courts had, for any special reasons, convicted the petitioner upon the sole testimony of accomplices after having their attention drawn to the rule that such testimony should not be believed without corroboration, then I think it is not, except for seeing that there are special reasons, a case in which the High Court should interfere in revision; but as in this case the courts are of opinion that such evidence has been corroborated, it becomes necessary to consider whether the corroboration is what is required by law, and, if there is no corroboration, whether the conviction should be sustained on the evidence of accomplices alone.

* * * *

[His Lordship next proceeded to deal with the evidence and concluded as follows.—ED.]

I am unable to hold therefore that the evidence of the accomplices has been corroborated. I have also given my reasons for disbelieving their story.

On the other question argued, I am of opinion that the petitioner was not entitled to recall the witnesses for cross-examination after the case had been closed. But it is not clear whether it is the prosecution or defence that has suffered on this account. As usual in this country, in examination-in-chief the bare outline of the prosecution case was stated by the witnesses, leaving all the difficulties to be explained in cross-examination, and in this case, unfortunately, there are many facts which have not been explained. It is true it was the fault of the petitioner that there was no cross-examination, but in this case, in the circumstances, I am not prepared to draw any presumption against the petitioner. I acquit the prisoner and set aside the conviction and sentence. The bail bond is discharged.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Olagayee .. .. Appellant*
(1st Defendant)

v.

Pichammal *alias* Avadai Ammal and another .. Respondent
(*Plaintiff & 2nd Deft.*)

Olagayee *v* Avadai Ammal.

Hindu Law—Wife's right of residence in family dwelling house—Husband's powers of alienation of dwelling house.

A Hindu wife has not, during her husband's lifetime, a right to reside in the family house like the widows of deceased co-parceners, and a husband is, consequently, competent to dispose of his family dwelling house, even though it has the effect of depriving his wife of her residence therein.

The text of Katyayana "except his whole estate and his dwelling house what remains after the food and clothing of his family, a man may give away whatever it be, whether moveable or immoveable; otherwise it may not be given" cannot be taken literally so as to debar a Hindu husband from alienating his family dwelling house to the detriment of his wife's residence in it.

Second appeal from the decree of the Temporary Subordinate Judge's Court of Madura in A. S. No. 550 of 1908, presented against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 564 of 1907.

S. Srinivasa Aiyar, for the appellant, contended that the wife, no less than the widow, is entitled to residence in the family house along with the husband; that it is not open to the husband to ask her to live elsewhere—relying upon *Ramanadan* v. *Rangammal*[1]; *Bai Devkore* v. *Sanmukhram*[2]; COLEBROOKE, *Book I*, v. 423; GHOSE'S *Hindu Law*, p. 303; MAYNE p. 610 (7th Ed.); MANU, Chap. V, v. 154; Chap. ix, 101-102; SARKAR, pp. 110, 348; STRANGE, Vol. i, p. 53; *Apararka*, *Anadashrama* Series, p. 46; *Mitakshara*, Chap. I, sl. 72; *Smriti Chandrika*, p. 102; *Mungala Daber* v. *Denonath Bose*[3]; *Srimati Bhageth Dasi* v. *Kanai Lal Mitter*[4]; *Sorolah Dassee* v. *Bhoobun Mohun*[5]; *Jayanti Subbiah* v. *Alamelu Thayamma*[6]; *Vyavastha Chandrika*, Vol. i, p. 260. Wife's right of maintenance &c., is good even against a purchaser—

* S. A. No. 1045 of 1909. 2nd February, 1911.

1. (1888) I. L. R. 12 M. 260.
2. (1888) I. L. R. 13 B. 101.
3. (1869) 4 Beng. L. R. 72 at p. 82.
4. (1879) 8 Beng. L. R. 229.
5. (1888) I.L.R. 15 C. at 305.
6. (1902) I. L. R. 27 M. 45.

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Baikamae v. *Pura*[1] ; *Lacchanna* v. *Bapamma*[2].

R.Rangasamy Aiyangar, for respondent, relied upon *Salakshi* v. *Lakshmajee*[3] ; *Mohun Geer* v. *Messamut*[4] for the position that the right of residence is a right to residence in some house, not necessarily family house, and that the wife has no right to dictate to the husband the house of her residence.

This second appeal coming on for hearing before Mr. Justice *Abdur Rahim* and Mr. Justice *Krishnaswami Aiyar*, the Court made the following

ORDER.—Before disposing of this case we think we ought to have a finding of the District Judge on the point whether the "other" house referred to in paragraph 6 of of the Subordinate Judge's judgment is also a family dwelling house and we order accordingly.

The finding should be submitted in six weeks from this date, and seven days will be allowed for filing objections.

In compliance with the above order, the District Judge of Madura submitted the following

FINDING :—The house in question was not a dwelling house, and the sole evidence of 2nd defendant that it was once used as a dwelling house is unreliable.

The second appeal, on the return of the finding, came up for disposal before their Lordships *Abdur Rahim* and *Ayling* JJ., his Lordship Mr. Justice *Krishnaswami Aiyar* having in the meanwhile resigned his seat on the Bench, when their Lordships delivered the following

JUDGMENT :—The finding now is that the 'other' house referred to by the Subordinate Judge is not a dwelling house. It is therefore contended that the 1st defendant, the senior wife, has a right of residence in the family house, and the gift in favour of the plaintiff, the junior wife, must be subject to such right. The learned vakil for the appellant admits that there is no decision of any High Court which has recognised the right of a Hindu wife to residence in the particular house in which she and her husband have been living, so as to preclude the husband from alienating the house, even if he is in a position and willing to provide suitable residence for her in some other house. The

1. (1879) I. L. R. 2 A. 145.
2. (1860) S. D. 230.
3. (1908) I. L. R. 31 M. 500.
4. (1872) 4 N. W. P. 153.

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decided cases have only recognised the right of widows of coparceners to right of residence in the family dwelling house, and, as for the wife of a Hindu, she is undoubtedly entitled as against her husband to be provided with suitable residence. It has also been held that the husband cannot alienate all his property so as to defeat the right of maintenance of his wife, and the right of maintenance of Hindu females generally has been held to be in the nature of a real right—*Ramanadan* v. *Rangammal*[1]. But the courts have never gone so far as to hold that a Hindu wife has during her husband's life-time a right to reside in the family house like the widows of deceased co-parceners. We have been referred to a text of Katyayana cited in in *Ramanadan* v. *Rangammal*[1] which is to this effect: "Except his whole estate and his dwelling house, what remains after the food and clothing of his family, a man may give away, whatever it be, whether moveable or immoveable; otherwise it may not be given." It is obvious that the words of the text cannot be taken literally, for if it were so, a Hindu would never be able to alienate his dwelling house, even if he had no wife to claim residence, nor would he be able to sell articles of clothing, etc. We do not, therefore, feel ourselves called upon, on the authority of this text, to impose limitations on a Hindu's rights of disposition over his dwelling house other than those already recognized by the courts.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

T. Venkatachala Pillai (died) and another .. Appellant*
(*2nd Defendant*)

v.

The Taluq Board, Saidapet, represented by the President .. Respondent
(*Plaintiff*).

Trust—Charitable trust—Board of Revenue, powers of—Madras Reg. VII of 1817, *preamble, Ss.* 2 *and* 3—*Madras Act V of* 1884, S. 51.

A trust created for the purpose of distributing *neermoru* (butter milk), etc., among people attending a festival is not a religious trust.

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* A. No. 13 of 1908. 9th February, 1911.

1. (1888) I.L.R. 12 M. 260.

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Held also (there being no contest in the matter) that a provision for making *archana* to the goddess on a certain day of the week did not make the trust a religious one for that reason.

The provisions of Madras Reg. VII of 1817 are applicable not only to endowments that were existing on its date but also to future endowments. Neither the words " have been " and "such endowments" in the preamble nor the words "have granted" in S. 2 have the effect of restricting the scope of the Regulation to existing endowments.

The words "were" and " have been " in S. 3 should be taken to have reference to the time when the Board of Revenue would be called upon to take action.

The Board of Revenue, under the provisions of Reg. VII of 1817, has undoubted power to appoint trustees for charitable endowments; but it has no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him. In this respect there is no difference between a hereditary and a non-hereditary trustee.

S. 51 of Madras Act V of 1884 empowers the Board of Revenue to make over to a local board both the management and right of superintendence of a charity. [*The Chairman Municipal Council, Rajahmundry* v, *Sasusla Venkateswarulu*[1] and *Nilayathakshi Ammal* v. *Taluk Board of Mayavaram*[2], referred to.]

Appeal from the decree of the District Court of Chingleput in O. S. No. 3 of 1905.

The facts and arguments appear sufficiently from the udgment.

T. R. Venkatarama Sastri and *A. Visvanada Aiyar* for appellant.

C. F. Napier for respondent.

The Court delivered the following

JUDGMENT:—In this case the Taluk Board of Saidapet sues for recovery of possession from the defendants of three items of property, alleging that they are trust properties, the first item being a Chattram, and items Nos. 2 and 3 being two houses endowed for the use of the Chattram. One Kanagammal, by her will dated the 5th February 1885, directed that twelve Brahmins should be fed on every *Dwadasi* day in the Chattram building, item No. 1, by means of the proceeds of the properties, items Nos. 2 and 3. She also directed that a sum of one rupee should be spent on every Friday for performing *archana* to the goddess in a temple. The balance, after deducting the expense of feeding, was to be devoted under the provisions of the will to defray the expenses of giving *neermoru* or buttermilk, *tambulam* or betel and nut, fans and sugar to people attending the festival of *Moluvaddee Servai* in Tiruvottiyur. She appointed three executors to her will but directed that Paupiah Chetti, who was the 1st defendant in the suit and with whom she was living either as wife or as a concubine, should conduct the charities, the other executors being given a right of interference in case Paupiah

1. (1907) I. L. R. 31 M. 111. 2. (1910) 20 M. L. J. 885.

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should be guilty of mismanagement. The 2nd and 3rd defendants in the suit are persons to whom Paupiah alienated by mortgage and sale the two houses, items Nos. 2 and 3, in August and June 1889. The plaint alleges that Paupiah, although he accepted the trust under the will and "discharged it faithfully for some years," afterwards grossly abused his trust and alienated the properties as mentioned above, and that he was prosecuted for criminal breach of trust and convicted of that offence. In August 1899 he executed a power of attorney in favour of the 2nd defendant. Although in the power of attorney he treated item No. 1, choultry, as his own property, he directed the 2nd defendant to conduct the charity therein. Complaints of misappropriation having been made by some members of the public in 1900 to the Collector of Chingleput, an inquiry was held and it resulted in the Board of Revenue resolving to take proceedings for the proper mangement of the trust. The plaint alleges (paragraph No. 12) that "the Board of "Revenue, with the written consent of the Governor in Council "transferred to the Taluk Board the management of item No. 1 "together with its endowments with power to file suits against the alienees of the trust properties and recover possession of the "same." Paupiah, the 1st defendant, died after the institution of the suit and the 4th and 5th defendants were brought on the record in the suit as his legal representatives. They did not, however, put in an appearance and the suit was tried *ex parte* as against them. The 2nd and 3rd defendants resisted the suit and raised various pleas. They contended that there was no real trust at all, and that the properties really belonged to Paupiah and not to Kanagammal, and that they were purchased in her name in order to screen them from Paupiah's creditors. They also contended that they were *bonâ fide* purchasers for valuable consideration from Paupiah without notice of the trust, and that the alienations could not therefore be disputed by the plaintiff. They denied that the Board of Revenue had any right to make over the management of the charity to the Taluk Board. And they contended further that the charities, if any, were of a private character and not public. It is unnecessary to refer to other pleas raised by them as we have not got to deal with them in this appeal.

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The first issue framed in the case was: "Whether the plaintiff has any *locus standi* to maintain the suit?" The District Judge decided it in the affirmative. On the merits the District Judge held that Kanagammal was the owner of the properties and negatived the contention that the properties were purchased in her name to screen them from the creditors of Paupiah. Although the point was raised again before us at the hearing of the appeal we have no hesitation in agreeing with the lower court in its finding that the properties belonged to Kanagammal and that the trust was a genuine and valid one. No serious attempt was made to refute the arguments urged by the lower court in its elaborate judgment on this point. The finding of the judge that neither the 2nd nor the 3rd defendant was a *bona fide* purchaser for valuable consideration was not controverted at the hearing and it is clearly correct.

The main question argued at the hearing was that raised by the 1st issue, whether the Revenue Board's order making over the management of the choultry to the plaintiff was legal and valid. Mr. Venkatrama Sastrial contended that the trust must be regarded mainly as a religious one, and that the Board had therefore no jurisdiction over it. He urged that the distribution of *neermoru*, &c., to people attending the festival at Tiruvottiyur should be regarded as a religious charity. We are clearly of opinion that this contention is not correct. The distribution, no doubt, is to be amongst those who attend the festival in the temple,but it is not to be an offering to the deity and it is not any ceremony which is part of the temple festival itself. The learned vakil did not contend that the small provision for making *archana* every Friday to the goddess would make the trust a religious one. We therefore confirm the finding of the lower court that the trust is not religious in its character.

The next ground of objection is that, as the endowment in this case was not one made before the coming into operation of Regulation VII of 1817, its provisions are not applicable and the Board of Revenue had no jurisdiction over the endowment. Reliance is placed mainly on the preamble to the Regulation and Ss. 2, 3 and 4. The preamble sets out the reasons for the enactment of the Regulation and states that considerable endowments *have been* granted both by the past and present

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Government of the country and by individuals for the support of mosques, temples, &c., that there are grounds to believe that the produce of *such* endowments is in many instances being misappropriated, and that it is the duty of the Government to prevent such misappropriation. It is contended that the use of the expression "have been" and "such endowments" shews that the Regulation was intended to be applicable only to endowments already existing. We do not think so. No reason has been suggested for restricting the Regulation to existing endowments. It is admitted that the mischief intended to be rectified would equally apply to future endowments. The preamble merely states the reasons which induced the legislature to enact the Regulation. No inference can be drawn therefrom that it intended to confine the enactment, without any apparent reason, to existing endowments. Moreover, we are of opinion that the enacting portion of the statute is sufficiently clear to cover future endowments. Section 2 vests the general superintendence of all endowments in land or money *granted* for the support of *mosques, etc.*, in the Board of Revenue. We can see nothing in the use of the word "granted" to justify the interpretation of it as applicable only to what had already been granted before the passing of the Regulation. Section 3 directs the Board of Revenue to take measures "to ensure that all endowments made * * * are duly appropriated to the purpose for which they *were* destined by Government or the individuals by whom such endowments *were* made." The use of the past tense "were" is much relied on by the appellant's vakil as well as the reference in the section to "public edifices which *have been* erected." We are of opinion that these words were used as applicable at the time when the Board of Revenue would be called upon to take action. Happier language might perhaps have been used to denote the intended meaning regarding which we entertain no doubts, but we have to construe an old statute, and it is clear to us that it would not be reasonable to place on it the restricted interpretation suggested for the appellant. Our opinion is in accordance with the view expressed by *Subrahmanya Aiyar* J. in *Sivayya* v. *Rami Reddi*,[1] with reference to the construction of Act XX of 1863, although the point was not decided

1. (1899) I. L. R. 22 M. 223.

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in that case. It is admitted that in several reported cases it was assumed that Regulation VII of 1817 and Act XX of 1863 are applicable to endowments made after the Regulation as well as prior endowments. We overrule this contention.

The next point urged was that assuming that the trust is not a religious one and that the regulation is applicable to prior endowments, the Board of Revenue had still no jurisdiction to make over the management to the Taluk Board on two other grounds. It was first urged that under Regulation VII of 1817 the Revenue Board possesses only a right of superintendence and that it has no right of management itself and could not therefore make over the right of the management to the Taluk Board. It was further argued that the trusteeship would descend to the heirs of the deceased, 1st defendant, and that, if it would not, the heirs of the founder Kanagammal would be entitled to appoint a fresh trustee. We do not think that these latter contentions are well founded, but we do not think it necessary to decide these questions as we have come to the conclusion that the appellant is entitled to succeed on another ground, *viz.*, because the Board of Revenue had no power to transfer the management of the trust without first dismissing the trustee then in office.

It is admitted in the plaint (paragraph No. 4) that the 1st defendant accepted the trust and discharged it faithfully "for some years" and Exhibit J, the power of attorney executed by him to the 2nd defendant in 1899, enjoined him to conduct the charity in the chattram. It is true that the 2nd and 3rd defendants have contended in the suit that there was no real trust, but the 1st defendant having accepted the trust would remain, in our opinion, trustee until he was dismissed by a competent authority. The Board's order was passed under S. 51 of the Madras Local Boards Act V of 1884. The section empowers "the Board of Revenue, with the written consent of the Governor "in Council and of the Local Board concerned, to make over to "such Local Board *the management and superintendence* of any such "endowment and thereupon all powers and duties that attach to "the Board of Revenue in respect thereof shall attach to such Local "Board as if such Board had been specifically named in the said Regulation," *i.e.*, under Regulation VII of 1817. The Board of

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Revenue, under the provisions of Regulation VII of 1817, undoubtedly had power to appoint trustees for charitable endowments in certain cases. Section 13 of the Regulation invests the Board with power to make the appointment in the case referred to in Ss. 11 and 12 Section 11 provides that the local agents appointed under the Regulation shall report to the Board all vacances and casualties which may occur, and are required to furnish the Board with the information necessary to enable it to determine the rule of succession applicable to each case. Section 12 provides that in cases in which the nomination has usually rested with the Government or with a public officer or in which no private person may be competent and entitled to make sufficient provision for the succession to the trust and management, the local agents are to propose proper persons for the office of trustee, manager, or superintendent for the approval and confirmation of the Board, and the Board, according to S. 13, is then entitled either to appoint the person or persons nominated for their approval or to "make such other provision for the trust, management or superintendence as may seem to them right and fit with reference to the nature and conditions of " the endowment, etc." It, however, seems to us clear that the Board has no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him. In *Venkatesa Nayadu* v. *Shriman Shatagopa Shri Shatagopa Swami*[1], it was no doubt recognised that "section "13 gives the Board of Revenue the largest power of making "any arrangement which the Board may consider best adapted to "secure the purposes which the Regulation had in view in cases "of vacancy." In *Ganapati Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*[2], *Subrahmanya Aiyar* and *Benson* JJ. held that the Board of Revenue had power to appoint a hereditary trustee where such appointment would not interfere with the rights of any existing trustee but had no power to subsequently appoint additional trustees so as to affect his rights of management without good and sufficient grounds for so doing. In *Sheik Davud Saiba* v. *Hussain Saiba*[3], referred to in the above case, it was laid down that a committee appointed under Act XX of 1863 whose powers of superintendence are similar to those of the Board

1. (1872) 7 M. H. C. R. 77. 2. (1906) I. L. R. 29 M. 534.
3. (1893) I. L. R. 17 M. 212.

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of Revenue under Regulation VII of 1817, cannot appoint additional trustees where there is a hereditary trustee. These cases recognize the principle that the Board cannot ignore the rights of existing trustees, and in this respect we think there is no difference between a hereditary and a non-hereditary trustee who is equally entitled to a freehold office. It appears therefore to be clear that the power of the Board of Revenue to appoint trustees cannot be exercised to the prejudice of one who is in possession of the office under the instrument creating the trust. It is unnecessary to consider the argument urged by the learned vakil fot the appellant that the Board had no power to manage the charities itself, for it is clear that, even if that were so, it is entitled under S. 51 of Act V of 1884 to make over to a local body not only its power of superintendence but also the management of any endowment. This power of making over the management to a local Board would only be an exercise of the Board's right of superintendence, and the section apparently empowers the Board to make over to a local board both the management, in virtue of its right of superintendence, and its own right of superintendence. This was expressly decided in *The Chairman, Municipal Council, Rajahmandry* v. *Sasurla Venkateswarulu*[1] by *Miller* and *Munro* JJ. with reference to a similar provision in the district Municipalities Act IV of 1884, S. 26, and by *Benson* and *Krishnaswami Aiyar* JJ. in *Nilayathakshi Ammal* v. *Taluk Board of Mayavaram*[2] where the question arose with respect to S. 51 of Act V of 1884. The order of the Board of Revenue in this case would clearly have been valid if the 1st defendant, Paupiah, had been dismissed by the Board. They had the power to dismiss him and there can be no doubt that Paupiah's misconduct would have fully justified his dismissal. But, as stated above, we are unable to hold that it had the right to pass orders transferring the management under S. 51 of Act V of 1884 while the 1st defendant was still the trustee and there was no vacancy with respect to the office. The 1st defendant, the trustee, having died since the institution of the suit and his representatives, the 4th and 5th defendants, having no right under the will to succeed to his right of management, it will, no doubt, now be open to the Board of Revenue to transfer the management to the Local Board under S. 51 of the Act.

1. (1907) I.L.R. 31 M. 111. 2. (1910) 20 M.L.J. 885.

But for the reasons we have given above we are constrained to hold that the Taluq Board obtained no valid rights under Exhibit C series which would entitle it to sue for the recovery of the properties, and we must reverse the judgment of the lower court and dismiss the suit but without costs in the circumstances of the case.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

C. Ramanjulu Naidu and another .. Appellants*

v.

C. Aparanji Ammal .. Respondent.

Ramanjulu Naidu v. Aparanji Ammal.

Easement—Right to light and air—Right of action—Specific Relief Act, Ss. 54, 56—*Injunction—Damages*

In cases of obstruction to light and air, injunction is the rule; and damages the exception.

There is no rule of law that the plaintiff will not be entitled to an injunction if he can so alter or rearrange his house as to neutralize the effect of the defendant's building.

Held also that, in the circumstances of the case, whether the Indian law as contained in S. 28 of the Easements Act is wider than the English Law as laid down in *Colls* v. *Home and Colonial Stores, Limited*[1] or not, the test laid down by the English law was satisfied in the case and that the plaintiff was entitled to an injunction.

Appeal from an order and judgment of Mr. Justice *Bakewell* in the Ordinary Original Civil Jurisdiction of this Court.

M. D. Deva Doss instructed by *Kangamadham Naidu* and *Tirumalai Pillay* for appellants.

C. J. Smith instructed by *Branson and Branson* for respondent.

This appeal coming on for hearing the Court delivered the following

JUDGMENT:—*Chief Justice*:—This is an appeal from a decree of Mr. Justice *Bakewell* directing the defendants to remove a certain wall which is marked in the plan, and perpetually restraining them from erecting any wall or building so

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*O. S. A. No. 57 of 1909. 5th January 1911.

1. (1904) A. C. 179 at 182.

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as to obstruct the access of light and air through the three openings on the southern wall of the plaintiff's house. The allegation in the plaint—paragraph 4—is:—" That the defendants have recently commenced to erect on the first floor of their house a structure which is calculated to interfere with the plaintiff's right of light and air to the windows, doors and rooms on the southern side of her house, which right the plaintiff claims as a right by reason of her house having been built for upwards of 20 years, and thereby having acquired by peaceable enjoyment a right of light and air thereto."

Now, three points were taken in appeal. The first point was that the plaintiff had not proved 20 years' enjoyment of the right by way of easement. The second point was that, assuming 20 years' enjoyment was proved, there was no such damage as would give to the plaintiff a right of action with reference to the acts done by the defendants. The 3rd point was that, assuming there was a right of action, the proper remedy was by way of damages, that the injunction was improperly granted and that that injunction should be dissolved.

Now, the first point was not very seriously contested. A Municipal document was put in which goes to show that the building was originally constructed in 1888 or 1889. Two witnesses were called with reference to this part of the case on behalf of the plaintiff. One was the man who actually built the house in question. He said he built it 20 or 22 years ago for Andoo Chetty. In cross-examination he no doubt said that he could not say whether it was 16, 18, 20 or 22 years ago that he built the house. Another witness was called on behalf of the plaintiff with regard to this question. He was the plaintiff's agent who looked after her affairs in Madras. He said that " the house was built 20 or 25 years ago. I remember it being built. The whole house was built then." As to the time when the house was built he was not shaken in cross-examination.

Then, with regard to the question whether the house had continued to be the same as it was originally constructed, the first witness, who was the builder, said: " I saw the house this morning, and there was no alteration since Andoo Chetty's death and he also said " during Andoo Chetty's time no alteration was made." The other witness said : " No alteration has been made

"in No. 8. It exists as it did 20 years ago." It was suggested that some of the sons of Andoo Chetty were alive and that they might have deen called. This is a fair observation. Still, I think there is evidence to show that the plaintiff has had 20 years enjoyment of the easement right which she claims in this case. Therefore, I agree with Mr. Justice *Bakewell's* finding as to that.

Then, as regards the second question, that is, whether the right by way of easement is established by the evidence. It is argued that the erection of the wall did not cause such damage to the plaintiff as would give her a cause of action. Now the finding of fact by the learned judge is in the following terms—(paragraph 3 of the judgment):—"I think it is clear that the wall complained of by the plaintiff is not intended to form part of a building, but is a bare wall intended to obstruct the access of light and air to the openings in the plaintiff's southern wall, or at most to secure privacy to defendants' house. The wall is practically flush with the plaintiff's wall and prevents the verandah windows from being opened, and thus not merely diminishes the amount of light and air coming to the openings in plaintiff's house, but practically prevents all access of light and air to them and thus totally deprives him of the right which he has hitherto enjoyed. It is obviously of considerable importance to the plaintiff to maintain the access of light and air to this central wall of his house unimpaired, and that the opening at the top is not sufficient to compensate him for the loss of the side light and air. It is possible that little direct sun-light passes through the grating No. 3, into this wall, since it faces towards the south but a considerable portion of diffused and reflected light must pass through it and of course it would receive the direct southern breeze which in Georgetown is a matter of considerable importance."

Now, the learned Judge does not discuss the evidence in detail with regard to these three openings with reference to which, the plaintiff says, access of light and air has been obstructed. I think I may say that on the evidence and on the admission made by learned counsel the matter stands thus : There are three apertures or openings on the southern side of the plaintiff's house. The first is the southern end of a verandah which is protected by shutters, The verandah is open on the eastern side

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and it is also open on the northern side, and, of course, light and air find their way to this verandah on the eastern side to a considerable extent, as the verandah is oblong, and to a less extent on the northern side. Then the second opening is of the nature of a grating which affords some degree of light to the privy. It is not clear on the evidence, and there is no finding as to whether there is any other means for the access of light and air to this privy. The house contains two privies. There are certain openings which provide for access of light and air to one of the privies; but whether it is the upper privy, or the privy which is furnished with the grating which the plaintiff says has been blocked up, is not clear. The third opening is an opening into something in the nature of a quadrangle, which contains an opening on the top looking towards the sky which is protected by bars and an opening to the south also protected by bars which the plaintiff says has been blocked up by the erection of the wall by the defendants. It is not suggested that there is any other means for access of light and air to the quadrangle or "well" as the Judge calls it, except the light and air which comes from the top or from the opening which has been blocked up. In a sense, the facts are not disputed, or, at any rate, are not in dispute on the question—that the wall built by the defendants is flush with the southern side of the plaintiff's house. The learned counsel for the defendants said the distance was about 7 inches from the grating. At any rate it is not contested that the finding of the learned Judge that the wall is practically flush is not justified by the evidence. So it is perfectly clear that the erection of the wall had the effect of blocking up light and air to these openings into the plaintiff's house on the south.

There is the further question,—having regard to the other means of access for light and air, what is the effect of the blocking up of the opening on the southern side? And for that purpose an expert witness was called on one side, and another expert witness was called on the other—both gentlemen of long experience and unimpeachable integrity. As usually happens with regard to evidence of this character, the witnesses differ.

There is contradictory evidence of the question as to how far the condition of the premises with reference to light and air, having regard to the other means of access for light and air, was

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affected by the wall which the defendants had built. I do not think it necessary to go through the evidence in detail. Mr. Reynolds, who was called for the plaintiff, speaking of the verandah, no doubt said, in cross-examination : "In the verandah itself I should think there would be enough light for ordinary purposes if the south window were closed." It is perhaps unfortunate that the two experts did not make their inspections under exactly similar conditions; because Mr. Reynolds who was examined for the plaintiff seems to have made his inspection between 5-30 and 6 30 P. M., and Mr. Pogson who was examined for the defendants made his inspection between 2-30 and 3 P. M., when the light would be much stronger. Mr. Pogson, in his examination-in-chief, said : "The closing of these verandah windows will hardly affect light and air to the verandah at all." Then with regard to the latrine he says : "If a small window were put on the eastern side of the latrine, it would be sufficient to light it. That piece of evidence goes to suggest that there is, in fact, no other means of light to the privy except the grating on the south which the plaintiff had blocked up.

Now, taking the learned judge's finding of fact in connection with the admissions made in court and in connection with the evidence to which I have referred—I do not profess to have dealt with the evidence exhaustively, but, taking all these together—speaking for myself, I am prepared to hold on these facts that, applying the test which is laid down by the House of Lords in *Colls* v. *Home and Colonial Stores, Limited* [1] the plaintiff has a right of action. It is said there that to constitute an actionable obstruction of ancient lights, it is not enough that the light is less than before. There must be a substantial deprivation of light enough to render the occupation of a house uncomfortable according to the ordinary notions of mankind.

Now, Mr. Smith has contended on behalf of the respondent that under the law of India her rights with reference to the easement which she acquired by prescription are wider than under the English law as laid down by the House of Lords in the case I have just referred to. He relies on S. 28 of the Easements Act. I do not propose to discuss this question or to express an opinion with regard to it, because, as I have said, I

1. (1904) App. Cas. p. 179 at 182.

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am willing in the present case to adopt the test laid down by the House of Lords and applying that test I hold, on the facts, that, here, there has been a deprivation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind.

That therefore disposes of the second question. Now, the third question raised in appeal is one which, in my opinion, is of greater difficulty. The learned counsel for the appellant has argued, with great ability, that even if we are against him on the other two points, the proper relief to be given to the plaintiff in this case is damages, and that an injunction is not the remedy which this court ought to grant. He relies upon Ss. 54 and 56 of the Specific Relief Act. Section 54 says :" Subject to the other provisions contained in, or referred to by, this chapter, a perpetual injunction may be granted where the invasion of the right is such that pecuniary compensation would not afford adequate relief." Section 56 says that " an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceedings." Counsel relied upon the judgment of this court in the case of *Boyson* v. *Deane.*[1] There, Mr. Justice *Sheppard*, with reference to the English law says : " There the right to an injunction is the *prima facie* right. Here in India an injunction is not to be given when the remedy in damages is considered adequate." With regard to the application of the test, the learned judge points out that the test is practically a difficult one to apply. I refer to page 254 : " On the one hand," he says " there can be no disturbance of an easement on which a pecuniary value cannot be placed because it is always possible to ascertain the difference in the selling value of the property brought about by the obstruction of which complaint is made. On the other hand, if the phrase means 'such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before,' it would, as observed by *Farran* J., be difficult to predicate of any material obstruction to ancient lights that pecuniary compensation could bring about that result." If I had to decide the question whether the equitable jurisdiction of this court on its

1. (1898) I.L.R. 22 M, 251.

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original side is restricted or cut down by the express provisions of the Specific Relief Act, I should certainly take time to consider the question further. No doubt that is the view which was taken by Mr. Justice *Sheppard* in the Madras case to which I have referred, and it was the view taken in the Bombay cases to which the learned counsel for the appellants has referred us, *viz.*, *Dhunjibhoy Cowasji Umrigar* v. *Lisboa*[1] and *Ghansham Nilkant Nadkarni* v. *Moroba Ramchandra Pai*[2]. I confess I am not altogether satisfied that that is the law, and I find a passage in BANERJEE'S work on "Specific Relief" to which my learned brother has referred me. I do not read the whole passage. It runs: (page 754)—"The result of the recent cases, truly observes Mr. Nelson, is to make injunction the rule and damages the exception. The Specific Relief Act, however, was framed at a time when a more restricted view of the equitable jurisdiction seems to have prevailed, and it has even been suggested at Bombay that in cases before courts subject to this Act later English decisions have no application. But this suggestion has been repudiated at Allahabad, and it is hard to see why in interpreting and applying the provisions of an enactment admittedly based upon the principles of English equity jurisprudence, the latest and most approved authoritative expositions of those principles should not be resorted to." I do not propose to discuss this question or to express an opinion with regard to it, because, for the purposes of the present case, I am prepared to adopt the test adopted by Mr. Justice *Shppeard* in XXII Madras, and to deal with this case on the assumption that the plaintiff must show that adequate compensation cannot be given her by way of damages. On the facts here I am prepared to hold that seeing that the wall is admittedly built flush with the plaintiff's house and that the effect of this is, so far as the means of access for light and air on the southern wall are concerned, to prevent them entirely, and, applying the test in a common sense way, I am prepared to hold on the facts that this is not a case in which adequate compensation can be given by way of damages, or a case in which equally efficacious relief can certainly be obtained by some other usual made of proceeding.

1. (1888) I.L.R. 13 B. 252. 2. (1894) I. L. R. 18 B. 474 at p. 488.

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The Chief Justice.

One word with regard to the observation of Mr. Justice *Sheppard* in XXII Madras (page 255). There he says : "I think it is most important that no attempt has been made to prove that the plaintiffs cannot * * * so alter or re-arrange * * * as to neutralize the effect of the defendant's building. If this is possible, I do not see how the plaintiffs can say that compensation in money will not afford them adequate relief." Now, the learned judge cites no authority for that proposition and the learned counsel for the appellants has cited no authority. With great respect, as at present advised, I should not be prepared to assent to that proposition of law. I think I have dealt with all the questions which have been raised excepting the question of costs. I am always reluctant to interfere in the matter of costs which are in the discretion of the learned judge. In this case the learned judge gave the plaintiff costs upon the higher scale. Now, the rule empowers the judge to award costs on the higher scale for special reasons. The learned judge says—"The defendants must pay the costs of suit * * Under the circumstances I direct them to be taxed on the higher scale." He gives no reasons why costs on the higher scale should be given and I must say, speaking for myself, I fail to see any circumstance in this case which constitutes "special reasons" within the meaning of the rule. If the learned judge had specified any spe ial reasons I should certainly not be disposed to interfere; but, as he has not, I think the plaintiff should only have costs on the lower scale. Subject to that, I am of opinion that this appeal must be dismissed with costs.

Sankaran Nair J. :—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Abdur Rahim.

Marudaga Nachiar (died) & others .. Appellants*

IN APPEAL NO. 108 OF 1904.

[*Plaintiff* (*deceased*) *and legal representative of the plaintiff* (*deceased*)]

v.

Savadi Tirumalai Kolundu Pillai .. Respondents (*Defendants*

* A. No. 107 and 108 of 1904. 11th October, 1910.

Marudaga Nachiar v. Savadi Tirumalai Kolundu Pillai.

Hindu law—Widow, powers of—Decree against widow—Execution sale—Interest sold—Question of fact—Considerations—Debt—Onus of proof of necessity—Widows' rights over net income—Compound interest on debt—Court sale and voluntary sale by widow—Manager, powers of alienation—Alienee's rights.

Where a decree is obtained against a Hindu widow, even if the decree is based on the widow's contract and does not give a charge on the husband's estate and the reversioners had not been made parties to the suit or execution proceedings, the decree-holder would be entitled to have the entire estate sold, and if in fact the entire estate was sold and bought by the purchaser, the reversioners could not defeat the purchaser. There is no difference in this respect; between a court sale and a voluntary sale by the widow for the discharge of the husband's debt. [*Giribala Dassi* v. *Srinath Chandra Singh*[1], *Narana Maiya* v. *Vasteva Karanta*[2] disapproved.] The real question in all such cases is what was in fact sold : and that question is one of fact. The sale certificate is, though an important piece of evidence on the question, yet not conclusive. The frame of the suit, the judgment, the decree, the execution proceedings, the advertisements for sale, the adequacy or in—adequacy of the purchase-money and the conduct of the parties, are all circumstances which may legitimately be considered in the determination of the question. [*Boistub Churan Tevaree* v. *Govind Parshad Tewaree*[3]; *Asmat Bibee* v. *Ram Kant Roy Chowdhry*[4]; *Anktu Ram* v. *Nand Kishore*[5]; *Nagenderchunder Ghose* v. *Sreemutty Kaminee Dossee*[6]; *General Manager of the Durbhanga Raj* v. *Maharaj Coomar Ramput Singh*[7]; *Kistomoyee Dassee* v. *Prosunno Narain Chowdry*[8]; *Baijan Doobey's case*[9]; *Jugal Kishore* v. *Jotendro Mohun Tagore*[10]; *Deendayal's case*[11]; *Suraj Bunsi Koer* v. *Sheo Persad Singh*[12]; *Girdhari Lal* v. *Kuutoo Lal*[13]; *Simbunath Pande* v. *Golap Singh*[14], *Pettachi* v. *Chinnatambi*[15]; *Dulat Ram* v. *Mehr Chand*[16]; *Nanomi Babuasin* v. *Madhun Mohun*[17]; *Mahabir Pershad* v. *Moheswar Nath Sahai*[18]; *Bhagbut Pershad Singh* v. *Girja Koer*[19]; *Abdul Aziz Khan* v. *Appayasami Naicker*[20]; *Jiban Krishna Roy* v. *Brojo Lal Sen*[21]; *Brojo Lal Sen* v. *Tiban Krishna Roy*[22]; *Narana Maiya* v. *Vasteva Karanta*[2]; *Giribala Dassi* v. *Srinath Chandra Singh*[1]; *Veera Soorappa Nayani* v. *Errappa Naidu*[23]; *Devji* v. *Sambhu*[24]; ref. to.]

The mere description of the widow as Zamindarini is in no way a determining factor to lead to the inference that the interest sold was the whole estate.

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1. (1906) 12 C.W.N. 769.
2. (1893) I. L. R. 17 M. 208.
3. (1871) 13 W. R. 203.
4. (1873) 19 W.R. 251.
5. (1875) I. L. R. 1 A. 236.
6. (1876) 11 M. I.A. 241.
7. (1872) 14 M. I. A. 605.
8. (1866) 6 W. R. 304.
9. (1875) I. L. R. 1 C. 133.
10. (1884) I.L.R. 10 C. 985 at p. 992.
11. (1877) I.L.R. 3 C. 198.
12. (1878) I.L.R. 5 C. 148.
13. (1874) L. R. 1 I. A. 321.
14. (1887) I. L. R. 14 C. 572.
15. (1887) I. L. R. 10 M. 241.
16. (1887) I. L. R. 15 C. 70.
17. (1885) I. L. R. 13 C. 21.
18. (1889) I. L. R. 17 C 584.
19. (1888) I.L.R. 15 C. 717.
20. (1903) I.L.R. 27 M. 131.
21. (1903) I. L. R. 30 C. 550.
22. (1899) I. L. R. 26 C. 285.
23. (1906) I. L. R. 29 M. 484.
24. (1899) I.L. R. 24 B. 135.

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A Hindu widow is entitled to the entire net income of the husband's estate after the payment of peishcush and other similar charges; and she is not bound to pay her husband's debts out of her income. [*Ramasami Chetty* v. *Mangaikarasu Nachiar*[1]; *Debi Dayal Sahoo* v. *Bhan Pertap Singh*[2]; ref. to.]

A Hindu widow can agree to pay compound interest on loans contracted by her for necessity, and it depends on the exigencies of the circumstances in which a loan is incurred whether a provision for compound interest should be held to be reasonable or otherwise. [*Hurro Nath Rai Chowdhri* v. *Randhir Singh*[3].]

Where the question of necessity for an alienation by a widow is raised after a long lapse of time (as in this case 40 years) it would be unreasonable to insist on strict and definite evidence of necessity, and it is not the law that, if a person *bona fide* lent money on the security of the estate in order to enable the widow to meet the Government dues, he must lose his money unless he can show that the widow's difficulties had not been brought about by gross mismanagement.

The law on the powers of a Hindu father, manager of the family and widow to bind the entire estate by his or her dealings and the rights of the aliences, reversioners and others examined and summarized.

Appeals from the decree of the Subordinate Judge's Court of Tuticorin in O. S. No. 55 of 1901.

S. Srinivasa Aiyangar for appellant.

The advocate-General (*P. S. Sivaswamy Aiyar*), *V. C. Seshachariar* and *T. R. Venkatrama Sastri* for respondents.

The Court delivered the following

JUDGMENT:—IN A. NO. 108 OF 1904. The plaintiff, as a Hindu reversioner, sues for the recovery of the properties specified in Schedules A, B, C and D to the plaint and forming the impartible ancestral polyam of Naduvakurichi from the various defendants who claim to be entitled to the lands in their respective possession under sales in execution of decrees passed against one Thangama Nachiar, widow of the last Zemindar Kuthala Thevar, or by virtue of alienations made by her. The plaintiff is the daughter of Kuthala Thevar, and though the legitimacy of her descent was questioned in the Subordinate Judge's court, his finding in her favour on the point has not been contested before us. Kuthala Thevar died in October 1856 and his widow in 1899. The present suit was instituted in 1901. The Subordinate Judge has dismissed the suit so far as it relates to properties included

1. (1894) I.L.R. 18 M. 113. 2. (1904) I.L.R. 31 C. 433.
3. (1891) I. L. R. 18 C. 311.

in Schedules A, B and D and has given a decree to the plaintiff with respect to lands in Schedule C. The plaintiff has preferred an appeal (No. 108 of 1904) from that portion of the judgment which is against her, and the defendants Nos. 1 and 2, who are in possession of the properties of Schedule C, have appealed (No. 107 of 1904) from so much of the judgment as affects them. We shall first deal with the questions raised with reference to properties comprised in Schedules A and D and B, and the first question in this connection that has to be considered is whether the sales of those properties were due to reasons binding on the estate. In this connection it is necessary to narrate some of the more important facts connected with the history of the Zemindary since the death of Kuthala Thevar. On the death of Kuthala Thevar there was a contest between the plaintiff and the widow as to the right of succession and the matter came under the cognizance of the Revenue authorities. The Collector reported to the Board of Revenue on the 14th January 1857 supporting the plaintiff's claim, but the Board recognised the right of the widow to succeed to the Zemindary. It appears that pending decision of the rival claims the Zemindary was kept under the direct management of the Revenue Department. The widow was put into possession early in 1857. In 1861 the plaintiff joined by her husband instituted a suit (No. 9 of 1861) against the widow seeking to have it declared that certain debts were not binding on the estate and to recover possession of the Zemindary from the widow on the ground of mismanagement and waste. The suit was heard by Mr. Goldie, Civil Judge of Tinnevelly, and he dismissed the suit by judgment pronounced in February 1863. He held that though with proper economy it was not necessary for Thangama Nachiar to contract a particular debt of Rs. 3,000 on the security of the estate, it was not proved that she had been guilty of such waste and mismanagement as to render her liable to forfeit the family estate. He further found it proved by documentary and oral evidence that the other debts, the validity of which was impeached by the plaintiff, had been incurred for purposes binding on the estate. It is necessary to state the details regarding those debts since it is contended that most of the alienations in question in this suit were mainly due to those debts. It was found by Mr. Goldie that Kuthala Thevar, the Zemindar himself, was

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indebted to one Muthukaruppan Chettiar (3rd defendant in the suit of 1861) in the sum of Rs. 2,100 and the widow borrowed of the same Muthukaruppan Chettiar Rs. 3,400 in 1858 to pay one Sadasiva Tharvadiar from whom she had previously borrowed Rs. 2,900 in order partly to discharge certain debts owed by the Zemindar to several persons and partly to pay the Government revenue. So the widow executed two bonds in favour of Muthukaruppan, one for Rs. 4,811 and the other for Rs. 700. It appears from the evidence that Muthukaruppan Chettiar instituted a suit to recover Rs. 5,000 on the bond for Rs. 4,800 and obtained a decree by consent on the 24th December 1858 for Rs. 5,300 to be paid in six instalments. Kuthala Thevar also owed Rs. 1,821-14-10 to one Thanappen Chettiar (4th defendant in the suit of 1861) and this debt was transferred to one Vythilingam Pillai (5th defendant in the suit of 1861) and another debt of Rs. 4,400 embodied in a consent decree and admitted by the plaintiff's pleaders in the suit of 1861 to have been almost entirely contracted by the Zemindar, was transferred to the same Vythilingam Pillai by Sadasiva Tharvadiar who himself was assignee of one Uthaman Chettiar (2nd defendant in that suit). Thus we have it that it was established before Mr. Goldie in 1863 that the debts for which the widow executed bonds in favour of Muthukaruppan Chettiar for Rs. 4,800 and Rs. 700 respectively and the sums of Rs. 1,821 and Rs. 4,200 which the widow owed to Vythilingam Pillai were debts binding on the inheritance, being in the most part incurred by the last Zemindar himself and to a small extent by the widow for the payment of peishcush.

The decree in execution of which properties in Schedules A and D were sold was obtained by one Ramalinga on a bond (Exhibit III *a*) for Rs. 20,000 executed in his favour by the widow on the 9th February, 1865. The bond recites that the amount was borrowed to discharge decree-debts due to Vythilingam Pillai and Muthukaruppan Chettiar which in the litigation of 1861 were held to be valid and binding on the estate. On the date of Exhibit III *a* the judgment-debt of Rs. 4,400 due to Vythilingam Pillai amounted to Rs. 6,493 and the other debts of Rs. 1,821 due to him amounted to Rs. 2,915 and the decree-debt for Rs. 5,300 due to Muthukaruppan Chettiar amounted to

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Rs. 11,426, in all something over Rs. 20,000. Ramalinga obtained a decree for Rs. 26,574 odd in a suit No. 5 of 1868 instituted under the provisions of the Registration Act on the bond for Rs 20,000 and in execution thereof properties in Schedules A and D were sold and purchased by Ramalinga Mudaliar himself in August 1870 for Rs. 24,500. Ramalinga sold six villages of Schedule A to the 3rd defendant in 1879 for Rs. 11,500, the remaining one village in that schedule to the 4th defendant in 1885 for Rs. 22,000 and the properties mentioned in schedule D to the grandfather of defendants Nos. 106 to 108 in September 1869 and January 1870 for Rs. 2,400. We may at once mention here that it is not suggested that the judgments-debts owing to Vythilingam Pillai and Muthukaruppan Chettiar have not been discharged, and it is not shown that those debts were satisfied out of money other than that borrowed from Ramalingam Mudaliar.

The history of the properties comprised in Schedule B is briefly this; on the 25th October 18-3 one Purnalingam Pillai purchased these properties at a court auction in execution of a decree obtained against the widow in a suit (No. 87 of 1870) instituted by the sons of one V. Perumal Pillai on a bond executed by the widow in the latter's favour on the 7th June 1862 for Rs. 2,600. The 5th defendant who is now in possession of these lands derives her title though certain transfers from Perumal Pillai. It is stated in the bond that the sum of Rs. 2,336-11-8 was wanted for the payment of peishcush, the balance Rs. 263-4-0 being paid to the widow in cash. We may state here that it is abundantly clear from the evidence alluded to in paragraphs 74 and 77 of the Subordinate Judge's judgment that up to June 1862 the arrears of peishcush amounted to generally Rs. 2,000, that the Revenue authorities had been pressing for payment and the widow complained of her inability to make collections owing to the obstructions of other persons, and that by the 5th August 1862 she paid the peishcush.

On the question of necessity, one of the points for determination is what was the income of the Zemindary derived by the widow at the time of the transactions which are in question, *i. e.*, broadly speaking, between 1857 and 1862 and whether the widow was in possession of the jewels and cash of the value of Rs. 10,000.

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On the latter question the Subordinate Judge rightly observes that it is difficult to accept the statement of the plaintiff in this suit, having regard to the fact that in the plaint in the suit of 1861 she had stated that the value of the moveables which came into possession of the widow was only Rs. 710, and we have therefore no hesitation in agreeing with the lower court in its conclusion—and in fact that conclusion was not seriously challenged before us—that the plaintiff has failed to prove her allegations on this point.

As regards the income of the Zemindary during the period of the transactions in question the matter is left in obscurity and we feel that with the materials available to us it is not possible to form an accurate estimate of it.

The plaintiff, in her plaint in the suit of 1861, stated that the villages and the Zemindary "yielded" an income of Rs. 5,400 including the peishcush thereon, which is Rs. 3,028-11-8 per annum, and this is understood by the court below to mean that the income of the Zemindary was Rs. 5,400 out of which the peishcush of Rs 3,028 was to be paid. The net income of the Ayan lands is mentioned as Rs. 1,000 a year. Therefore the actual net income of the entire properties which came into the possession of the widow was according to the plaintiff's statement, in 1861 about Rs. 3,000 a year. But Mr. Goldie states in his judgment that according to the statement furnished by the pleaders of Thangama Nachair the income of the Zemindary was Rs. 15,000 and, relying on that statemen, the says that the widow was in enjoyment of a large income and that she was under no necessity to borrow a sum of Rs. 3,000.

Exhibit XXVI *b*, a statement dated the 10th December 1868, showing the proportional share of peishcush fixed for each village in the Zemindary, and Exhibit XXVI *c*, an account dated the 10th May 1869, showing the division of the Zemindary, give Rs. 14,173-11-9 as the income of the Zemindary. If the above be taken to represent the gross actual income out of which figures the peishcush of Rs. 3,000 odd and the collection charges and road-cess, which according to the defendants' 4th witness, the Kurnam of Naduvakurichi Kaspa, amounted, in his experience of 15 years previous to the present suit, to Rs. 1,000 and Rs. 400 respectively, altogether to Rs. 1,400 on the average—and the

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collection charges in 1863 would certainly have been less and not more—the net income of the Zemindary would be between Rs. 12,500 and Rs. 13,600 a year.

The learned Subordinate Judge however assumes—we say, assumes because he does not refer to any evidence on which he relies in this connection—that the plaintiff's statement in 1863 is correct and seeks to explain away the statement filed by the widow's pleaders and the finding of Mr. Goldie based thereon by suggesting that the Rs. 15,000 'apparently include probable income of waste lands, etc.' The latter suggestion is supported to this extent by Exhibit XXVI *b* that the income as given therein is both of the cultivated and waste lands. But that document does not show either the amount of income from the waste lands or its proportion to the total income or that it is a mere estimate of probable income and not a statement of the actual income. The Subordinate Judge does not rely upon any evidence to support his conclusion on this point. He does not find at least expressly what portion of that income of Rs. 15,000 represents merely possible income of waste lands. The learned Advocate-General who appeared in this appeal for the defendants Nos. 3, 4 and 106 to 108 relies on Exhibit XV which is a cadjan jamabandy account for Fasli 1267 (1856-7) as showing the total jama of Naduvakurichi Zemin for Fasli 1266 to be Rs. 2,505 and that for Fasli 1267 to be Rs. 4,534 and on Exhibit XXVI series which purport to be an abstract of the income of cultivated land and probable income of uncultivated land of each village as showing that in estimating the total income the possible income from waste land which for one Fasli (73) is given as about Rs. 8,000 must have been included. The learned Subordinate Judge found himself unable to place any reliance on these cadjan accounts and we are not prepared to say that he ought to have acted upon them. The defendants' witness No. 4 who produces these papers admits that he is in possession of all the accounts from the very beginning, and his explanation as to why he has selected only the jamabandy account for 1267 is not to our minds altogether satisfactory, though we are not prepared to hold that the other accounts have been wilfully suppressed. And as to Exhibit XXVI series there is no evidence as to why and for what purpose those abstracts came to be prepared and there is no

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means of verifying whether such abstracts are accurate. There is indeed no guarantee of their correctness from anything that appears in the evidence. We agree with the Subordinate Judge that the defendants ought to have asked the defendants' witness No. 4 to produce all the various kinds of accounts for all the years covered by the transactions so that the question of actual income might not be left in doubt. The defendants' witness No. 4 says that the cadjans produced are the originals in the handwriting of his father who held the office of Kurnam before him, but that the fair copies which were sent to the Zemindar's office would alone contain his father's signatures and the dates of transmission. No proper explanation is forthcoming why such copies transmitted to the Zemindar's office, which would in that ordinary course come into possession of the purchasers of the properties, have not been produced.

Now to turn to the evidence of the defendants' witness No. 4 as to the income of the Zemin: he says that for the 15 years of which he had experience the actual income has been Rs. 10,000 out of which, if we deduct the amount to be paid for peishcush Rs. 3,128, for road-cess Rs. 400 and the collection charges Rs. 1,000, the net income left would be about Rs. 5,500. In the absence of any proof the defendants, in our opinion, are not entitled to ask us to assume that during these years the clear realisable income of the Zemindary was substantially less than Rs. 5,500

We now proceed to deal with the questions which arise with respect to the properties in schedules A and D. In our opinion the Subordinate Judge is right in holding that Rs. 20,000 was actually borrowed under Exhibit III *a* and that the debts for the payment of which the amount purports to have been borrowed were in fact so discharged. The transaction took place as far back as 1865 and all the parties to the transaction and the attestors to the bond are dead and it would not be reasonable under the circumstances to expect any direct evidence on either of the points. But it is not suggested that those creditors have not been satisfied or that they have been paid otherwise than with the money borrowed from Ramalinga as recited in Exhibit III *a*. It is not proved that the widow inherited cash or valuable moveabes, and she had been complaining that she was

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obstructed in making collections and had been borrowing money in order to pay peishcush. These circumstances combined with the fact that she and the plaintiff, the next reversioner, were on very unfriendly terms would make it improbable, quite apart from the question whether the widow was in fact unable to meet the Government's and other lawful demands with the receipts from the Zemindary, that she should have discharged the debts mainly incurred by the late Zemindar out of her own income which she would neither be legally bound nor inclined to do. That a Hindu widow is entitled to the entire net income of the estate after the payment of peishcush and other similar charges and is not bound to pay her husband's debts out of her income is well-established (see *Ramasami Chetty* v. *Mangaikarasu Nachiar*[1] and *Debi Dayal Sahoo* v. *Bhan Pertap Singh*[2], and has not been disputed by Mr. S. Srinivasa Iyengar, the learned vakil for the appellant. Now the debts for the payment of which Rs. 20,000 was borrowed from Ramalinga having been traced almost entirely to Kuthala Thevar, the other contention of the appellant which remains to be considered in this connection is whether the provision for payment of compound interest at 12 p. c. in the bond, Exhibit III *a*, is so unreasonable that we must hold that the widow could have been under no necessity to borrow on such terms. It is even contended that a Hindu widow is not entitled to agree to the payment of compound interest. But there is no authority for such an absolute proposition which on the face of it is untenable. It must depend on the exigencies of the circumstances in which a loan is incurred whether a provision for compound interest should be held to be reasonable or otherwise. This is all that can be gathered from *Hurro Nath Rai Chowdhri* v. *Randhir Singh*[3]. There is no evidence in this case that Thangama Nachiar could have obtained the money on more favourable terms. We agree, therefore, with the Subordinate Judge that there was necessity for Exhibit III *a*.

The next important question is what interest passed by the sale in execution of the decree obtained on Exhibit III *a*. The decree was under the especial provisions of the Registration Act XVI of 1864 and it may be taken to be the settled law that

1. (1894) I. L. R. 18 M. 113. 2. (1904) I. L. R. 31 C. 433.
3. (1891) I. L. R. 18 C. 311.

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under that Act only a simple money decree and not a mortgage decree could be passed (see *Boistub Churn Tevaree* v. *Gobind Parshad Tewaree*[1], *Asma Bibee* v. *Ram Kant Roy Chowdhry*[2] and *Ankhe Nam* v. *Nand Kishore*[3]. In fact the decree, Exhibit III, is a simple money decree and does not create any lien on any property. That being so, the decree-holder, it is contended, would only be entitled although the debt was incurred for legal necessity to sell merely the widow's interest in the estate and not the reversion. The argument is that you cannot go behind the decree and show that the debt was chargeable upon the estate and the widow not having been sued in her representative capacity and the reversioner not having been joined in the suit or the execution proceedings only the widow's interest could be sold. The main contention of the respondents is that the debt on which the decree is founded having been incurred for legal necessity the entire inheritance was liable to be sold in execution of the decree and not merely the widow's interest and the only point for enquiry is what was in fact sold. This question in one shape or other has been the subject of repeated discussion before the Judicial Committee and we proceed to examine those cases with a view to see if they have laid down any principles which would be applicable to the facts of this case.

To begin with *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee*[4]; there the mortgagee from the last male proprietor paid the Government revenue in order to save the estate which was then in the hands of the deceased proprietor's widow and which for no justifiable reason she had failed to pay. The mortgagee, instead of suing on his mortgage for sale of the estate tacking on thereto the amount so paid, sued the widow to recover this amount only and obtained a personal decree against her. It was held that in execution of that decree only the widow's interest could be sold as she, to the knowledge of the decree-holder, had made default in payment of the revenue in order to destroy the estate and therefore the reversioner would be entitled to recoup the same out of the widow's life profits.

The case of the *General Manager of the Durbhanga Raj* v. *Maharaj Coomar Ramput Sing*[5] was a suit instituted against

1. (1871) 13 W. R. 203.
2. (1873) 19 W. R. 251.
3. (1875) I. L. R. 1 A. 236.
4. (1867) 11. M. I. A. 241.
5. (1872) 14 M. I. A. 605.

the last male owner for arrears of rent, but he having died pending the trial the widow was brought on the record as representative and a decree was passed against her. In execution of that decree the entire estate was sold. Their Lordships approving of the decision in *Ishan Chunder Mitter* v. *Buksh Ali Soudagar*, reported in Marshall's Reports page 614, held the son was also bound by the decree and that the whole proceeding, if fairly looked at, showed that the entire estate was sold.

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In *Baijun Doobey* v. *Brij Bhookun Lall Awusti*,[1] where the cases *Nugender Chunder Ghose* v. *Sreemuthy Kaminee Dassee*[2] and *General Manager* of the *Durbhanga Raj* v. *Maharaj Coomar Ramput Singh*[3] and the decisions of the High Courts on the subject are reviewed and discussed, there is a sentence in the judgment of the Judicial Committee delivered by Sir *Barnes Peacock* that according to *Kristomoyee Dassee* v. *Prosunno Narain Chowdhury*[4] all that would be sold under a personal decree against the widow would be her interest, but the very next sentence runs thus: "It was there held that when only the rights and interest of a widow in the property left by her husband were sold in execution of a decree against her on account of a debt contracted by her, and neither the decree nor the sale proceedings declared the property itself liable for the debt the purchaser obtained an interest in the estate only during the widow's life-time." Then their Lordships consider the terms of the notification of sale which they observe did not say that the decree was to be levied out of the husband's assets but stated that whatever right and interest the judgment-debtor had would be sold and that besides such right and interest the right and interest of no other person would be sold. They go on to observe that in the case before them the decree in execution of which the sale took place was one for recovery of maintenance due to the plaintiff herself who was also the reversioner; it was the right and interest of the judgment-debtor, the widow, which was liable to make good her default in non-payment of the maintenance, and that the plaintiff wanted to sell the widow's estate and not his own interest, and therefore the real question was what was liable to be sold under the decree and what in fact was sold. They also rely on the statement in the appellant's certificate of purchase that whatever right, title and interest the judgment-debtor had in the property had become vested in the

1. (1875) I. L. R. 1 C. 133.
2. (1867) 11 M. I. A. 241.
3. (1872) 14 M. I. A. 605.
4. (1866) 6 W. R. 304.

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auction-purchaser in arriving at their conclusion that 'what was intended to be sold was the widow's interest only.' If the Judicial Committee had regarded the terms of the decree to be conclusive there would have been no necessity to discuss the question what was in fact sold and what was intended to be sold under the decree, which was merely a personal one. Besides the claim against the widow was, as pointed out in *Jugal Kishore* v. *Jotendro Mohun Tagore*,[1] for a personal debt due by her, the widow having received the profits and failed to pay the maintenance, and the suit was to enforce her personal liability. In our opinion, therefore, this case of *Baijan Doobey*[2], far from supporting the appellant's contention, is against its correctness.

In *Kistomoyee Dassee* v. *Prosunno Narain Chowdry*[3], referred to by their Lordships with approval, the principle governing the decision is thus stated: "Here she was a Hindu widow in possession and the debt contracted was by her and her rights and interests in the property were sold. To that extent and no further did the appellant purchase, and that purchase conveyed the interest in the estate only during the life of the widow. The decree might have declared the property itself liable for the debt, but in the absence of any such statement in the decree or in the sale proceedings, we think under the circumstances, we must restrict the auction purchaser to the terms of his purchase." In *Suraj Bunsi Koer* v. *Sheo Pershad Sing*[4], it was held that by a sale under a decree obtained against the father the son's interest did not pass inasmuch as the father's debt was one for which the sons were not liable

In *Deendayal's case*[5] the decree was against a Hindu father for debt incurred by him for 'legal necessity.' The son was not a party to the suit and in execution of the decree the right, title and interest of the father was seized and sold. On those facts the Judicial Committee held that the father's interest alone passed by the sale, referring for authority to the cases of *Nugender Chunder Ghose*[6] and of *Baijan Doobey*[2]. But they do not lay down in *Deendayal's case*[5], as explained by them afterwards, that the son's interest could under no circumstances be sold if the son was not joined in the suit.

1. (1884) I. L. R. 10 C. 985 at p. 992.
2. (1875) I. L. R. 1 C. 133.
3. (1866) 6 W. R. 304.
4. (1878) I. L. R. 5, Cal. 148.
5. (1877) I. L.R. 3 C. 198.
6. (1867) 11 M. I. A. 241.

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In *Jugul Kishore's case* [1] it was held that the absolute interest was sold and not merely the widow's interest, though the sale certificate in conformity to the provisions of the Civil Procedure Code stated that the right, title and interest of the judgment-debtor was sold. Here the decree in execution of which the sale took place was for costs for which the widow was liable as one of the defendants in a suit instituted against her and other members of the joint family by a person claming a share therein. Their Lordships point out that, as held in the *Sivaganga case*[2], although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her and that in a suit against the widow in respect of the estate the decision is binding upon the reversioner. There they quote the passage "Assuming her"—that is the widow—"to be entitled to the Zemindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though in some respects for a qualified interest." In the present case the decree on Exhibit III *a* was not in respect of the estate, but that would only make this difference : the reversioners would not be bound by the decision in that suit and it would be open to them to show that the debt was for a purpose for which the entire inheritance could not be sold.

In the case of *Nanomi Babuasin* v. *Madhun Mohun* [3] the sale took place under a decree obtained against a Hindu father for debt incurred by him which was found not to have been incurred for immoral purposes. The Judicial Committee held that the only question for consideration was "whether anything more than the father's coparcenary interest was bargained for, paid for and taken possession of by the purchaser" and, agreeing with the courts in India that it was clear from the execution and sale-proceedings that the purchaser must have thought he was buying the entirety, and indeed all parties thought the same, held that the entire family property was sold.

With reference to the arguments of Mr. Doyne, the learned counsel for the appellants, who relied on *Deendyal's case* [4] they explain that case as we have already mentioned, and observe that the question was really governed by *Girdhari Lal's case* [5]

1. (1884) I. L. R. 10 C. 985 at p. 992. 2. (1863) 9 M. I. A. 539.
3. (1885) I. L. R. 13 C. 21. 4. (1877) I. L. R. 3 C. 198.
5. (1874) L. R. 1 I. A. 321.

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and *Suraj Bunsi's case* [1]. They say that if the debt was of a nature to support the sale of the entirety he (the father) might have legally sold it without suit or the creditor might legally procure a sale of it without suit and all the sons can claim is that, not being parties to the sale and execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. There it is pointed out: 'If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary estate alone (and in *Deendyal's case*[2] there certainly was an ambiguity of that kind) the absence of the sons from the proceedings may be a material consideration. But if the fact be that the purchaser has bargained and paid for the entirety he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings. Nothing can be clearer than this language to show that the real question for decision in these cases is what was intended to be sold and what was bought by the purchaser, and not whether the persons whose interests are affected by the sale were parties to the proceedings, provided of course the debt was of a nature for which the judgment-debtor could have legally sold the entirety. If the son or the reversioner, as the case may be, was not a party to the proceedings, that is only a circumstance to be considered in determining the question what was sold, and it would be open to the son or the reversioner to show that the debt was not for a proper purpose.

In *Simbunath Pande* v. *Golap Singh* [3] where the question was whether the son's share was sold under a decree obtained against the father, their Lordships observe : "Each case must depend on its own circumstances. It appears to their Lordships that in all the cases, at least in recent cases, the enquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance but only a sale in execution of a money decree." Upon the evidence in that case they came to the conclusion that only the father's interest was sold. Their Lordships laid stress on the language of the sale certificate as the instrument which

1. (1879) I.L.R. 5 C. 148. 2. (1877) I.L.R. 3 C. 198.
3. (1887) I. L. R. 14 C. 572.

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conferred title, remarking that, although that language which stated that the right, title and interest of the judgment-debtor was sold was influenced by the provisions of the Civil Procedure Code, it afforded a *prima facie* conclusion which required to be rebutted. The facts that the creditor did not take steps to bind the other members of the family and that the price paid was nearer the value of the father's share alone than the entirety were relied upon to strengthen the *prima facie* conclusion that the father's interest alone was sold. Again, neither the non-inclusion of the sons in the suit or the execution proceedings nor the nature of the decree was deemed to be conclusive of the enquiry.

In *Pettachi* v. *Chinnatambiar* [1], in execution of a decree, against the holder of an impartible Zemindary, the right, title and interest of the Zemindar was sold. The Judicial Committee agreed with the conclusion of the learned Judges of this court (*Turner* C. J. and *Muthusami Iyer* J.) that only the personal interest of the judgment-debtor was sold and not that of his son and successor. Sir *Barnes Peacock*, referring to the arguments advanced at the bar on behalf of the appellants, observes : 'It is not a question of what the court could have done or what they ought to have done, but what they did, what was put up for sale, and what was purchased.' There also the terms of the sale certificate, the proceedings in execution and the inadequacy of price were taken into consideration. The next decision of the Board is that of *Daulat Ram* v. *Mehr Chand* [2]. That was a case of a sale in execution of a mortgage decree against the managing members of a Hindu trading family who had executed a mortgage for debt due by the firm; the plea by the members of the family that the sale did not affect their interests inasmuch as they were not parties to the suit was disallowed on the authority of *Nanomi Babuasin's case* [3].

In *Mahabir Pershad* v. *Moheswar Nath Sahai* [4] the question was what was sold under a decree against the plaintiff's father founded on debts which were not shown to have been incurred for illegal or immoral purposes, whether the entire family property or the father's interest, and their Lordships held, on

1. (1887) I. L. R. 10 M. 241.
2. (1887) I. L. R. 15 C. 70.
3. (1885) I. L.R. 13 C. 21.
4. (1889) I. L. R. 17 C. 584.

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consideration of the evidence that the entire family property was sold. In coming to that conclusion they rely on certain proceedings in execution which showed that all parties—judgment-creditors, judgment-debtor, the plaintiff and his advisers—considered that the thing put up for sale was the entirety of the estate, and, holding that the question was one of fact, gave an extended meaning to the condition in the sale certificate "that in future the certificate shall be considered as a good evidence of transfer of the right and interest of the judgment-debtor." Their Lordships rely upon their own previous rulings in *Nanomi Babuasin* v. *Madhan Mohun*[1] and *Bhagbut Pershad Singh* v. *Girja Koer*[2]. In *Abdul Aziz Khan* v. *Appayasami Naicker*[3] (P. C.) referred to by the appellant's vakil, the decrees were on debts incurred by the holder of an impartible Zemindary and in execution of those decrees the right, title and interest of the judgment-debtor purported to be sold as evidenced by the sale certificate. The Zemindar, according to the rulings of the Indian courts at the time of sale, had only a life interest in the Zemindary, but, when the suit was instituted, the Privy Council had held that the holder of an impartible Zemindary had an absolute interest in it. The debts were not incurred for purposes which would justify alienation by the Zemindar of the absolute interest in the property, according to the law as then understood, his own interest being of a limited character. The Judicial Committee held that the law, as interpreted at the time of sale, must be applied to the construction of the contracts as contained in the sale certificates, and held, following their own decisions in *Mahabir Pershad* v. *Moheswar Nath Sahai*[4] and *Simbhunath Pande* v. *Golap Singh*[5] that in all cases, at least the recent cases, the proper enquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying, if there was no conveyance but only a sale in execution of a decree or as put by Lord *Watson* in the course of the argument in *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar*[6]: 'The questions are what did the court intend to sell and what did the purchaser understand that he bought.' Then they say, 'these are questions of fact or rather of mixed law and fact and

1. (1885) I. L. R. 13 C. 21.
2. (1888) I. L. R. 15 C. 717.
3. (1903) I. L. R. 27 M. 131.
4. (1889) I. L. R. 17 C. 584.
5. (1887) I.L.R. 14 C. 572.
6. (1887) I. L. R. 10 M. 241.

must be determined according to the evidence in the particular case.' It is to be observed here that the judgment of the Judicial Committee assumes that, if the debt were incurred for justifiable causes the credit r, though he obtained only a money-decree thereon, could sell in execution thereof, the absolute interest, and they lay down the proposition that in all cases of sales under a money-decree the question for determination is what was actually sold and bought by the purchaser, whether the limited estate of the judgment-debtor or the absolute interest. If the judgment-debtor had in fact an absolute interest, but only a limited interest was sold and purchased by the auction-purchaser under a misconception of the law, the purchaser cannot claim a larger interest and must be held to his bargain. On the other hand, if the debt on which the decree is founded was one for which the judgment-debtor was empowered to bind the absolute estate, although he himself was beneficially entitled to only a limited estate in the property and the absolute interest was put up for sale, the purchaser would acquire title to the absolute interest.

In *Jiban Krishna Roy* v. *Brojo Lal Sen*[1] their Lordships of the Privy Council, in confirming the judgment of the Calcutta High Court—*Brojo Lal Sen* v. *Jiban Krishna Roy*[2]—take as the basis of their decision the passage in the judgment of the learned Judges of the High Court, in which it is pointed out that the liability for arrears of rent for which decree was obtained was the widow's personal liability inasmuch as she ought to have paid the rent out of the income of the property, and did not therefore attach to the reversion, and that the landlord did not in fact proceed to bring the tenure itself to sale under the especial provisions of the Rent Law. That case, therefore, is distinguishable from the present case.

We may thus summarise the law as established by these cases. A Hindu father or manager of the family or a widow may, in certain circumstances, bind the entire estate by his or her dealings. The father can sell or mortgage not only his own share but that of his coparcener sons for debts which are not shown to be immoral or illegal ; the manager of the family can deal with the family property including the shares of the other members of

1 (1903) I. L. R. 30 C. 550. 2. (1899) I. L. R. 26 C. 285.

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the family for proper family purposes, and a Hindu widow is entitled to sell or charge the entire interest in the family property —her own as well as that of the reversioners—for legal necessity In any of these cases the title of the alienee cannot be impeached nor in a case where the purchaser or mortgagee made *bona-fide* enquiries and satisfied himself as to the necessity for which the alienation was made. In the case of a sale it makes no difference whether it was effected by a conveyance or took place at a court auction in execution of a decree. When the sale is in execution of a decree, and the coparceners or reversioners intervened in the proceedings in execution, and the question was raised and decided in their presence that their interests were also liable to be sold, they would not afterwards be allowed to reopen the question as to the character of the debts. *A fortiori* they would be precluded from raising such questions if they were parties to the suit.

In the case of a widow, if the suit for recovery of debt incurred by her husband was instituted in the life-time of her husband and revived on his death against the widow in her representative capacity, or the decree in respect of such a debt was obtained against her husband and executed on his death against the widow as representing the estate, or the decree itself was in respect of the estate and there was nothing fraudulent in the conduct of the widow, the reversioners would be concluded by the proceedings so far as the liability of their interests being sold under the decree is concerned. But it may be that even in such cases the interests of the coparceners or the reversioner, though liable to be sold, were not in fact brought to sale, however strong the presumption might be to the contrary. If the coparceners or reversioners were not parties to the suit, and the head of the family or the widow was not sued as representing the estate and the decree was not against the estate but a personal decree, and the coparceners or reversioners were not joined in the execution proceedings, it would be open to them to contend that the judgment-debt was not such that their shares or interest could be sold in execution thereof. It also seems to us that the effect of the Privy Council ruling is—though it is not necessary to decide that point in the present case—that, even if the debt be found to be in fact immoral or illegal or not incurred for legal necessity

a *bona-fide* purchaser of the entire interest at a sale in execution of a decree founded on that debt will be protected, if he can show that he made proper inquiries and satisfied himself as to the character of the debt, though in fact he might have been deceived. However that may be, if the foundation of the decree be a debt of the proper character, for which the widow could have bound the entire interest, it is sufficiently clear, as the result of Privy Council decisions, that even if the decree is based on the widow's contract, and does not give a charge on the husband's estate, and the reversioners had not been made parties to the suit or execution proceedings, the decree-holder would be entitled to have the entire estate sold, and if in fact the entire estate was sold and bought by the purchaser, the reversioners could not defeat the purchaser. And this seems to be perfectly in consonance with the principles governing such questions. The real question, therefore, in these cases is, what in fact was put up for sale and sold or, putting it most in favour of the reversioner, what was liable to be sold and what in fact was actually sold. In investigating this question the court is not confined to any one fact. The sale certificate is no doubt the most important document as the instrument conferring title but is not conculsive. The frame of the suit, the judgment, the decree, the execution proceedings, the advertisements for sale, the adequacy or inadequacy of the purchase-money and the conduct of the parties are all circumstances which may legitimately be considered in an enquiry of this nature.

That, in our opinion, being the rule governing the subject as laid down by the Judicial Committee, we shall now very briefly notice some of the more recent High Court decisions. The cases in *Narana Maiya* v. *Vasteva Karanta*[1], a decision of *Muthusawmy Iyer* and *Best* JJ., and in *Giribala Dassi* v. *Srinath Chandra Singh*[2] (*Rampini* and *Sharfuddin* JJ.) undoubtedly support the contention of Mr. S. Srinivasa Iyengar. In the former, the facts of which are imperfectly reported, the learned Judges relying on *Baijan Doobey's case*[3] held that, the decree in execution of which the sale took place being a personal decree against the widow and not as the representative of the husband's

1. (1893) I.L.R. 17 M. 208. 2. (1909) 12 C.W.N. 769.
3. (1875) I. L. R. 1 C. 133.

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estate, only the widow's interest was sold, not that nothing more could in any circumstances be sold under such a decree. They further held, the case being one of a court sale and not of a voluntary sale by the widow in discharge of her husband's debt, the question whether the debt was due from the husband was immaterial. This distinction, we venture to think, is unwarranted by principle and negatived by what is laid down in *Nanomi Babuasin's case*[1] and *Daulat Ram's case* [2], which cases do not appear to have been brought to the notice of the learned Judges. And in the Calcutta case, where also reliance is placed on *Baijan Doobey's case*[3], it was ruled that the decree being a personal one against the widow based on a simple money bond executed by the widow, and the reversioner not being a party to the suit, the latter's interest could not be affected by a sale in execution of that decree. This goes even further than *Naran Maiya* v. *Vasteva Karanta* [4]. With the utmost respect, however, to the learned Judges who decided these two cases, we are constrained to hold that both these decisions are not in accord with the law as enunciated by the Privy Council in at least the later rulings. On the other hand the cases reported in *Veera Soorappa Nayani* v. *Errappa Naidu*[5], *Srinath Dass* v. *Hari Pada Mitter*[6] and *Devji* v. *Sambhu*[7] support the view which we are inclined to take.

As we agree with the court of first instance that there was necessity for the bond, Exhibit III-*a*, we hold that the absolute estate in the properties in Schedules A and D was liable to be sold. What then is the evidence as to the interest actually put up for sale and bought by Ramalinga? The sale certificate which ought to be in the possession of the respondents (see Exhibit XX) has not been produced and no proper explanation has been given to us as to its non-production. The decree (Exhibit III) was a money decree, and except the order confirming the sale (Exhibit III-*b*) which no doubt shows that the 7 villages were sold and not only the widow's interest therein, the other proceedings in execution that are available to us—Exhibits III-*b*, III-*c*, III-*d*, and III-*e*—do not, in our opinion, throw much light on the question. That being so, supposing the case rested here, we might have felt

1. (1886) I. L.R. 13 C. 21.
2. (1887) I. L R. 15 C. 70.
3. (1875) I. L. R. 1 C. 133.
4. (1893) I. L. R. 17 M. 208.
5. (1906) I. L. R. 29 M. 484.
6. (1899) 3 C. W. N. 637.
7. (1899) I.L.R. 24 B. 135.

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some difficulty in holding that anything more than the widow's estate was sold, and that is apparently the view of the Subordinate Judge. The learned Subordinate Judge, however, appears to think that the fact that Thangama Nachiar was described in the suit of 1865 as the Zamindarini of Nadavakurichi was something in support of the defendants' case, and the learned Advocate General has laid emphasis on this description as if it showed that Ramalinga intended to proceed against the entire estate as represented by the widow. But we do not think the mere description of Thangama Nachiar as the Zamindarini lends colour to any such inference. But the evidence, which is greatly relied on by the court of first instance in connection with the present inquiry, is Exhibit I. It is called an agreement and was executed on the 26th April 1875 by the plaintiff and her husband in favour of Ramalinga. That document recites that the amount mentioned in Exhibit III-*a* was advanced by Ramalinga for the discharge of debts due by the Zamindar, Kuthala Thevar, and therefore the debt was binding upon the Zemin and that in execution of the decree obtained by Ramalinga on the said debt the mitta comprising the seven villages in question was sold and purchased by Ramalinga. Then it states that Ramalinga gave away, out of favour to the executants of Exhibit I, 2 cottas odd of certain land belonging to him and a sum of Rs. 100, the amount of a Small Cause Court decree obtained by Ramalinga against the plaintiff's husband. Apart from the question of its legal effect the plaintiff sought to impeach the document on the ground that it was executed under undue influence and that the plaintiff, who was alleged to be a gosha lady, executed it without understanding the purport and contents of the document. The Subordinate Judge, after a full discussion of the evidence, has found against both these pleas and it has not been shown that that finding is wrong. In fact the learned pleader for the appellants has not even printed the plaintiff's evidence and has made no serious attempt to satisfy us that the judgment of the first court is wrong on this point.

We are, however, asked to say that on the very face of the document it is void as being a transfer of a *spes successionis*, or to treat it as a catching and unconscionable bargain with an expectant heir. As regards the first contention it is no doubt a pure

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question of law, but the document does not purport to create a transfer of the plaintiff's right to succeed as a reversioner. This fact is also a sufficient answer to the argument that it is to be regarded as a catching and unconscionable bargain. Further, the question whether Exhibit I, supposing it can be treated as constituting a bargain at all, is a catching and unconscionable bargain, would be one of fact and was not expressly raised by the issues. Neither the plaintiff nor her husband, at the time of its execution, were very young persons and fully understood what they were about. But it is urged that, since the properties were of considerable value and were given away in exchange for 2 cottas of land and Rs. 100, that in itself is sufficient evidence to cast upon the defendants the *onus* of shewing that the bargain was a fair one. But the argument presupposes that the properties had not passed to Ramalinga by the sale and that the plaintiff's reversionary interest still subsisted. The truth is that Exhibit I can only be regarded as containing a statement in the nature of admission by the plaintiff that the debt on which the decree in the Registration suit was founded was one properly chargeable on the estate and that the entire estate was sold in execution of the decree. We have already shown it on the evidence which is still available that the debt was for legal necessity, and Exhibit I is of considerable value as strengthening that conclusion. On the other question also, the nature of the interest which passed by the sale, a question which is mainly one of fact, the Subordinate Judge has in our opinion, rightly placed reliance on the admissions contained in Exhibit I. These admissions were made about 5 years after the date of the sale, when much of the evidence which has since been lost was still available, and all the facts in connection with the sale must have been fresh in the minds of the plaintiff and her husband. On the whole, therefore, we are of opinion that the finding of the Subordinate Judge that the entire estate in the properties A and D passed to Ramalinga is correct.

As regards the properties comprised in Schedule B, we agree in the conclusion of the court of first instance, that, except a small sum of Rs. 263, the bulk of the money, namely, Rs. 2,336 was borrowed from Perumal Pillai in order to pay the peishcush. Assuming that the income capable of being derived from the Zemindary was nearer Rs. 5,000 than Rs. 2,000, still

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the letters and orders of the Collector passed at the time of this transaction show that there were constant and pressing demands from the Collectorate which the widow was unable to meet, and it is also in evidence that she was complaining that she was unable to make collections. She had been involved in litigation mainly with the plaintiff, and also with other persons ever since the death of the Zemindar. The Subordinate Judge is right in relying on those facts as showing that Thangama Nachiar was in embarrassed circumstances and in need of money. And in a case like this where the question is raised after the lapse of nearly 40 years it would be unreasonable to insist on more definite evidence of necessity. Further, if under the above circumstances a person *bona fide* lent money on the security of the estate in order to enable the widow to meet the Government dues, it is not the law that the lender must lose his money unless he can show that the widow's difficulties had not been brought about by gross mismanagement.

In the suit on the mortgage bond for Rs. 2,600 Thangama Nachiar was the 1st defendant and Ramalinga Mudaliar, who had purchased the properties in execution of a money-decree passed since the date of this mortgage, was the 2nd defendant. Ramalinga raised the question that the bond was not executed for necessity. But his plea failed and a mortgage-decree was passed.

The next question is what was sold under the decree. In the sale certificate what is entered as sold is Ramalinga's interest, but taking all the facts into consideration, the nature of the suit, the issues raised and the judgment and the decree, there can be no doubt that the entire estate in the properties was intended to be sold, and was actually sold, however it might have been described in the sale certificate.

The result is that appeal No. 108 fails and is dismissed with costs.

Bammidi Bayya Naidu v. Bammidi Paradesi Naidu.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Bammidi Bayya Naidu .. Appellant* (*Plaintiff*)

v.

Bammidi Paradesi Naidu (died) and others .. Respondents (*Defendants*)

*C.P.C., S.*11, *Expl.* (2)—"*Directly and substantially in issue*"—*Heard and decided—Rent suit—Propriety of patta, issue on, how far directly and substantially in issue—Second suit for rent of subsequent fasli—Extent of holding, question of.*

Plaintiff brought a suit for rent due for fasli 1316. Defendant raised the plea that the patta tendered was not a proper patta in that it mentioned a larger extent of land as comprised in his holding than was really the case. The plaintiff had previously brought a suit for rent for fasli 1314 and had obtained a decree. The patta then tendered was similar to patta for the suit fasli and the issue in the previous suit was "whether plaintiff tendered pattas to the 1st defendant and whether the pattas so tendered were proper." The decision was that there was tender and that there was nothing objectionable in the patta.

Held:—Per *Sankaran Nair* J. (*Munro* J. dissenting).—That the decision in the prior suit was not *res judicata.*

Per *Sankaran Nair* J.—(1) The title to the land comprised in the patta was not directly and substantially in issue in the previous suit for rent, a decree for rent not necessarily involving the decision that a proper patta had been tendered.

(2) There was no clear finding as to the ownership of the land entered in the patta in the previous suit.

(3) Explanation (2) to S. 11, C.P.C., does not dispense with the necessity of a finding upon the issue by the judge in the previous suit.

Second appeal from the decree of the District Court of Ganjam in A. S. No. 170 of 1908, presented against the decree of the Court of the District Munsif of Sompeta in O. S. No 861 of 1907.

T. V. Seshagiri Aiyar for appellant.

S. Swaminathan and *T. Prakasam* for respondents.

The Court delivered the following

JUDGMENT:—*Munro*, J.—The plaintiff, a land-holder to whom the provisions of S. 3 of Madras Act VIII of 1865 apply, sues the defendants, his tenants, for rent for Fasli 1316. Under S. 7 of the abovementioned Act no suit brought to enforce the terms of a tenancy shall be sustainable unless patta and muchilika have been exchanged, or unless it be proved that

*S. A. No. 640 OF 1900. 15th February 1911.

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the party attempting to enforce the contract had tendered such a patta or muchilika as the other party was bound to accept, or unless both parties shall have agreed to dispense with pattas and muchilikas. Under S. 4 of the Act the patta must contain, among other things, the local description and extent of the land. The patta in the present suit gives the extent and boundaries of the land alleged by the plaintiff to be in the defendants' occupation. The defendants alleged that the extent of *jerayiti* land entered in the patta was greater than the extent of such land held by them. The plaintiff contended that the matter was *res judicata* by reason of the decision in a simliar suit by him against the defendants for the rent of the two previous faslis. The pattas in that suit were similar to the patta in the present suit. In the former suit the plaintiff alleged tender of pattas and refusal by the defendants, but the defendants contended that the plaintiff did not tender pattas for the suit Faslis and that the pattas alleged to have been tendered were improper, one of the objections taken to the propriety of the pattas being that the extent of the defendant's jerayity land was much overstated. In this state of the pleadings it was incumbent upon the plaintiff under S. 7 of Act VIII of 1865 to prove the tender of such pattas as the defendants were bound to accept. An issue was accordingly framed as to the tender and propriety of the patta and was found in the affirmative. Had it been found in the negative, the plaintiff's suit must have been dismissed. In the present suit an issue as to the tender and propriety of patta also necessarily arises. The patta being similar to the pattas on the previous suit and no change of circumstances being alleged, I think the plaintiff's contention should have been upheld. The finding in the previous suit that the pattas were proper, *i. e.*, that they were such as defendants were bound to accept, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the land entered in the pattas, and I do not think the defendants can again be allowed to put the plaintiff to proof of his title. See *Venkatachalapathi* v. *Krishnan.* [1] I would therefore allow the appeal.

As my learned brother takes the contrary view, the second appeal is dismissed with costs.

1. (1892) I. L. R. 13 M. 287.

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Sankaran Nair J.—This suit is brought by the plaintiff to recover rent due for Fasli 1316 from the defendants who are tenants in possession of certain lands which the plaintiff says are held under him. The plaintiff states that he tendered a proper patta to the first defendant according to which the 1st defendant was bound to properly cultivate and raise crops in about 14 acres of land in the village of Jayakrishnapuram and pay the landlord's share. The main contention of the defendant is that the defendants hold about 5 acres of land under the plaintiff and of the rest, about 10 acres are inam lands and 3 acres are cash rent paying lands belonging to the defendants themselves. Both the lower courts have upheld the defendants' contention. In fact the judge states that the plaintiff did not seriously argue before him that the patta was a proper one, or that the lands which were found by the Munsif to belong to the defendant really belonged to the paintiff. The question that was argued before us at great length is whether the defendants are barred from raising this plea by the decision in a previous suit.

The plaintiff sued in O. S. No. 430 of 1906 on the file of the same court for the rent of Faslis 1314 and 1315 In that case he alleged tender of a patta which both the lower courts say was similar to the patta which is now alleged to have been tendered. The defendants alleged in that suit that the extent of land belonging to the plaintiff had been very much overstated. On that plea, the following issue was raised in that suit:—

"Whether plaintiff tendered pattas to the 1st defendant and whether the pattas so tendered were proper?"

It was decided that pattas were tendered and the court that tried that suit also held that "the terms of the pattas Exhibits E and F, do not contain any objectionable matter," and accordingly found that issue in the affirmative. The plaintiff got a decree for the rent due for Fasli 1314. His claim for the rent for Fasli 1315 was dismissed as it was found that the defendant had executed a muchilika for that year to another person with the consent of the plaintiff who was therefore held estopped from claming that year's rent. There was no finding on the question whether these ten acres were inam and the other three acres belonged to the defendant,

In fact the question was not raised in that form, nor was there any clear decision that the lands belonged to the plaintiff except what may be implied from what is extracted above.

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The plaintiff's contention is thus stated by the Munsif: "The "defendant did not raise this question or did not so raise the "question as to place the court in a position to giv a proper find-"ing on all the matters relevant; the defendant is now barred under S. 13." In second appeal it is also contended before us that this question was really raised and decided against the defendant.

Section 11 of the new Civil Procedure Code runs thus: "No "court shall try any suit or issue in which the matter directly "and substantlally in issue in a former suit between the same "parties, or between parties under whom they or any of them "claim, litigating under the same title, in a court competent to "try such subsequent suit or the suit in which such issue has "been subsequently raised, and has been heard and finally "decided by such court."

No question arises in this case as to the identity of parties or the competency of the courts. The points for determination are whether the question 'that the properties now belong to the defendant' "has been directly and substantially in issue in the former suit," and whether it has been finally decided.

To be in issue, a matter must have been put forward, or must be one which ought to have been put forward in the previous suit—see explanations 3 and 4 to the section.

It is settled by the Judicial Committee that the scope of the rule of *res judicata* as limited by the words "directly and substantially in issue" is not confined to the relief granted by the former suit or to the property which was the subject-matter therein—see *Pittapur Raja* v. *Buchi Sitayya*[1] in which the Judicial Committee considered the words of S. 13 of the Code of Procedure of 1877. It cannot, therefore, be contended that in O. S. No. 430 of 1906 the only matter in issue was whether the plaintiff was entitled to the rent then sued for and that the decision, if any, on this question, *i.e.*, whether these lands belong to the plaintiff or the defendant, cannot be *res judicata* for the sole reason that the present suit is for the rent of another year.

1. (1885) I.L.R. 8 M. 219.

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On the other hand, the words of the section clearly imply that the decision on a matter not essential for the relief finally granted in the former case, or which did not form one of the grounds for the decision itself, cannot be said to have been directly and substantially in issue—see *Shoesagar Singh* v. *Sitaram Singh*[1].

The rule appears to be that where the decision on a question was essential to the relief granted or the decree passed, or where it formed the ground-work of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit. If, therefore, the decision as to the extent of the plaintiff's property, or that the property in question belongs to the plaintiff, was essential for the decree that was passed in O. S. No. 430 of 1906, then the question must be deemed to have been directly and substantially in issue under Expl. 4 to S. 11, Civil Procedure Code, even though the parties did not raise that question as they were bound to raise it. Again, whether essential or not, if the court, in the former suit, decided that the property belonged to the plaintiff and based the judgment in favour of the plaintiff, for the rent that alone was sued for, on the ground that this property belonged to him, then also it was directly and substantially in issue.

The section also states that not only must it have been directly and substantially in issue but it must have been *heard and decided*. If, as a matter of fact, such a question was heard and decided, then all the conditions of *res judicata*, so far as they are material to this case, have been complied with. Even if the question was not raised it must be deemed to have been raised—see Expl. (4).

We shall now consider when a question is *res judicata*, though there was no express finding on it in the previous suit. With reference to this it must be borne in mind that the section deals with two classes of cases, *viz.*, trials of suits and trials of issues. The difference is that in the case of trials of suits, the suits must either be dismissed or decreed. In the case of trials of issues, the judge records findings on the issues. In the first case the decree may render it necessary to imply a decision on a question not expressly decided. In the latter, from its very

1. (1897) I.L.R. 24 C. 616 (P. C.)

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nature, no implication is necessary, but we ought to have a clear decision to create the bar.

The decision of a suit involves the determination of all the questions which are necessary and essential for that decision, and those questions will therefore be deemed to have been necessarily decided, if not expressly, by implication. Thus where a certain relief is granted to the plaintiff in a suit, it is not open to the defendant in that suit to raise any plea in a subsequent suit which would interfere with the relief given in the previous suit. He cannot interfere with the scope of that prior decree so far as that matter is concerned. He was bound to raise every plea in the previous suit, and if he did not raise it he is precluded from relying upon it so far as the claim which was then allowed was concerned. Thus when the plaintiff brings a suit for possession of property against a defendant, the latter is bound to put forward every ground of defence he may have. If a decree is passed against him, it is not open to him to say afterwards that he then resisted the suit only, for instance, on the ground of his being the heir of the deceased admitted owner, and that he is entitled to put forward his claim as a devisee in a subsequent suit. So in the Sivaganga case—*Srimut Raja Mootoo Vijaya Ragunadha Tevar* v. *Katama Nachiar, Zemindar of Sivaganga*[1]. Similarly if there is a mortgage-decree directing the sale of certain properties and their distribution in satisfaction of certain mortgage claims in the order and mode mentioned in the decree, then it is open to any of the parties to put forward any other claim or mortgage which would interfere with such distribution—see *Sri Gopal* v. *Pirthi Singh*[2] —whether this claim was set up in the previous suit or not. Again if a suit is brought on a bond, the decree for payment of the money is conclusive against the defendant as to its genuineness, consideration and non-payment. Section 11 says that the matter must have been decided in the previous suit. In the cases above referred to there is a decision by necessary implication. A finding in express terms is not necessary—see *Pahalwan Singh* v. *Maharajah Muheshur, Buksh Singh Bahadur*[3], *Mahabir Pershad Singh* v. *Macnaghten*[4].

Mr. Seshagiri Aiyar contended that under the provisions of the Rent Recovery Act, VIII of 1865, no suit for rent is main-

1. (1866) L. R. 11 Moore, 50.
2. (1902) I.L.R 24 A. 429.
3. (1872) 12. B. L.R. 391. (P.C.)
4. (1889) I.L.R. 16 C. 682 (P.C.)

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tainable against a tenant unless the patta tendered to the tenant is one he was bound to accept, and he was not bound to accept the patta unless the lands for which the rent is payable are correctly stated therein; when therefore the court decided in O. S. No. 436 of 1906 that rent was payable and that the tenant was bound to accept the patta then in question, it must be taken to have also impliedly decided, within the meaning of the above decisions, that the lands as stated in the patta belonged to the plaintiff and were held by the defendants as tenants. But it is to be noticed that though a patta when tendered to a tenant must be one he is bound to accept, the tender of a patta is not essential to entitle a landlord to recover rent. The parties may dispense with them. A decree for rent therefore does not necessarily involve the decision that a proper patta has been tendered. *Misir Raghobardial* v. *Sheo Buksh Singh*[1] was a case in which a suit was first brought for a sum of Rs. 1,665 of the interest only, the principal sum not being then due. The plaintiff alleged that it was for interest on a bond for Rs. 12,000, which the defendant denied, and an issue was raised as to the consideration of the bond. It was decided to be only Rs. 4,790. In a suit subsequently brought to recover the principal sum of Rs. 12,000 after it had fallen due in a court of higher jurisdiction the question was raised whether the decision in the first suit with reference to consideration was binding. One of the grounds for holding that it was not binding was that the first court was not competent to try the second suit. With reference to the issue as to consideration raised in the first suit, their Lordships of the Privy Council say: "This was a collateral rather than a direct issue in the suit. The plaintiff may have succeeded without having a finding upon it, if he had proved an admission by the defendant that the sum claimed was due for interest or etc., etc." The difference between issues 'collateral' and 'direct' as pointed out by their Lordships depends upon this: whether it was possible to pass the decree without any finding upon the particular issue. If it was not possible, then it was a direct issue. The parties were bound to raise it. If they did not raise it, it will be deemed to have been raised, and even if there is no finding on it, as the final decision could not have been arrived at without a

1. (1883) I.L.R. 9 C. 439. (P.C.)

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finding, the decision of that question will be necessarily implied. The fact that it was based on an admission would make no difference. In the case before us, we have a decree for rent. This does not necessarily require a decision as to the terms of the patta or the extent of the land for which the rent was to be paid. If therefore, as a fact that question was not decided in the previous suit, we are not bound to imply that it was so decided. The cause of action in this suit for the rent for Fasli 1316 is not the same cause of action as in the previous suit. The property sued for is not the same. The right litigated in this suit., *i. e.*, the claim to recover the rent for Fasli 1316, is not the same as in the previous suit. The decree dismissing this suit will not in any way interfere with the decree in the previous suit awarding to the plaintiff the rent for Fasli 1314, any more than the dismissal of the claim for rent for Fasli 1315 interferes with the decree for the rent of Fasli 1314. If the parties had agreed to dispense with the exchange of pattas and muchilikas or the claim for rent had been admitted, a decree could have been passed without any reference to the title to the land. In these circumstances we cannot imply that there was any decision on the question now raised, *i. e.*, whether the lands in dispute belong to the plaintiff or to the defendant.

It was contended that a determination that these lands do not belong to the plaintiff would be inconsistent with the decision in the previous case that the patta then tendered was proper, as that decision that the patta was proper necessarily implies that the lands therein belong to the plaintiff, but this is not enough. In the case reported in *Amanat Bibi* v. *Imdad Hussain*[1], a suit was brought by the plaintiff to redeem certain property on a mortgage which was recognised as subsisting in the year 1854. The question was whether the plaintiff was barred by the decision in a prior case where a suit was brought by the same plaintiff to recover the same property on the ground that the defendant had paid the arrears of Government revenue on account of the plaintiff. That suit was dismissed on the finding that the property had been transferred to the defendant Talukdar by a deed of conditional sale which was dated in 1853, under which the purchase-money was to be repaid within a period of 8 months and

1. (1887) I.L.R. 15 C. 800 (P.C.).

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that on the expiration of that period the sale was to become absolute. Their Lordships of the Judicial Committee construing the corresponding section of the Civil Procedure Code of 1877 held that there was no bar. They said: "Now "what was the question in issue in the former suit? The question "was whether the plaintiff was entitled to recover property "which had been transferred by the Government to the Talukdar "on repaying to the Talukdar the arrears of revenue which "he had paid to Government. The matter in issue in "this suit is the respondents' right to redemption under a "mortgage-deed. *It may be difficult to reconcile the position of "the Talukdar as a mortgagee in* 1854 *with his position as absolute "owner in* 1853 *under a purchase from the mortgagor.*" (The italics are mine.) "But if it be established that the respondent "was mortgagor in 1852 with the right of redemption, why "should he be barred of his right merely because at an earlier "date he may have had no right to the property at all." It will be seen that the Talukdar's position as absolute owner in 1853 under a purchase from the mortgagor is absolutely inconsistent with the existence of that mortgage at any subsequent date, yet as the question of mortgage right set up in the second case was not necessarily involved in the previous decision, though the finding on which the judgment was really based was inconsistent with the claim set up in the latter suit, their Lordships held that the claim was not *res judicata.*

If then the decision or the decree in the first suit does not require us to assume the determination of the question now in issue in this subsequent suit, are we bound to imply that there was a decision as to the extent of land in the previous suit for the reason that when that court decided that the patta was a proper one it must be taken to have decided on the extent of the land? There is no doubt that for that suit or for that year's rent the court must be taken to have decided that question. But I am of opinion that in the absence of a finding we are not bound to imply that the matter was decided for the purpose of this suit.

I have already pointed out that the section deals with two classes of cases, *viz.*, trials of suit and trials of issues. Eminent judges have lamented the application of the doctrine that the trial of an issue, which was not essential in the sense I have

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above pointed out, should be held to be a bar to the trial of the same question in a subsequent suit. That view was based on considerations arising from the conditions under which litigation is carried on in India. See *Garth* C. J. in *Denobundhoo Chowdhry* v. *Kristomonee Dossee*[1], *Stuart* C. J. in *Babu Lal* v. *Ishri Prasad Narain Singh*[2], and *Muhammad Ismail* v. *Chattar Singh*[3], but the section itself places the matter beyond doubt, and the Judicial Committee have laid down the doctrine in decisions which we are bound to follow. However, to hold that an issue has been determined, it must appear that the matter raised by that issue was alleged by one party and denied by the other, and that there was a finding of the court thereon. The Expl. (2) of the section states that a matter which ought to have been alleged should be taken to have been alleged. But it does not dispense with the necessity of a finding upon the issue by the judge in the previous suit. An issue can hardly be said to be decided unless there is a finding thereon, and when there is no such finding it seems difficult to hold that in a second suit, that question cannot be tried. The principle that to plead a bar by a finding on an issue, there must be a determination by the court is well illustrated in the following two cases. In *Govind Chunder Koondoo* v. *Taruck Chundur Bose*[4] the Full Bench of the Calcutta High Court held that a decree for rent based on a finding that the plaintiff was entitled to the land is binding upon the defendant in that suit in a subsequent suit brought by the defendant to establish his title to the same land against the other parties to the previous suit. The ground of decision was that the self-same right and title was in issue, contested between them, adjudicated upon, and decided against the plaintiff in the second suit. The judgment of the Full Bench was delivered by the Chief Justice, *Garth* C. J. In *Gobind Chunder Addya* v. *Afzul Rabbani*,[5] where the question of title as between the parties to the second suit was not decided in the prior suit which was for rent and a declaration of title against another party, the Chief Justice held that, though a suit for rent would be barred, the same plaintiff's representative is not precluded from bringing any suit to try the title to the land

1. (1877) I. L. R. 2. C. 152.
2. (1880) I.L.R. 2 A. 582.
3. (1881) I. L.R. 4 A. 69.
4. (1878) I. L. R. 3 C. 145.
5. (1883) I. L. R. 9 C. 426.

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on the ground that the question of title to the land in the previous suit was merely raised incidentally to the main question. Mr. Justice *Field*, in the same judgment, points out clearly the distinction. He states that the suit being only for rent and no cause of action arising out of the non-delivery of possession having been alleged or put forward, if the court had tried the issue of title, the finding upon that issue would have the effect of *res judicata* between the parties, but inasmuch as that issue was not tried, the question raised thereby was not heard and decided and therefore the matter was not *res judicata*. His judgment shows that, if there had been any cause of action alleged arising out of the non-delivery of possession, then it is possible that a decision as to title may have been implied in the case. The learned Chief Justice has been erroneously charged with inconsistency by some text writers and judges on account of their failure to keep the distinction which I have above pointed out clearly in view. Further, the finding on the question must be clear and unambiguous. It must shew that it was not merely intended to be binding between the parties only for the purpose of the suit but to be a decision finally declaring the title of the successful party. Thus their Lordships of the Privy Council decided that a suit which was brought in a subordinate court by a plaintiff against the widow of his deceased brother claiming his property by right of survivorship, the issue in that suit being whether at the death of the latter the ownership of the brothers was joint or separate, was not barred by a decision of the same issue in a Munsiff's Court in a prior suit brought by the widow against the same defendant. One of the grounds of decision was that a Munsif was not competent to finally decide the question. Having first so decided they added : " Having regard, however, to the subject-matter of the suit, to the form of the issue which has been above set forth and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, *viz.*, whether any, and what rent was due from the tenant, and that on this ground also the judgment was not conclusive." (See *Run Bahadur Singh* v. *Lucho Koer*[1]). I am unable to say in this case that

1. (1885) I. L. R. 11 C. 301.

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there was any decision in the previous suit on the issue as to the title to the land intended to bind the parties in another suit.

I will now refer to the decisions that have been cited in the course of the argument. In *Nil Madhab Sarkar* v. *Brojo Nath Singha*[1], a case very similar to this, it was pointed out, as was also laid down clearly in the decisicns in *Govind Chunder Koondoo* v. *Taruck Chundur Bose*[2] and *Gobind Chunder Addya* v. *Afzul Rabbani*[3], already referred to, that if the court in the previous suit had determined the extent of the land and the rent annually payable, the decision would bind the partiesi n subsequent suits, but not where it did not appear that the court decided anything more than what was necessary for that suit, the rent payable to the plaintiff. In *Kailash Mondul* v. *Baroda Sundari Das*[4], the principle is laid down in terms which are capable of wider application. The decisions in *Woomesh Chandra Maitra* v. *Barada Das Maitra*[5], *Rejendranath Ghose* v. *Tarangini Dassê*[6], and in the same volume page 337 (*Surjiram Marwari* v. *Barhamdeo Persad*,[7]) support the view taken by me.

As to the cases cited for the appellant in *Venkatachalapathi* v. *Krishna*,[8] *Natesa Gramani* v. *Venkatarama Reddi*,[9] the question was expressly decided in the first suit. They are therefore no authorities. In *SellappaChettiar* v. *Velayuda Tevan*[10] both the suits were to enforce pattas and not for rent, and a decision that the patta is proper would necessarily involve a finding that the lands referred to in the patta belonged to the plaintiff. It therefore falls within the 1st class of cases which I have already referred to. In *Sri Gopal* v. *Pirthi Singh*[11] the facts are these. On the 18th August 1888 one Sri Ram, a mortgagee, brought a suit for sale on a mortgage of the 18th August, 1876, and made the holder, the prior mortgagee, party to the suit. That prior mortgagee pleaded his rights under a mortgage of the 21st July, 1871, but he was the holder also of another mortgage of the 7th February, 1874. He made no mention of this latter mortgage nor did he raise any question as to his rights under that mortgage. Sri Ram obtained a decree for sale subject to his redeeming the mortgage of the 21st July, 1871. Subsequently a suit was brought by the defendant-mortgagee to enforce his caim on his mortgage of the

1. (1895) I.L.R. 21 C. 236.
2. (1878) I.L.R. 3 C. 145.
3. (1883) I.L.R. 9 C. 426.
4. (1898) I. L. R. 24 C. 711.
5. (1900) I. L. R. 28 C. 17.
6. (1904) 1 C. L. J. 248.
7. (1905) 1 C.L.J. 337.
8. I. L. R. 13 Mad. 287.
9. (1907) 17 M.L.J. 518.
10. (1907) I. L. R., 30 M. 498.
11. (1898) I.L.R. 20 A. 110.

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7th February, 1854. It was decided by the Full Bench of the Allahabad High Court—and that decision was confirmed on appeal, see *Sri Gopaul* v. *Prithisingh*[1] that he was barred from enforcing this mortgage as he ought to have pleaded it in the previous suit. No possible objection can be taken to that decision as any decree enforcing the mortgage of February, 1874, would have been absolutely inconsistent with the decree in the first suit. The decree in the first suit enabling Sri Ram to sell the property subject *only* to the mortgage of 1871 negatives, as absolutely inconsistent with it, the existence of any other mortgage right in that defendant which may be set up as against the plaintiff. But in so holding the learned Judges of the Allahabad High Court make certain observations to which, with all respect to them, exception can be justly taken. Their Lordships say : "It is quite "certain that in order to make S. 13 applicable it is not "necessary that the matter of the subsequent suit should have "been heard or have been finally decided by a court of com-"petent jurisdiction in the first suit when the case is one to "which explanation (ii) applies. Indeed explanation (ii) to S. 13 "of the Code would be meaningless if it were necessary, in a "case which was covered by it, that the matter should have been "heard and finally decided in the previous suit." It was pointed out by my learned colleague in the course of the argument that, where the parties themselves do not raise a question but the judge decides the suit on that question not raised by the parties, the matter would not be *res judicata* without that explanation (ii), which is explanation (iv) in the present code, as under explanation (i) of the old Code [explanation (iii) of the new code] the matter must have been alleged and denied or admitted. It may also be pointed out that the learned judges do not recognise the distinction betweeen the two classes of cases, as in the first class of case, where the decision of the suit itself must be taken to imply a decision of the necessary issue, the explanation is necessary in order to shew that the matter must be deemed to have been raised. I am unable, therefore, to accept that argument. The next case is *Jamadar Singh* v. *Serazudin Ahamad Chaudhuri*[2]. In that case the plaintiff brought a suit for the recovery of money which he said ought to have been taken in part payment of rent which was due by him and for which a

1. (1902) I.L.R. 24 A. 429. 2. (1908) I. L. R. 35 C. 979.

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decree had been obtained against him. This case also obviously falls within the class of cases where the decision of the suit itself is a bar, as it directly involves the decision of this question, because, as I pointed out already, a decree for rent implies the non-payment of any amount towards the payment of rent. The learned judges make similar observations here as in *Sri Gopal* v. *Pirthi Singh*[1].

That the learned judges recognize this distinction appears to be clear from another judgment of the same Bench delivered about the same time (*Maharaja Manindra Chadra Nandy* v. *Upendra Chandra Hazra*[2].) where the claim was held not to be *res judicata* as the decision in the previous suit did not decide the rate of rent but only decreed the amount claimed for a certain period. The next two cases—*Kameswar Pershad* v. *Rajkumari Rattan Koer*[3]. and *Arunachellam Chetty* v. *Meyyappa Chetty*[4]—are instances where a *plaintiff* was held to be barred from putting forward a claim with he ought to have advanced in a previous suit and on which there was, therefore, no decision. With reference to such cases we have to consider the effect of S. 42 of the Civil Procedure Code of 1882. The Privy Council decision in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*[3] was distinguished on that ground in *Ramaswamy Ayyar* v. *Vythinatha Ayyar*[5]. We have also to bear in mind that the Madras High Court and certain decisions of the other High Courts recognize distinction for this purpose between plaintiffs and defendants, though other decisions refuse to make any such recognition. It is now well settled that a defendant in possession of an estate is bound to put forward all his pleas to resist the plaintiff's suit to recover possession. But in the case of a plaintiff this court has in a course of decisions held that this principle is not applicable to a plaintiff, that he is not bound to sue on all his causes of action, and that even if he fails on one title he may recover on another title—*Ramasawmy Ayyar* v. *Vythinatha Ayyar*[5]. From this it follows that he is bound to put forward his whole case only with reference to his cause of action or title, on which he sues. (See *Kameswar Pershad* v. *Rajkumari Rattan Koer*[3] explained at pages 772, 773 of *Ramasawmy Ayyar* v. *Vythinatha Ayyar*[5]. No other title will be deemed to have been determined.

1. (1898) I. L. R. 20 A. 110
2. (1905) 9 C. L. J. 343.
3. (1893) I. L. R. 20 C. 79.
4. (1898) I. L R. 21 M. 91.
5. (1903) I. L. R. 26 M. 761.

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In other courts, on the other hand, it has been held that he is bound to put forward all his titles, if possible Otherwise he will be precluded from relying upon any of his titles in a subsequent suit.. If this is the correct view, it follows that any title which he may have will be deemed to have been decided in the previous suit.—*Gudappa* v. *Tirkoppa*[1]. Mr. Justice *Subrahmanya Aiyar* in *Arunachallam Chetty* v. *Meyappa Chetty*[2]. took the view adopted by the Bombay High Court, that a plaintiff is bound to unite all the causes of action he may have against a defendant in respect of the relief or property for which he sues. From this it necessarily follows that if he omits to sue on any cause of action he is barred from again relying on it, either by S. 42 of the Act of 1882 or by S. 13. The dismissal of his suit implies, therefore, a rejection of any title, he may have to the land. This also falls, therefore, within the first class of cases to which I have already referred. It may be pointed out that this case has been overruled by *Ramasawmi Aiyar* v. *Vythinatha Ayyar*[3] and Mr. Justice *Subrahmanya Aiyar* has receded from the position he then took up in *Veeranna Pillai* v. *Muthukumara Asary*[4]. Similarly as regards *Kameswar Pershad* v. *Rajkumari Rattan Koer* [5], even if the second suit was based on the same cause of action as the first suit as explained in *Ramasawmy Aiyar* v. *Vythinatha Ayyar* [3], the second suit is clearly barred. Or if we take the view adopted by the Bomby High Court and in *Arunachallam Chetty* v. *Meyappa Chetty* [2], that the Privy Council held that all causes of action must be united in the same suit if possible, then also there would be a bar, as there would be an estoppel by the decision in the suit not by a finding. There may be a difference of opinion, therefore, between the High Courts in deciding whether a question must be deemed to have been decided against a plaintiff, on account of his failure to make it a ground of attack. But where a question need not be deemed to have been decided on the ground that the decree in the previous suit requires such assumption to make it a decree rightly passed, I am not aware that the cases show that without a clear and express finding a party is precluded from raising any question in a subsequent suit.

1. (1900) I. L. R. 25 B. 189.
2. (1898) I. L. R. 21 M. 91.
3. (1903) I. L.R. 26 M. 761.
4. (1904) I. L. R. 27M. 102.
5. (1893) I. L. R. 20 C. 79.

For these reasons I would dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Siva Subramania Mudaliar v. Gnanasammanda Pandara Sannadhi.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Siva Subramania Mudaliar and others .. Appellants* (*Defendants Nos.* 16, 1 *and* 17 *to* 20.)

v.

Gnanasammanda Pandara Sannadhi .. Respondent (*Plaintiff*).

Vendor and vendee—Lien—Waiver—Direction to pay purchase-money to stranger—Remmission, benefit of—Principal and agent—Pleadings—Change of.

Where a defendant vendee admits non-payment of consideration in terms of the bond, the onus is on him to show that it was subsequently paid.

A person who directs another to pay money to a third person is entitled to countermand that order before that person has entered into direct relations with the third person and agreed to pay it to him. But where the agent is directed or authorized by his principal to pay to a third person money existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay to him, or to receive or hold the money on his behalf or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he had fresh instructions from the principal not to pay to such third person. [*Griffin* v. *Weatherby*[1] referred to.] If the person entitled to the payment excuses a portion of the amount in favor of the person directed to pay to him, that is a benefit derived by the latter from the creditor for which he is not bound to account to the person by whom he is directed to make the payment.

A vendor's lien can be lost only by an express or implied contract of waiver;and a vendor who has directed the purchase-money or a portion thereof to be paid to a third party must be taken to have waived by a contract necessarily implied from his conduct the right to a lien for any portion of the money to be paid to the third person under the agreement. [*Webb* v. *Macphesson*[2]; *Ramakrishna Ayyar* v. *Subramania Ayyar*[3]; *Abdulla Beary* v. *Mammali Beary*[4] referred to.]

Distinction between entrustment of money to another for payment to a stranger and direction to pay one's dues to the stranger pointed out.

Their Lordships declined to treat the suit as brought, *i.e.*, for enforcement of lien for non-payment of purchase-money directed to be paid to a third person as a suit for an account on the basis of agency or a suit for damages for non-performance of a contract.

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* A. No. 267 of 1909. 22nd February 1911.

1. (1868) L.R. 3 Q. B. 753.
2. (1903) I.L.R. 31 C. 57 (P.C.)
3. (1905) I.L.R. 29 M. 305.
4. (1910) 7 M.L.T. 376.

Siva Subramania Mudaliar v. Gnanasammanda Pandara Sannadhi.

Appeal from the decree of the Subordinate Judge's Court of Tinnevelly in O. S. No. 37 of 1907.

T. R. Venkatarama Sastry for appellant.

K. Srinivasa Aiyangar and *V. Venkatachariar* for respondents.

The facts and arguments appear sufficiently from the judgment.

The Court delivered the following

JUDGMENT:—The plaintiff in this suit is the present Pandara Sannadhi ot the Dharmapuram Adhinam. The suit is for the recovery of a portion of the consideration which the plaintiff alleges to be due from the 1st defendant and from the defendants Nos. 16 to 20 for the sale of a village belonging to the Adhinam which was made by his predecessor in office in favour of the 1st defendant on the 12th July, 1901, for Rs. 1,27,000. The plaintiff alleges that the portion of the consideration now sued for is still due from the vendee and he seeks in this suit to enforce his lien for the unpaid purchase money under S. 55, Sub-S. 4, Clause (*v*) of the Transfer of Property Act. The vendor Pandara Sannidhi died subsequent to the sale and the plaintiff is his successor in the office. The defendants Nos. 16 to 20 are members of the undivided family to which the 1st defendant belongs and have been impleaded on the ground that the property was purchased for the benefit of the family. The defendants Nos. 2 to 15 are purchasers and mortgagees of some of the properties sold to the 1st defendant. The lower court gave a decree in the plaintiff's favour for a portion of the amount sued for. This appeal relates to two of the items which the lower court found to be due to the plaintiff. The first of these items—a sum of Rs. 2,600—is described in the sale deed, Exhibit A, as "the sum retained for payment to Sankaramurthi Mudaliar, an auction-purchaser of the lands sold in auction for arrears of revenue of the last Fasli of Pattavilaham being Chidambaram Nataraja Kattalai, and for obtaining a sale deed in my name." The second item—Rs. 2,842-8-0—is stated in Exhibit A as received by the vendor in cash, but the 1st defendant admits that it was not so paid, but was reserved with him for a particular purpose which we shall refer to hereafter.

The plaintiff states in his plaint that the amount of the 1st item was not paid to Sankaramurthi Mudaliar as required

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under the sale deed, and that the sale was not obtained in favour of the Adhinam. The defence with regard to this item was that the amount was paid to Sankaramurthi Mudaliar and was utilised by him for purchasing the Pattavilaham land referred to in Exhibit A, the purchase being made *benami* for the plaintiff's mutt. The plaintiff's case is that, on account of the defendant's failure to pay the amount to Sankaramurthi Mudaliar and to get a conveyance from him of the land in favour of the plaintiff's predecessor or the plaintiff, Sankaramurthi Mudaliar sold the lands to one Chidambaranatha Thambiran of the plaintiff's Adhinam for Rs. 4,000 on the 13th July 1906 (Exhibit F). The defendants pleaded also that the suit was barred by limitation, but the Subordinate Judge decided this issue in the plaintiff's favour on the ground that, as the suit was to enforce the plaintiff's lien, the period of limitation applicable was 12 years from the time when the money was payable. On the merits with respect to the first item, the Subordinate Judge held that Sankaramurthi Mudaliar, the purchaser at the revenue sale, might have been *benamidar* for the Pandara Sannadhi, and he also held that Sankaramurthi Mudaliar received the sum of Rs. 2,600 required for the purchase from the 1st defendant, but he was of opinion that the amount was not paid by the 1st defendant on the plaintiff's account but as part of the sum of Rs. 5,000 which he had agreed to pay to Sankaramurthi as brokerage for his services in inducing the Pandara Sannadhi to sell the village to the 1st defendant, though the Pandara Sannadhi had already agreed to sell it to a third person. The Subordinate Judge seems to place considerable reliance on the statement in Exhibit VI, a sale deed executed on the 15th September 1901, nearly two months after the date of Exhibit A, by the 1st defendant in favour of the 2nd and 3rd defendants of a portion of the village, that, out of the consideration money for that sale, Rs. 2,600 had been received by the 1st defendant to get back the Pattavilaham lands which had been sold away at the revenue sale, taking the statement to mean that, so far as the 1st defendant was concerned, Sankaramurthi Mudaliar was the actual purchaser at the revenue sale, and that " he took the loan from the 2nd defendant to be paid to the Pandara Sannadhi to enable him to re-purchase those lands from the Mudaliar." We are of opinion that the inference drawn by the Subordinate

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Judge from the statement in Exhibit VI just referred to is erroneous.

Their Lordships, after dealing with the evidence on this question, said :—

"We are of opinion that Sankaramurthi made the purchase of Pattavilaham land *benami* for the Pandara Sannadhi with the monies paid by the 1st defendant as part of the consideration for Exhibit A. We therefore reverse the finding of the Subordinate Judge with regard to this item."

The second item in the appeal relates, as already mentioned, to an amount stated in Exhibit A to have been paid in cash to the vendor on the date of the sale. As the 1st defendant admits that the amount was not paid then, the onus is on him to show that it was subsequently discharged. His case is that it was retained with him to be paid to the 2nd and 3rd defendants in the suit, who are prior mortgagees of some lands included in Exhibit A, on account of damages due to them from the Pandara Sannadhi in consequence of the irrigation facilities of the lands having been rendered defective by some works done by the Government. The Subordinate Judge finds that the Pandara Sannadhi had entered into an agreement with the 2nd and 3rd defendants to pay a sum of Rs. 1,500 a year on account of damages accruing to them in consequence of the change in the condition of the properties mortgaged to them. Exhibit A was executed on the 29th of *Ani* of *Pilava* year. The 1st defendant contends that, as the *Chithrai Kalavathi* of the previous year had then expired and two months of the *Pilava* year had run, the mortgagees (defendants Nos 2 and 3) claimed damages at the rate of Rs. 1,500-0-0 a year, both for the previous year and for the current year *Pilava*, that Rs. 3,000-0-0 was thus due to them, and that the sum of Rs. 2,842-8-0 was to be paid for the purpose, a small deduction being made as the damages for the *Pilava* year would be paid in advance before they were due. The Subordinate Judge decreed a sum of Rs. 1,492-8-0 in the plaintiff's favour for this item, holding that it was not likely that the 2nd and 3rd defendants, who had already an agreement from the 1st defendant for the sale to them of the mortgaged property, would have insisted, in the circumstances, on the payment of the amount of damages

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due to them; but that the other persons, who were co-mortgagees with them to the extent of ⅜ths share of the mortgage, were likely to have insisted on the payment of their share of the damages. The 1st defendant having admitted that he was able to compound the mortgagees' claim for damages by payment of a sum of Rs 2,250-0-0, the Subordinate Judge held that the plaintiff was entitled to recover ⅝ths of that amount which he took not to have been paid by the 1st defendant. His view, therefore, must be taken to be that the Pandara Sannadhi agreed that the 1st defendant should pay the sum of Rs. 2,842-8-0 to the mortgagees towards their claim for damages, but, as the 1st defendant did not actually pay a portion of the sum to them, the plaintiff is entitled to recover that portion. He does not consider the question whether the 2nd and 3rd defendants ever agreed with the Pandara Sannadhi directly that a sum of Rs. 1,492 8-0 need not be paid. If they did not do so but remitted the amount in favour of the 1st defendant, the plaintiff would have no title to recover the amount from him. A person, who directs another to pay money to a third person, is no doubt entitled to countermand that order before that person has entered into direct relations with the third person and agreed to pay it to him. But as stated in BOWSTEAD on *Agency*, 4th Edn., p. 414, "where an agent is directed or authorised by his principal to pay to a third person money existing or accuring in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay to him, or to receive or hold the money on his behalf, or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he had fresh instructions from the principal not to pay to such third person." (See *Griffin* v. *Weatherby* [1]) And if the person entitled to the payment excuses a portion of the amount in favour of the person directed to pay to him, that is a benefit derived by the latter from the creditor for which he is not bound to account to the person by whom he is directed to make the payment. The 1st defendant swears that he paid a sum of Rs. 2,250, and that the rest was remitted in his favour by the mortgagees. There is no evidence to

1. (1868) L.R. 3 Q. B. 753.

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contradict his statement. There is, no doubt, some force in the argument for the respondent that this matter would then probably have been referred to in the sale-deed, Exhibit VI, executed by the 1st defendant in favour of the 2nd and 3rd defendants, and that it would have been appropriated as part of the consideration for that sale. But, on the other hand, it is improbable that the mortgagees, having an agreement in their favour entered into by the Pandara Sannadhi promising to them Rs. 1,500-0-0 as damages every year, would have agreed to waive the claim altogether. On the whole, we feel inclined to accept the statement of the 1st defendant that he did pay the amount of Rs. 2,250-0-0 to the mortgagees. But it is unnecessary to decide this question as, in our opinion, the plaintiff cannot claim a lien for the amount which, according to the finding of the lower court (and we concur in that finding) the plaintiff directed the vendee, the 1st defendant, to pay to the 2nd and 3rd defendants. A vendor's right of lien for unpaid purchase-money was considered at length by the Judicial Committee of the Privy Council in *Webb* v. *Macpherson* [1]. As laid down in that case, the lien no doubt can be lost only by an express or implied contract of waiver. But it seems to us that a vendor, who has directed the purchase money or a portion thereof to be paid to a third party, must be taken to have waived by a contract, necessarily implied from his conduct, the right to a lien for any portion of the money to be paid to the third party under the agreement. This question has been very recently decided in this court after full consideration by the *Chief Justice* and *Krishnaswami Aiyar* J. in Second Appeal No. 1475 of 1907 (*Abdulla Beary* v. *Mammali Beary* [2]). As stated in that case, "a promise to pay to a stranger is a mere covenant the "breach of which must be compensated in damages, and there "is no occasion for the statutory charge in favour of unpaid "vendor to arise." No doubt in *Ramakrishna Ayyar* v. *Subramania Ayyen* [3] a decree was passed on the footing of the existence of a lien for purchase money ordered to be paid to a stranger. But as pointed out in *Abdulla Beary* v. *Mammali Beary* [2] the question, whether the lien would subsist in such cases, was not raised or decided in that case. Mr. Srinivasa Aiyangar attempted to argue that the amount of Rs. 2,842-8-0 must be regarded as the

1. (1903) I.L.R. 31 C. 57. 2. (1910) 7 M. L. T. 376.
3. (1905) I.L.R. 29 M. 305.

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plaintiff's money deposited with or paid to the 1st defendant as his agent to be paid to the mortgagees But we are unable to accept this contention. There is a clear legal distinction, though a fine one, between a vendee owing money to the vendor being directed to pay it to a stranger and a person being entrusted with another's money to be paid to a stranger. In the one case the money is received and kept by the person who is to make the payment as an agent. In the other, it is merely an obligation that he is bound to render and which he has been authorised to render to a third person. Even if any idea of agency on the part of the 1st defendant could be imported, the present suit cannot be regarded as one for an account; and the plaintiff, by ignoring in his plaint the real facts of the case, precluded himself from asserting that his so-called agent was guilty of any misconduct and when such misconduct took place. We are of opinion that the plaintiff has no lien with regard to the second item and that his right to recover the money from the 1st defendant. if it could be held to exist, is barred by limitation. The respondent contended that, as the defendant failed to obtain a conveyance of the land in the plaintiff's favour as promised by him, the plaintiff is entitled to recover the amount claimed by him. But the suit is not framed as one for damages for non-execution of the conveyance. To such a suit the 1st defendant might have defences not open to him in the present suit. We must reverse the finding of the Subordinate Judge with regard to this item also.

In the result we allow the appeal with costs in this court and in the court below, and the decree of the Subordinate Judge must be modified accordingly.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF BENGAL.]

Maharaja Manindra Chandra Nandi .. Appellant*
v. (*Plaintiff*).
The Secy. of State for India in Council .. Respondent.
(*Defendant*).

Bengal Acts—Cess Act (IX of 1880, *B.C.), Ss.* 6, 72, 76, 80, 81 *and Schedule E—Proprietor of land—Coal mines—Royalty—Cess on royalty—Annual net profits—Liability to pay cess—Policy of Cess Act.*

* 1910, Nov. 16 & 17, and Dec. 14.

Manindra Chandra Nandi *v.* The Secy. of State for India.

Where the plaintiff, who was the owner of landed property leased it to various parties for the working of coal mines, and who, besides the rent of surface land, received, under the designation of royalty, a percentage on the coal raised by the lessees or mine-owners, had been assessed for 'cess' under the provisions of the the Cess Act (IX of 1880, B C.) in respect of the royalty received or receivable by him from the coal mines on his estate :

Held, that the return required under S. 72 of the Act was not with regard to the mine-owners' profits, but had reference to the general net profits of the property ; that the royalty receivable by the plaintiff was part of the "annual net profits' of the mine within the meaning of those words in Ss. 6 and 72 of the Act ; and that the plaintiff had been properly assessed with 'cess' thereon.

In S. 81 of the Act the word 'owner' is used in the sense of proprietor, but the liability for the 'cess' lies on both 'occupier' and 'owner' in the case of mines, etc., as in the case of land it lies on holders of estates or tenures or rayats, the policy of the Act being that all persons who benefit by the maintenance and construction of 'roads and other means of communication' or 'works of public utility' out of the cesses, should bear the liability of paying the same.

[*Manindra Chandra Nandi* v. *The Secretary of State for India n Council*[1] affirmed.]

Appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 7th January, 1907, affirming those of the SubordinateJudge of Burdwan, dated the 22nd of February, 1905.

The main questions for determination on the appeal were: (1) whether royalties paid by the lessees of a coal mine in Bengal to the proprietor formed a portion of the annual net profits from the mine upon which road and public works cesses were leviable under Act IX of 1880 of the Bengal Council; (2) whether they were payable by, or leviable from the said proprietor; and (3) whether they were so liable when income tax was payable upon the royalties under Act II of 1886.

The appellant was the Maharaja of Cossimbazar, and the proprietor of an estate known as Chati Baliapur, in the District of Burdwan, bearing Towzi No. 5 559 on the roll of the Burdwan Collectorate. On his estate were coal mines which he had let on lease to various persons and companies.

Under their leases the lessees paid to him royalties at a fixed rate per maund upon the quantity of coal raised, and coke and coal dust sold.

For the year 1900-'01 the appellant was assessed under Chapter V of Act IX of 1880 of the Bengal Council with, and

1. (1907) I. L. R. 34 C. 257.

Manindra Chandra Nandi *v.* The Secy. of State for India.

on the 20th September, 1900, called on to pay, Rs. 11, 227-7-0 in respect of the rates for road and public works cesses calculated upon the amount of the royalties so paid to him.

The lessees paid cesses on the actual net profits made by them after deduction of these royalties, and not upon the amount of the royalties paid by them.

The appellant was also assessed for the same year under the Income Tax Act (II of 1886) upon the amount of the said royalties.

Against the assessment under Chapter V of Act IX of 1880 (B C.) the appellant preferred an appeal to the Board of Revenue, by whom it was rejected on the 28th January, 1901.

The appellant paid to the Collector of Burdwan the amount of the said road and public works cesses assessed upon him.

On the 28th January, 1902, the appellant instituted the present suit in the Court of the Subordinate Judge of Burdwan against the respondent, the Secretary of State for India in Council. In his plaint he alleged and contended that the said assessment under Act IX of 1880 (B. C.) was illegal, null and void, he having been assessed for the same royalties under Act II of 1886, and that the orders of the Collector and of the Board of Revenue in respect of the said assessment were illegal and *ultra vires*, and he prayed for a declaration to the above effect and for the recovery of the sums paid by him with interest and costs.

The respondent, by his written statement, denied the correctness of the plaintiff's contentions in law, or his right to a refund of the said sums, and submitted that the said assessment was legal and valid.

On the 10th May 1902, the appellant filed a petition asking leave to amend the plaint. He stated that the main foundation for his suit was the contention that the respondent cannot get two kinds of taxes on the royalties, and he prayed to be allowed to amend his plaint by claiming in the alternative that in the event of its being held that the assessment under the Cess Act IX of 1880 (B. C.), was valid, he should obtain a refund of the amount paid on the 27th August 1900, under Act II of 1886, for income tax on the said royalties, *viz.*, Rs. 5,669-5-7.

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The respondent opposed the proposed amendment, but the same was allowed by the court.

A further written statement was filed by the respondent on the 2nd August, 1902.

On the 16th August, 1902, the Subordinate Judge fixed the following issues for trial:—

1. Whether the suit is maintainable without making the District Board party to?

2. Is plaintiff entitled to a refund of the cesses as mentiond in the plaint?

3. Is plaintiff entitled to a refund of the income tax as mentioned in the plaint? If so, what amount?

On the 21st January, 1905, on the application of the respondent, the following, further issue was raised:—

4. Whether the suit for refund of income tax with or without notice under S. 424, C. P. C., is maintainable?

Whether the notice served is sufficient?

The Subordinate Judge, on the 22nd February, 1905, delivered judgment and made a decree dismissing the plaintiff's suit with costs. He decided the first issue in favour of the appellant. As regards the second issue he held that the appellant was the owner of the coal mine, within the meaning S. 72 of Act IX of 1880 (B. C.); that the royalties received by him from the lessees constituted his share of the net profits from the mine, within the meaning of the said Act; that there was nothing in the Act which required that only one return of net profits should be made when the owner was not the occupier of the mine; that S. 6 of the Act made all net profits from the mine, which resulted to every one interested in the mine, liable to assessment, and that the orders of the Collector and Board of Revenue bringing the said royalties, paid to the appellant, under assessment were legal and valid. He further held that the levying of income tax upon the said royalties did not affect the validity of the levy of cesses under Act IX of 1880 (B. C.) and did not entitle the plaintiff to any refund of the latter. As regards the fourth issue he held that the notice under S. 424 (C. P. C.) did not cover any demand for a refund of income tax, and that, therefore, the said claim was not maintainable, and that the third issue did not arise.

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The appellant having appealed against the said judgment and decree, the High Court at Calcutta, on the 7th January, 1907, delivered judgment and dismissed the appeal with costs. *Rampini* and *Mukerjee*, JJ., who heard the appeal, held that the royalty payable by a lessee (occupier) of the mine to the owner formed a part of the annual net profits from the mine and was liable to assessment for cess under Act IX of 1880 (B. C.), and also for income tax under Act II of 1886. They also held that the appellant's suit for a refund of the cesses paid in respect of the royalties was not based on the ground that though payable they had been irregularly levied from him, but that they were not assessable as such at all. The learned judges differed somewhat in their construction of the Act. For a full report of the judgments see *Manindra Chandra Nandi* v. *The Secretary of State for India*[1].

The appellant, thereupon, appealed to His Majesty in Council.

De Gruyther, (*Ross* with him) for the appellant:— S. 72 and Schedule E of the Cess Act (IX of 1880, B.C.) show that one return of the annual net profits of a mine is required to be submitted, and such a return must be made by the person who has the possession of the mine, or by one who has control over it. S. 73 clearly shows that only one return is contemplated under the Act. The term 'annual value' of land is defined in the Act, but the term 'annual net profit' is not defined in the Act. Such profits have to be determined, and the only person who can give information about the same is the person who is in possession of the mine and working it. The term 'owner' in S. 72 means owner in possession. The appellant is not the owner in possession, and the procedure adopted by the Collector in calling upon him to make return of the net profit and assessing cesses and making him pay the same is *ultra vires*. Sections 79, 80, 81, 82, 83 and 98 all support the view that only one return is required. Here two returns were required and two separate assessments were made and two persons separately were compelled to pay the cesses. But the Act contemplates one return, one assessment and payment by one person. The appellant is not the owner in possession, and the royalties paid to him are

1. (1907) I. L. R. 34 C. 257.

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not assessable. Railway, tramway and mine are all put on the same footing under S. 72. Suppose *A*, who is working some railway, running on the land of *B*, pays cesses to the Government and also royalty to *B*: if the courts in India are right, *B*, too, would be liable to pay cesses in respect of the royalty received by him. But suppose, further, that *A* is exempted under S. 8 of the Act from paying any cesses: would *B* be still liable to pay the same? The decision of the courts in India would logically lead one to the untenable conclusion that *B* would be liable to pay cesses on the royalty received by him. The appellant has paid income tax on the royalties and is not liable to pay the cesses as well in respect of the same royalties.

Arthur Cohen, K. C. (*Dunne* with him) for the respondent:—The real question is what are "the annual net profits." The case of *Coltness Iron Company* v. *Black*[1] lays down that in calculating net profits from a mine royalties paid by the lessee must be included in such profits. Under S. 5 of the Act it is the 'property' that is made liable to cesses, and not the owner or lessee of the property. This view is strengthened by a reference to S. 76 of the Act. He referred to Ss. 28 and 36 of the District Road Cess Act (X of 1871, B. C.), now repealed by S. 3 of Act IX of 1880. [Their Lordships intimated that they did not want to hear him further.]

De Gruyther, asked their Lordships to consider the question relating to the procedure adopted by the Collector in calling upon the appellant to make a return, and *Cohen*, K. C., replied on that point.

The judgment of their Lordships was delivered by

Mr. Ameer Ali:—The plaintiff is the owner of considerable landed property in Bengal, part of which he has leased to various parties for the working of coal mines. Besides the rent for the surface land, he receives, under the designation of royalty, a percentage on the coal raised by the lessees or mine-owners. He has been assessed for "cess" under the provisions of Bengal Act IX of 1880, in respect of the royalty received or receivable by him from the coal mines on his estate. This Act provides for the levy of "cess" on all immovable property situate in the Province for the construction of roads and other means of com-

1. (1881) 6 A. C. 315, at p. 331.

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munication, and it gives to the "Collector", defined in the Act, the power of making the assessment. For the purposes of the Act, mines, &c., are included in the definition of immovable property, and it is declared that, in the case of lands, the "cess" should be assessed on their "annual value," and in the case of mines, &c., on "the annual net profits" from such property. The mode of ascertaining "the annual value of lands" and the "annual net profits" from mines, &c., are specifically laid down. The plaintiff contends that the royalty he receives from the coal mines cannot, upon a proper construction of the Act, be included in the term "annual net profits" and that, therefore, the assessment is illegal.

He accordingly brought a suit in the Court of the Subordinate Judge of Burdwan to obtain a declaration to that effect. This judge dismissed the action on the 22nd February, 1905, and his decision was affirmed by the High Court of Calcutta in two elaborate judgments in which many subsidiary matters have been discussed at considerable length. From the decree of dismissal by the High Court, the plaintiff has preferred this appeal to His Majesty in Council.

In their Lordships' opinion the only point for determination in this case turns on the meaning to be attached to the words "annual net profits" in Ss. 6 and 72 of the Act. Section 6 so far as it is material for the purposes of this decision, is in these terms:—

"The road cess and the public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways, and other immovable property, ascertained respectively as in this Act prescribed."

Chapter V, which begins with S. 72, lays down the procedure for valuation, assessment and levy of cesses on mines, &c.

Section 72 is in these terms:—

"On the commencement of this Act in any district, and thereafter before the close of each year, the Collector of the district shall cause a notice to be served upon the owner, chief agent, manager, or occupier of every mine, quarry, tramway, railway, and other immovable property not included within the provisions of Chapter II, and not being one of the tramways or

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railways mentioned in S. 8; such notice shall be in the form in Schedule (E) contained, and shall require such owner, chief agent, manager, or occupier to lodge in the office of such Collector within two months a return of the net annual profits of such property, calculated on the average of the annual net profits thereof for the last three years for which accounts have been made up."

It is contended on behalf of the plaintiff that the term "net annual profits" used in this section means "the net annual profits" of the person actually working the mine, and who or whose agent or manager has to make the return; and that it does not include royalty paid to the proprietor of the land, which stands in the same category as the ordinary expenses and outgoings connected with its working such as boring, haulage, &c. In their Lordships' judgment this contention has no substance. Schedule (E) is referred to as indicating the meaning of the words "net annual profits," but it goes no further than the section itself. It is to be observed that both in S. 6 and S. 72 the "net annual profits" have reference to the property and not to the individual.

The inference is clear that the return required under the section is not with regard to the mine-owner's profits but has reference to the general net profits of the property. The obligation to make the return is laid on the person most cognisant of the circumstances under which the mine is worked and of the profits derived from it. But that does not alter, in their Lordships' view, the character of the royalty received by the proprietor for his share of the profits of the mine. This conclusion is enforced by an examination of the provisions of Ss. 76, 80, and 81. Section 76, which provides for the valuation of property assessable under Chapter V, where the annual net profits cannot be ascertained by the officer making the assessment, speaks again of the property itself, and declares that in such eventuality "he [that is the Collector] may by such ways or means as to him shall seem expedient, ascertain and determine the value of such property, and shall thereupon determine six per centum on such value to be the annual net profits thereon." The language of the section leaves little room for doubt that the annual net profits are to be taken as a whole. Section 80 provides for service on the person making the return under

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S. 72 of a notice "showing the amount of road cess and public works cess payable in respect of such property." This again clearly shows that although the cess is assessed on the basis of the net annual profits, it is paid in respect of the property, and not in respect of any part of the profits.

Section 18 deals with cases where the "occupier of such property" is different from the "owner," and provides the mode by which, in case he pays more than his share of the cess, he might recover such excess. In this section the word "owner" appears to be used in the sense of proprietor. It is clear, however, that the liability for the cess lies on both "occupier" and "owner" in the case of mines, &c., as in the case of land it lies on holders of estates or tenures and rayats, the policy of the Act evidently being that all persons who benefit by the maintenance and construction of "roads and other means of communication" or "works of public utility" out of these cesses, should bear the liability of paying the same.

On the whole their Lordships are of opinion that the conclusion at which the lower courts have arrived is correct, that the royalty receivable by the plaintiff is part of the net annual profits of the mines and that he has been properly assessed with cess thereon. This appeal consequently fails.

It has been found by the courts in India that the plaintiff has not been prejudiced by any irregularity on the part of the Collector in the mode of assessment; their Lordships do not feel called upon to express any opinion on the question of the procedure he should have adopted.

The appeal must, in their Lordships' judgment, be dismissed with costs, and they will humbly advise His Majesty accordingly.

Watkins and Hunter—Solicitors for appellant.

Solicitor, India Office—Solicitor for respondent.

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Present:—The Lord Chancellor, (Lord Loreburn) Lord Macnaghten, Lord Atkinson and Lord Robson.

J. S. B. Birch and others .. Petitioners*

v.

The King-Emperor .. Respondent.

Practice—Criminal Proceedings—Special leave to appeal—What the applicants must show by their petition.

His Majesty will not review criminal proceedings unless it be shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

[*In re Abraham Mallory Dillet* [1] followed.]

The applicants ought to show the materials upon which one of those propositions can be established and ought fully to inform the Board of the facts.

This was a petition, which was heard *ex parte*, by J. S. B. Birch, M. C. Gupta and M. S. Mukerjee, for special leave to appeal from a verdict and sentence pronounced by the Chief Court of Lower Burma on April 12, 1910.

The first petitioner was, at the time when the events occurred out of which the charges against him arose, the acting Superintendent of the Kheddah Department under the Government of Burma; the second petitioner was the acting Assistant Superintendent, and the third petitioner was the Head Clerk, of the department.

The first petitioner was charged as follows:—Firstly, that, on the 9th day of December, 1907, at Mymensingh, being a public servant in the employ of the Government of Burma, he was entrusted with the sum of Rs. 15,100, the property of the said Government, for the purpose of making advances of pay to the sirdars, mates and hunters of the temporary hunting establishment of the Kheddah Department; that he agreed to pay them at the rates of Rs. 15, Rs. 12 and Rs. 10 per mensem respectively; that he made them advances of pay at such rates amounting to Rs. 7,120, and that between the 9th day of December, 1907,

* 1910, December 14.

1. (1887) 12 A. C., 459.

and the 25th day of March, 1908, at Mymensing or Katha, or between the said places, he, being a public servant, dishonestly misappropriated a portion, to wit, Rs. 5,904 of the balance of the said sum of Rs. 15,100 and thereby committed an offence punishable under S. 409 of the Indian Penal Code and within the cognizance of the Chief Court of Lower Burma ; and, secondly, that he, on or about the 23rd day of March, 1908, at Katha, being then a public servant as aforesaid, and being entrusted by the said Government with the sum of Rs. 11,303-12-0, the property of the said Government, for the purpose of paying salaries for the months of March and April, 1908, to the sirdars and hunters of the said establishment, dishonestly misappropriated the sum of Rs. 5,259-10-10, which was not required for the said purpose, and thereby in his capacity as a public servant committed criminal breach of trust in respect thereof, and thereby committed an offence punishable under S. 409 of the Indian Penal Code and within the cognisance of the Chief Court of Lower Burma.

The second and third petitioners were charged with abetment of the above offences.

After a lengthy deparmental enquiry and magisterial proceedings the accused were committed for trial before the Chief Court of Lower Burma. The trial took place before the Hon. Mr. Justice Hartnoll and a jury.

The trial lasted from the 6th January to the 2nd April, 1910, 118 witnesses being examined for the prosecution. The defence called no evidence and the jury brought in an unanimous verdict of guilty. The petitioners were sentenced to five years' rigorous imprisonment.

The principal business of the Kheddah Department is the conduct of organised hunts of wild elephants. For the purposes of the operations of 1908, which were to be held in Upper Burma, it became necessary at the end of 1907 for Birch to engage from India hunters of different grades. The sanctioned pay to the three grades was respectively Rs. 20, Rs.18 and Rs. 16 per mensem. The prosecution alleged that Birch engaged such hunters at Mymensing, but that he gave them advances at the lower rates of Rs. 15, Rs. 12 and Rs. 10 respectively, and not at the higher sanctioned rates.

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The sums which the accused were charged with misappropriating were partly the difference between the pay sanctioned and the lower rates alleged to have been paid, and partly moneys entered in the accounts as paid to hunters, who were never engaged at all.

The charges were framed in accordance with the provisions of S. 222-A of the Code of Criminal Procedure under an Order of *Ormond* J., who in passing the Order made the following remarks:—"The general policy of the Criminal Procedure "Code is that an accused person should be tried for not more "than three offences of the same kind. The charge as it stands "includes 1,368, or rather, 1592 charges." The petitioners contended that although as altered the charges verbally complied with the provisions of S. 222-A, they were contrary to the spirit and intention of the section, and really amounted to several hundred charges added together and called one.

The petitioners submitted that the conviction and sentences were wrong and ought to be set aside, and the proceedings quashed on the grounds that (1) the learned Judge erred in law in putting to the jury charges different in amount, and arrived at differently from those contained in the charges to which the petitioners were called upon to plead, without amending the original charges, and giving the petitioners an opportunity of answering and meeting the charges as so put to the jury; (2) the charges as put to the jury were in contravention of S. 234 of the Criminal Procedure Code, in as much as they included more than three separate charges; (3) the charges as framed were in contravention of the spirit of S. 234 and 222-A of the Code of Criminal Procedure, and that the petitioners were thereby greatly prejudiced in their defence; (4) the court had no jurisdiction to try the first charge; (5) even if the court had jurisdiction to try the first charge, it had no jurisdiction to try the first and second charges in one trial, and that the petitioners were greatly prejudiced in their defence by having the two charges heard in one trial; (6) that the learned judge erred in allowing the prosecution to cross-examine their own witnesses; and (7) the learned judge erred in law by allowing evidence to be given of alleged attempts to suborn certain witnesses, there being no evidence that such attempt, if made, was

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made with the knowledge or connivance or at the instigation of the petitioners.

DeGruyther, (*Eddis* with him) for the petitioners:—The charge on which the petitioners were convicted by the jury was the alleged misappropriation. The circumstances of the case were that on May 25, 1908, every one of the hunters was put into a train and sent down to Rangoon to be shipped back to India. A native sent a telegram on that day to the Police at Rangoon, saying that the petitioner Birch had misappropriated some of the money. On the arrival of the men at Rangoon the Police examined 25 of them—most headmen—and took down their statements. They all said that they had been engaged and paid at the higher rate. Other men also made statements to the Police that they were engaged and paid at the higher rate, and the man who actually engaged the hunters at Chittagong likewise said that they were engaged and paid at the higher rate. Those men were called by the prosecution as witnesses at the trial, and the judge allowed the prosecution to cross-examine them as hostile witnesses. They stuck to their statements. Seventeen other men stated that they were paid at the lower rate. In regard to the second charge, the prosecution sought to prove that only 292 men were employed by producing railway tickets, and urging that the quantity of provisions supplied would only be enough for the support of that number. The witnesses being allowed to be cross-examined as hostile prejudiced the minds of the jury. The charges were made two years after the men were engaged, and as they had all returned to their homes in India, it was impossible for the defence to procure their attendance. The charges were originally 1,592 in number, and although they were altered in compliance with the provisions of S. 222-A of the Criminal Procedure Code, they were contrary to the spirit and intention of the section, and really amounted to several hundred charges added together and called one.

[The *Lord Chancellor* referred to registered agreements entered into by some of the hunters on which great stress was laid at the trial, and which formed the basis for the application to cross-examine hostilely.]

De Gruyther said they had no information as to what those agreements were. With regard to the allegation as to the

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destruction of documents the petitioners denied that they were destroyed by them, and they knew nothing whatever about the alleged attempts to suborn witnesses. The persons who were said to have made those attempts were acquitted. He added that they had placed before the Board all the information at their disposal.

The Judgment of their Lordships was delivered by

The Lord Chancellor:—Their Lordships are unable to advise His Majesty that leave to appeal should be given in this case.

The rule as regards Criminal Proceedings is very well known, and was laid down in *Dillet's case.*[1] It was there said: "Her Majesty will not review criminal proceedings unless it "be shown that by a disregard of the forms of legal process or "by some violation of the principles of natural justice, or other-"wise, substantial and grave injustice has been done."

The applicants ought to show the materials upon which one of those propositions can be established, and ought fully to inform the Board of the facts.

In the present case the applicants have not shown the materials, have not fully informed the Board of the facts, nor have they even given a summary view of the course of the trial, and of the evidence.

Solicitors for the Petitioners: Messrs *Sanderson, Adkin, Lee and Eddis.*

The petition was heard *ex parte.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.]

Kishen Parshad and others ... Appellant*

v.

Har Narain Singh and others .. Respondents.

Hindu Law—Joint family—Suit by managing members—Limitation Act S. 22.

Members of a joint Hindu family who are the sole managers of the family business are competent to enter into contracts in their own names and sue on the said contracts; and it is not necessary that in those suits they should join other members of the family as co-plaintiffs.

1. (1887) L. R. 12 Ap. Cas., 459, at p. 466.

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Where in such a suit the other members who were unnecessary parties were added after the period of limitation: *Held* that the suit was not liable to be dismissed under S. 22 of the Limitation Act. The defendant is entitled to insist on all persons with whom he expressly contracted being made parties to the suit. [*Kattushin Khanna* v. *Vallotil Narayanen*[1] and *Alagappa Chetty* v. *Vellian Chetty*[2] doubted. *Arunachella Pillai* v. *Vythialinga Moodeliar*[3] approved. *Ramsebukh* v. *Ram Lal*[4] and *Imam-ud-din* v. *Liladhar*[5] referred to.]

Appeal from a judgment and decree of the High Court of Judicature of the North-Western Provinces, Allahabad, reversing a judgment and decree of the Court of the Subordinate Judge of Ghazipur.

The first court decreed the suit of the plaintiffs (appellants), and the High Court, on appeal, dismissed it. The main question for determination in the appeal was, whether the suit was barred by the law of limitation?

Kishen Parshad, Bishun Parshad and Jamna Parshad, plaintiffs, together with their sons and grandsons, constituted a joint Hindu family, governed by the Mitakshara law. They were managers of the family, and as such, carried on the family business of bankers and merchants under the name and style of "Manorath Bhagat Dhian Ram."

Shamrathi Singh, Mahadeo Singh, and Ranjnandan Singh, the first three defendants (respondents), together with their sons, constituted another joint Hindu family governed by the Mitakshara law.

In 1894, the first three defendants, named above, concluded an agreement with the three plaintiffs aforesaid, by which the latter agreed to lend money to the former and to open a credit account for them in the books of the said firm of Manorath Bhagat Dhana Ram. It was further agreed that any one or more of the said three defendants would have power to act on behalf of the rest with the said three plaintiffs.

The money dealings between the parties lasted for some years. On the 9th August, 1901, the three defendants adjusted the account and struck the balance due from them. The money dealings, however, continued up to 6th January, 1903, on which date the three defendants paid Rs. 500 to the firm.

1. (1881) I. L. R. 3 M. 234.
2. (1894) I. L. R. 18 M. 32.
3. (1882) I. L. R. 6 M. 27.
4. (1881) I. L. R. 6 C. 815.
5. (1892) I. L. R. 14 A. 524.

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On the 3rd June, 1904, three plaintiffs instituted the suit, giving rise to the appeal, in the Court of the Subordinate Judge of Ghazipur, to recover the said debt against the three above named defendants and other members of their family.

The defendants did not deny the debt, but contended, among other things, that the suit was bad for non joinder inasmuch as all the members of the plaintiff's family were not joined in the suit. The three plaintiffs maintained their right to sue alone, but merely to remove the objection they applied to the court, on the 22nd August, 1904, for leave to amend the plaint by adding the remaining members of the joint family as parties to the suit. The court allowed the amendment, which was made on the 8th September, 1904. The defendants then pleaded that the whole claim of the plaintiffs was barred by time because some of the plaintiffs were made parties to the suit after the expiry of the period of limitation.

Of the issues fixed for trial, only the following are material for the purpose of this report:—

1. Whether it is necessary to make other members of the family parties to the suit, if so, what persons have not been made parties, and what is the result of such omission?

3. Is the plaintiff's suit barred by time as against all the defendants, or the defendants aforesaid?

The Subordinate Judge delivered his judgment on the 24th September, 1904, and decreed the claim of the plaintiffs with costs.

He held that the original plaintiffs were the managing members of the joint family, and, as such, were entitled to institute the suit in their own names alone, on behalf of themselves and the other members of the family. In that view, it was not necessary, in his opinion, that all the members of the family should be made parties to the suit, or that it should be brought on behalf of all of them. The parties, added as plaintiffs by the order of the 8th September, 1904, made on the application, dated the 22nd August, 1904, were in fact, unnecessary parties to whom the provisions of the Limitation Act (S. 22, Act XV of 1877) did not apply. For these and other reasons the

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Subordinate Judge found, on the third issue, that the suit of the plaintiffs was not barred against any of the defendants.

The defendants, thereupon, appealed to the High Court, which delivered its judgment on the 2nd February, 1907. The learned Judges of that court agreed with the finding of the Subordinate Judge that the three plaintiffs, aforesaid, were managers of the joint family, and brought the suit as such, but they held that the managers alone could not maintain the suit, and that the suit was barred by time when the added plaintiffs were brought on the record. They accordingly allowed the appeal, reversed the decree of the Subordinate Judge, and dismissed the suit with costs. For a full report of the judgment see *Shamrathi Singh and others* v. *Kishan Parshad and others.*[1] The plaintiffs, then, appealed io His Majesty in Council.

De Gruyther, K. C., and *B. Dube*, for the appellants:—This is a suit on an account stated, and Article 64 of Schedule II of the Limitation Act (XV of 1877) applies. There have been further dealings between the parties, and the last amount paid by the respondents was, on the 6th January, 1903. The suit is, therefore, within time even on the 8th September, 1904, when other members of the appeallants' family were made parties to the suit, under Article 85 of the Act. If the latter article is not applicable the suit falls under one or other of Articles 57, 59, 116 and 120 of the Act. But the appellants, who were the managers of the family business, and with whom the respondents made their contract, can alone bring the suit in respect of the breach of that contract. The contract was made with the firm of "Manorath Bhagat Dhana Ram," the managers of which are entitled to sue. The addition of other members of the family, as parties to the suit does not bring the case under S. 22 of the Limitation Act, as they were not necessary parties. The case is one of mis description, and not of non-joinder, and the suit is not barred under that section—*Kusturchand Bahiradas* v. *Sagarmal Shriram*,[2] *Pragi Lal* v. *Maxwell*,[3] The High Court has relied upon the case of *K. P. Kanna Pisharody* v. *V. M. Narayanam Somayajipad*,[4] which is distinguishable as the suit, there was for the

1. (1907) I. L. R. 29 A. 311. 2. (1890) I. L. R., 17 B. 413
3. (1885) I. L. R. 7 A. 284, at p. 287. 4. (1881) I. L. R 3 M. 234.

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recovery of property and the decision related to the question whether one or more of the co-owners can sue without making all the co-owners parties to the suit. Another case relied upon by the High Court is the case of *Ramsebuk* v. *Ram Lall Koondoo*[1] where the suit was brought by some of the contractors without joining the remaining co-contractors. These cases are not applicable. The Calcutta case is treated as a leading case and has been followed in subsequent cases.

[*Lord Macnaghten*:—The managing members of the joint family were sufficient to bring the suit.]

Their Lordships stopped the counsel, who refered to *Gan Savant Bal Savant* v. *Narayan Dhond Savant*,[2] *Narayan Gob Habbu* v. *Pandurang Ganu*,[3] *Ramayya* v. *Venkata Rathnam*,[4] *Alagappa Chetti* v. *Velliam Chetti*,[5] and *Arunachala Pillai* v. *Vythialinga Mudaliar*,[6] also the Code of Civil Prcoedure [1908], by Woodroffe and Ameer Ali, p. 127.

Ross, for the respondents: Article 120 of Schedule II of the Limitation Act (XV of 1877) does not apply.

[*Lord Macnaghten* :—Their Lordships do not want to hear you in this point.]

The appellants are not entitled to maintain the suit without joining the other members of the family as parties, *Hari Gopal* v. *Gokaldas Kushabashet*,[7] *Angamuthu Pillai* v. *Kolandavel Pillai*,[8] And when the other members were joined the suit was barred under S. 22 of Act XV of 1877.

[*Lord Robson*: In—neither of these cases the action was brought on a contract made by the manager of the joint family.]

To recover any portion of the family property all members must join in the suit—MAYNE on *Hindu Law and Usage* (7th Edition) S. 298, p. 379.

[*Lord Mersey*—referred to p. 381 of MAYNE'S *Hindu Law*].

All the members of a joint family must be joined as parties in a suit to recover joint family debt—*Kalidas Kevaldas* v. *Nathu Bhagvan*[9]; *Ramsebuk* v. *Ram Lall Koondoo*[1].

1. (1881) I. L. R. 6 C. 815.
2. (1883) I. L. R. 7 B. 467. at p. 471
3. (1881) I. L. R. 5 B. 685.
4. (1893) I. L. R. 17 M. 122
5. (1894) I. L. R. 18 M. 33.
6. (1882) I. L. R. 6 M. 27, at p. 28.
7. (1887) I. L. R., 12, B. 158.
8. (1899) I. L. R., 23 M. 190, at p. 194.
9. (1883) I.L.R. 7 B. 217.

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De Gruyther, K. C., and *B. Dube* were not called upon to reply.

The judgment of their Lordships was delivered by

Lord Robson:—The question to be determined in this appeal is whether or not the suit is barred by the Indian Limitation Act of 1877.

There is no doubt that when first brought, it was well within the statutory period of three years, but it is contended by the respondents that it was not then brought by all the proper and necessary plaintiffs, and that afterwards, when the record was amended in that respect, the statutory time had expired.

The suit was commenced by the first three plaintiffs on the record. They are the managing members of an undivided Hindu joint family governed by the Mitakshara law and, as such mannaging members, they carry on the business of money-lenders together at Hanumanganj in the district of Ballia, as a firm, under the name and style of Manorath Bhagat Dhana Ram.

The other members of the joint family do not participate in the management of that business or "shop" as it is called, and the loan transactions out of which the claim arises were negotiated and concluded by the members of the said firm alone, with the first three defendants, who are also members of another undivided Hindu family.

The accounts between the parties began in 1895, and balances were periodically agreed between them until the 9th August, 1901, when the last balance was struck and the period of limitation began to run. On that date the defendants duly acknowledged the correctness of the balance then appearing in the plaintiffs' books, and executed a *sarkhat* or agreement admitting it to be due and payable by them. It is found by the learned Subordinate Judge that this agreement was made between the defendants and the first three plaintiffs, who accordingly brought their action for the balance in question on the 3rd June 1904. The defendants objected that all the members of the family to which the plaintiffs belonged ought to be joined with them as plaintiffs. On the 22nd August, 1904, the original plaintiffs, while denying that the other members of the family were necessary parties, and alleging themselves to be the proprietors and managers of the firm, yet, with a view to removing the defendants' objection for

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what it was worth, prayed for leave to add the other members of the family as plaintiffs. Leave was accordingly given and the amendment was made on the 8th September, 1904. By this time the three years allowed by Act XV of 1877, Second Schedule, Article 64, had expired, and it became necessary to determine whether or not the additional plaintiffs were really necessary parties, because, if not, the suit had always been properly constituted and the time under the statute stopped running on the 3rd June, 1904, within the three years.

The learned Subordinate Judge of Ghazipur decided in favour of the plaintiffs, but the High Court for the North-Western Provinces reversed his judgment. Their Lordships are of opinion that the judgment of the learned Subordinate Judge ought to be restored.

The Indian decisions as to the powers of the managing members of an undivided Hindu joint family are somewhat conflicting. It is, however, clear that where a business like money-lending has to be carried on in the interests of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort, it would be impossible for the business to be carried on at all, and there is no reason to doubt the correctness of the finding of the learned Subordinate Judge that the first three plaintiffs here were in fact entrusted with, and regularly exercised, such a power in regard to this money-lending business. He finds in broad terms that all the business relating to the shop had been carried on in the names of the first three plaintiffs only, and that all law suits relating to the shop, or the family, had also been instituted in their names alone.

Is there any principle of law, or any custom applicable to a case like this, according to which the managing members of a Hindu joint family entrusted with the management of a business must be held incompetent to enforce at law the ordinary business contracts they are entitled to make or discharge in their own names? The defendant is, of course, entitled to insist on all the persons with whom he expressly contracted being made parties to the suit, and that was done in the action as originally

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framed in this case. There were no other parties to the contract of the 9th August, 1901, than the respondents and the first three plaintiffs. The respondents are demanding, however, that persons who are incompetent to interfere in the business of the contract, or to give a receipt under it, and are merely interested in its profits shall be treated as parties necessary to its enforcement. The High Court thought there was much to be said in favour of the view taken by the court below, but considered the matter concluded by authority. They cited the case of *Kathusheri Khanna* v. *Vallotil Narayanan* [1] which was a case turning on the co-ownership of land. The co-owners were an association of individuals of which only some brought the action while others supported the defendants. *Knight* C. J. held that all the co-owners in such a case must join and that they could not invest the managers of their property with the right to sue in their own names or in a representative capacity. Their Lordships think that this proposition, thus broadly stated as to co-ownership, cannot be applied to the managing members of a business carried on for an undivided Hindu joint family. It was not so applied in the later case of *Arunachala Pillai* v. *Vythialinga Mudaliar* [2], where it was stated that the managing member of an undivided Hindu family, suing as such, is entitled to bring a suit to establish a right belonging to the family without making the other members of the family parties to the suit.

Stress was laid by the High Court on the judgment in *Ramsebuk* v. *Ram Lal Koondoo* [3]. In that case a business was carried on for the benefit of a Mitakshara family by a firm consisting of four members of the family. The action in question was brought by two only of the partners, and the other two were not added until after the period of limitation had expired. The court held that the plaintiffs must fail because all the co-contractors had not been added as plaintiffs. *Garth* C. J. says, p. 824: "If in this case it had been found in the court below as a fact that the contract was made *between the defendant and the two original plaintiffs only* there would be no difficulty in

1. (1881) I. L. R. 3 M. 234. 2. (1882) I.L. R. 6 M. 27.
3. (1881) I. L. R. 6 C. 815.

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deciding in their favour, because the joinder of the other two plaintiffs would only have been a *misjoinder* which, by S. 31 of the Code of Civil Procedure, is never now fatal to a suit." Again (p. 825) the learned Chief Justice says: "The lower court has found in this case, that all the four plaintiffs were partners in the concern, and that the defendants contracted with all jointly." It is to be observed that there were other members of the family who had an equal family interest in the profits of the business but it was not suggested that they should be joined as plaintiffs or that they were to be treated as partners in the firm of managing members. In the present case, however, the defendants were originally sued by all the partners or persons with whom they had made their contract, and therefore they cannot avail themselves of *Ramsebuk's case*[1] as an authority in their favour.

The same observations apply to the case of *Imam-ud-din* v. *Liladhar*.[2] There the decision simply was that, except in the case of an assignment by the other surviving partner, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm.

The decision in the case of *Alagappa Chetty* v. *Vellian Chetty*[3], cited by the respondents, may be supported on the ground that the single plaintiff in that case was not shown to be the managing member of the family or to be the only partner or proprietor of the business with which the litigation was concerned.

Their Lordships think, however, that the proposition there laid down to the effect that the manager cannot sue without joining all those *interested* with him, if literally construed, goes too far.

In the opinion of their Lordships, the original plaintiffs in this case were entitled, as the sole managers of the family business, to make, in their own names, the contracts which gave rise to the claim, and that they properly sued on such contracts without joining the other members of the family.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed; that the decree of the High

1. (1881) I. L. R. 6 C. 815. 2. (1892) I. L. R. 14 A. 524.
3. (1894) I. L. R. 18 M. 32.

Court should be reversed with costs, and that of the Subordinate Judge restored.

Kishen Parshad v. Har Narain Singh.

The respondents will pay the costs of the appeal.

Barrow, Rogers and Navill.—Solicitors for the appellants.

T. L. Wilson and Co.—Solicitors for the respondents.

[This case has been since followed by the Madras High Court in Appeal 69 of 1908.—ED.]

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT, CALCUTTA.]

Present:—Lord Macnaghten, Rord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Bhagbati Barmanya (since deceased) & another .. Appellants*

v.

Kate Charan Singh & another .. Respondents.

Will—Construction—Gift to class—After-born children—Rule in "Leake v. Robinson"—Vested interest.

When children are mentioned in a will, that means, *prima facie*, if no intervening interest be given, that which is considered to be the testamentary meaning in the case of a gift to individuals, namely, those who may be living at the death of the testator. If the gift be not immediate, it may be that he intends to include all those children who may be living at the time of distribution, and the court judges of the intention in this respect from the whole scope of the will. [*Mann* v. *Thompson*[1] ref. to.]

The rule is not altered by the addition of words of futurity as if the gift be to children "born and to be born" or to children "begotten and to be begotten." In accordance with this rule a gift expressed to be to a daughter and her husband and "their child now existing and also the other children who may hereafter be procreated" is limited to children born between the date of the will and the testator's death. [*Dias* v. *De Livera*[2] ref. to.] The rule is applicable to Hindu wills as well.

The rule in *Leake* v. *Robinson*[3] is not applicable to Hindu wills. As a general rule where there is a gift to a class, some of whom are or may be incapacitated from taking because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for those members of the class who are capable of taking. [*Ram Lal* v. *Kannia Lal Sett*[4] approved and ref. to.] A will ran as follows :—

"My mother and my wife shall, as long as they live, hold possession of all my properties, moveable and immoveable, and enjoy and possess the same on payment of the Collectorate revenue and the Zemindar's rents, and by maintaining intact and

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* 14th February 1911.

1. (1854) Kay, 638, 643.
2. (1879) 5 A. C. 123.
3. (1817) 2 Mer. 363.
4. (1886) I.L.R. 12 C. 663.

Barmanya v. Charan Singh.

continuing the service of the established deities and the ancestral rites according to the practice heretofore obtaining. and shall pay off my debts and realize my dues. They shall not be competent in any way to transfer the immoveable property to any one. On the death of my mother and my wife, the sons of my sisters, that is to say, their sons who are now in existence, as also those who may be born hereafter, shall, in equal shares, hold the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of established deities and the ancestral rites according to the practice heretofore obtaining."

Held on the construction of the will—

1. That the more proper meaning as regards the sisters' children would be that the bequest was confined to such of the sisters' children as were alive at the death of the testator.

2. Even if otherwise the bequest took effect in favour of such of the sister's children as were alive at the death of the testator.

3. Whatever be the meaning of the words "right of inheritance," they could not be taken to render meaningless the words which had only just been used."

4. That the nephews were intended to take a vested and transmutable interest on the death of the testator, though their possession and enjoyment were postponed.

The Judgment of their Lorships was delivered by

Lord Macnaghten:—This is an appeal from a judgment of the Calcutta High Court delivered by *Maclean* C. J., affirming a decree of the District Judge of Murshidabad.

The question turns upon the meaning and effect of the will of a Hindu gentleman named Ram Lal Singh. The will was executed on the 2nd of March 1868. The testator died on the following day.

At the date of the will the state of the testator's family was this. The testator had no issue. His mother and his wife were alive and he had four sisters living. Two were childless widows. The other two had male off-spring.

The will, so far as material, is in the following terms:—

"My mother and my wife shall, as long as they live, hold possession of all my properties, moveable and immoveable, and enjoy and possess the same on payment of the Collectorate revenue and the Zemindar's rents, and by maintaining intact and continuing the service of the established deities and the ancestral rites according to the practice heretofore obtaining, and shall pay off my debts and realize my dues. They shall not be competent in any way to transfer the immoveable property to any one. On the death of my mother and my wife, the sons of my sisters, that is to say, their sons who are now in existence, as also those who may be born hereafter, shall, in equal shares, hold the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of established deities and the ancestral rites according to the practice heretofore obtaining."

Barmanya v. Charan Singh.

The difficulty, so far as there is any difficulty, in construing the will, is occasioned by the bequest to the after-born sons of the testator's two sisters which has been taken to include nephews born after the testator's death. It may perhaps be doubted whether the will properly construed gives rise to the question on which so much argument has been expended. If an English will expressed in similar terms were before an English court it would probably be held that the gift to after-born children was confined to children coming into existence between the date of the will and the testator's death. There is nothing in the circumstances in which this will was made, though the testator died the next day, to render that view improbable, for he expressly provides that if he recovers the will shall hold good unless altered. "The real doctrine of the court," says *Wood*, V.C., in *Mann* v. *Thompson*[1],

> "is that when children are mentioned in a will that means *prima facie* if no intervening interest be given, that which is considered to be the testator's meaning in the case of a gift to individuals, namely, those who may be living at the death of the testator. If the gift be not immediate it may be that he intends to include all those children who may be living at the time of distribution, and the court judges of the intention in this respect from the whole scope of the will."

The rule is not altered by the addition of words of futurity as if the gift be to children "born and to be born" or to children "begotten and to begotten." In accordance with this rule a gift expressed to be to a daughter and her husband and "their child now existing and also the other children who may hereafter be procreated" was held by the Board to be limited to children born between the date of the will and the testator's death—*Dias* v. *De Livera*[2]. The fact that this rule is a rule of convenience is some reason for applying it to Hindu wills, and an additional reason may be found in the well-known doctrine of Hindu Law that a gift to an object not in existence is absolutely void. But, however this may be, it has been assumed throughout that the testator intended children born after his death to be included in the gift. And their Lordships propose to deal with the case on that assumption.

It will be convenient at the outset to dispose of a point suggested by the words "by right of inheritance." It was said that

1. (1854) 1 Kay 638, 643. 2. (1879) 5 A. C. 123.

Barmāndya v. Charan Singh.

there was really no bequest in favor of the nephews, and that, so far as they were concerned, the will only declared a right of inheritance. The High Court had no difficulty in rejecting that contention, and their Lordships are of the same opinion. It is not very easy to determine the proper meaning of the expression translated by the words "by right of inheritance." The learned Chief Justice explains that the literal translation should be "as after takers," and he adds that "it may be that the testator used the expression in the sense that the nephews would take with the same incidents of proprietorship as heirs would." Whatever the exact meaning of this doubtful expression may be, it cannot, in their Lordships' opinion, have been inserted for the purpose of rendering meaningless words which had only just been used.

Apart from this point the learned counsel for the appellant argued in the first place that there was no vesting until the death of the survivor of the mother and the widow. Their Lordships, however, think it is clear, on the construction of this will, that the nephews were intended to take a vested and transmutable interest on the death of the testator, though their possession and enjoyment were postponed. Whether it was the intention of the testator that on the birth of nephews after his death interests vested should be divested so as to let in such after-born nephews is another question.

It was contended in the second place (and this, of course, was the principal contention) that the gift including, as it did, a gift to persons not in existence at the time of the testator's death, was altogether void.

Upon this question there has been, as the learned Chief Justice observes, a conflict of judicial opinion in India. But in their Lordships' opinion the question was set at rest for all practical purposes by the judgment of *Wilson* J., as he then was, in the case of *Ram Lal* v. *Kanai Lal Sett*[1].

In that case the learned judge disposed of the cases which had been treated in India as authority for introducing into the construction of Hindu wills the rule commonly referred to as the rule in *Leake* v. *Robinson*[2]. He showed that the rule was introduced into India owing to a mistaken analogy, and at the end of

1. (1886) I.L.R. 12 C. 663. 2. (1817) 2 Mer. 363.

a judgment which leaves nothing more to be said, he stated that he should be "prepared to hold, as the general rule, that where there is a gift to a class, some of whom are or may be incapacitated from taking because not born at the date of gift or by the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking."

In that conclusion their Lordships agree, and they are glad to have this opportunity of expressing their entire concurrence in the judgment to which they have referred. It would serve no useful purpose to recapitulate the learned judge's arguments. But there is one passage at page 678 to which their Lordships desire emphatically to call attention. It is this:—

"It is no new doctrine that rules established in English courts for construing English documents are not, as such, applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question."

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors: Mr. *G. C. Farr* for the appellants.

Solicitors:—Messrs. *T. L. Wilson* & *Co.* for the respondents.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Ayling.

Shiev Gowda .. Appellant*
v. (*Defendant*)
C. S. Fernandez .. Respondent
(*Plaintiff.*)

Limitation Act, Art. 85—"*Mutual account*"—*Meaning*—*Test.*

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* A. No. 100 of 1906. 12th August, 1910.

Shiev Gowda v. Fernandez.

Per *Chief Justice* :—As a general rule payments made on account by one party and credited by the other, whether in money or in goods, do not render the accounts mutual.

Per *Ayling* J.:—For an account to be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. [*Hirada Basappa v. Gadigi Muddappa* [1] and *Velu Pillai* v. *Ghose Mahamed*[2] referred to.]

Defendants borrowed money from plaintiffs: they obtained goods of various kinds through them and they made payments from time to time by sending in coffee.

Held Per *Curiam* :—That the accounts were not "mutual."

Appeal from the decree of the District Court of South Canara in O. S. No. 18 of 1906.

K. Srinivasa Iyengar for appellant.

K. N. Aiya for respondent.

The Court delivered the following

JUDGMENT:—*Chief Justice* :—The main question raised in this appeal is whether the suit is for the balance due on a mutual, open and current account, and whether there have been reciprocal demands between the parties within the meaning of Article 85 of the Second Schedule to the Limitation Act. If so, the defendant's plea of limitation fails. If not, the plaintiffs are not entitled to recover in respect of items in the account prior in date to three years before the institution of the suit.

The District Judge held that Article 85 applied and the suit was not barred by limitation, apparently on the ground that the accounts had been open and running for many years. He does not seem to have considered the question with reference to the words of the article "where there have been reciprocal demands between the parties." The oral evidence affords little assistance as to the course of business between the parties and we have to rely in the main on the plaintiffs' accounts. The plaintiffs are merchants and the defendants are coffee-planters, and the plaintiffs' accounts show that from the year 1893 the plaintiffs had been financing the defendants and the defendants had been sending consignments of coffee to the plaintiffs. In April 1893 a sum of Rs. 4,000 was advanced by the plaintiffs and the account for 1893-94 (Exhibit *V*) states that a document was executed for this amount. During 1893 further advances were made by the plaintiffs and sundry payments amounted to

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Rs. 10,700. In January 1894 a consignment of coffee was received by the plaintiffs from the defendants and other consignments were received later. These consignments were sold by the plaintiffs and the defendants were credited with the sale proceeds with interest. A balance was struck in May 1894, the defendants being debited with interest on the moneys paid by the plaintiffs and also with what was termed "commission." This was not really commission but an amount calculated at Rs. 2 per candy, every Rs. 1,000 advanced being taken as the equivalent of thirty candies in respect of advances made before any coffee was received by the plaintiffs and every Rs. 1,000 being taken as the equivalent of 10 candies in respect of advances made subsequently. The higher rate is described in paragraph 4 of the plaint as damages for the defendants' default in not supplying the full quantity of coffee, in other words, for not keeping the plaintiffs fully secured in respect of advances made by them to the defendants and on their behalf. The accounts for 1895-96 (Exhibit *IV*) aud 1896-97 (Exhibit *III*) show that business was continued on the same lines. In June 1896, the defendants made a cash payment of Rs. 13,000 and the balance against them was reduced to Rs. 5,500 (Exhibit *II*). In May 1897, the balance was Rs. 5,545 and odd and on this the plaintiffs claimed to charge interest at 15 per cent. In November, 1899, the balance shown in the plaintiffs' account (Exhibit *A*) was Rs.7,500 and odd and this is the amount for which the suit was brought. I am of opinion that, having regard to the course of business, so far as it can be ascertained from the plaintiffs' accounts, the relation between the defendants and plaintiffs was not that of seller and buyer as regards the coffee consigned to the plaintiffs, nor that of principal and agent in respect of coffee consigned to the plaintiffs nor that of principal agent in respect of the coffee sold by plaintiffs—see *Musamat Phool Koomaree Bibee* v. *Woonkar Pershad Rustoly*[1] but that the contract between the parties was, as would seem to be suggested in paragraph 4 of the plaint and in the concluding portion of pagraph 6 of the learned judge's judgment, that the plaintiffs should finance the defendants, and that defendants should keep the plaintiffs secured in respect of the advances made by the plaintiffs on their behalf by consigning to them coffee of a value equal to the amount of their indebtedness being given credit for the proceeds of the coffee as and when sold by the plaintiffs, and that if they failed to do this they should make the further payment which is called commission but which is really payment by way of damages. I do not think it can be said that this is a case in which there are independent obligations on both sides—see the judgment of *Holloway* J. in *Hirada Basappa* v. *Gadigi Muddappa*[2]. No doubt if at any time the sale proceeds of the coffee had exceeded the amount of the defendants' indebtedness, the plaintiffs would have been accountable for the balance as money received for the use of the

1. (1867) 7 W. R 67 at p. 70. 2. (1871) 6 M. H. C. R. 142.

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Chief Justice.

defendants. But this, in my opinion, does not in itself make the account mutual or give rise to reciprocal demands. I think the case falls within the principle of the decisions in *Horgopol Premsukdas* v. *Abdul Khan Haji Mahomed*[1] (where certain jewels were sold by the plaintiffs on the defendants[2] behalf and the defendants credited with the proceeds)and *VeluPilla*v.*Ghose Mahomed.* [2] *Ganesh* v. *Gyanu*[3], where the dealings consisted of loans on both sides and the parties were also partners, shares being debited and credited in the accounts, is clearly distinguishable on the facts. I accept the general principle laid down in the American Cyclopædia of Law and Procedure, Vol. XXV, p.1,125, as applicable to the article in question under the Indian Limitation Act:—" As a general rule payments made on account by one party and credited by the other, whether in money or in goods, do not render the accounts mutual so as to defer the operation of the statute to the date of the last item, etc." I am of opinion, though the mater is not free from difficulty, that the case before us does not come within the Article 85 of the Second Schedule to the Limitation Act and that the plea of limitation must be upheld.

The plaintiffs are only entitled to recover in respect of transsactions which took place within three years prior to the institution of the suit and an account must be taken on this basis. Mr. K. Srinivasa Iyengar intimated that if the plea of limitation was upheld he would not press the point that the second defendant and defendants Nos. 3 to 8 did not form a joint family or the plea of discharge. The decree against the defendants Nos. 1 to 8 on the amount (if any) found to be due will be limited to the share of the family property. In the court below, the plaintiffs will have proportionate costs on the amount (if any found due on the taking of the accounts.

Ayling J:—In the case out of which the present appeal arises the plaintiffs (respondents) sued to recover the balance due on a running account between themselves and the defendants (appellants) from the 24th April 1893 onwards,and the chief contention raised by the latter in appeal is that the suit is time-barred as regards all items arising before the 24th May 1897, three years prior to the filing of the suit. This contention, if established, reduces the plaintiffs' claim to a comparatively insignificant amount. On behalf of the respondent it is argued that the account is a mutual, open and current one with reciprocal demands between the parties within the meaning of Article 85, Schedule II, of the Indian Limitation Act.

The question of limitation is embodied in issue No. 4, but the learned District Judge, in dealing with it in paragraph 6 of his judgment, has confined himself to considering whether the account is open and current (which he rightly decides to be the case) and has appearently left the question of mutuality and reciprocity of demands out of consideration. The oral evidence

1. (1872) 9 B. H. C. R. 429. 2. (1894) I. L. R. 17 M. 293.
3. (1898) I. L. R. 22 B, 606.

Shiev Gowda v. Fernandez. — Ayling J.

is directed to other points but upon the plaintiffs' account (produced and marked as Exhibits *A*, *V* and *VI* aided to some extent by the pleadings of the parties) it is possible to determine the nature of the business. The latter opens on the 24th April 1893 with a loan Rs. 4,000 from the plaintiffs to the defendants on a bond. The latter is not now in existence but there seems to be no dispute that the conditions of the loan included interest at 12 per cent per annumand that repayment was to be effected by the defendants sending consignments of coffee to the plaintiff which the latter was to sell, crediting the proceeds to the defendants,account The plaintiffs were further entitled to make a further charge, which is called"commission" The charge is not really commission at all, but a special additional interest calculated on all sums advanced, the rate being three times as high on all sums, advanced before the first consignment of coffee for the year as on those advanced subsequently. It is agreed that the same conditions applied to the numerous subsequent loans made by the plaintiffs to the defendants as well as to the sums disbursed by them for the purchase of goods and other objects on the defendants' behalf.

The accounts shew that on the 5th May 1894, the balance due to the plaintiff had increased to Rs. 8,650 for which another bond was executed. On the 30th May it had amounted to Rs. 15,581-4-2 andon the 15th May to Rs. 18552-3-4. On the 6th January 1896 itwas reduced by a cash payment ofRs.13,000 (all previous credits to the defendants being the sale price of coffee received and sold) and 6th June 1896 accounts were struck and the balance due to the plaintiffs was found to be Rs. 5500. The account Exhibit II was signed by the 2nd defendant in token of liability. From this time forward there are no further cash loans andonly a few disbursement on the defendants' account but the small consignments of coffee received were insufficient to keep pace with the interest and by the 30th November 1899 the defendants' debt had increased to Rs. 7586-9-9 the amount sued for.

The learned District Judge sums up the business thus in terms which are in substantial accordance with the pleas on both sides, as well as with the accounts above summarised.

" Defendants have borrowed money from plaintiffs; they have obtained goods of various kinds through them, and they have made payments from time to time by sending in coffee."

The question is whether the account is one under Article 85 above referred to and it appears to me that it is not.

The oldest Madras case bearing on the point is *Hirada Basappa* v. *Gadigi Muddappa*[1] and followed in *Velu Pillai* v. *Ghose Mahomed*[2]. The principle laid down appears to be that the test of mutuality is not the existence of a " shifting balance " (which is important evidence of mutuality but not conclusive) but—to quote *Holloway* J.—" to be mutual there must be transactions on each side creating independent obligations on the other and not

1. (1871) 6 M.H.C.R. 142. 2. (1894) I.L.R. 17 M. 293

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Ayling J.

merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations." This feature, the existence of independent obligations, appears to be entirely wanting in the present case. A scrutiny of the accounts leaves no doubt that every consignment of coffee was made simply and solely on account of antecedent loans and with a view to reduce the balance due thereunder.

Not only was the balance never shifted to the defendants' credit but there was never any approval to such a desirable state of affairs. Apparently the balance against the defendants was never lower than the initial amount (Rs. 4,000); and the only substantial reduction was by the cash payment of Rs. 13,000 refered to above.

Applying the principle quoted above, I must hold that the account was not a mutual one with reciprocal demands.

Numerous rulings have been quoted by one side or the other, but none of them tend to really shake the above conclusion. That the fact that the repayment was mostly by consignments of goods and not in cash makes no difference may be deduced from *Hargopal Premsukdas* v. *Abdul Khan Haji Mahomed*[1] if any authority were needed. The judgment in *Ganesh* v. *Gyanu*[2] is in complete accord with that in *Velu Pillai* v. *Ghose Mahomed*[3] and follows the same principle; and I can find nothing inconsistent therewith either in *Lalji Sahoo* v. *Raghunandan Lal Sahoo*[4] or in *Chittarmal* v. *Bihari Lal*[5], the other cases quoted by the respondents' vakil. The other points raised in appeal may be summarily dealt with. I agree with the District Judge in rejecting the plea of discharge and in holding that the defendants formed a joint family with the 2nd defendant as its managing member.

On the other hand, I can find nothing in Exhibit *J* which would, as contended by the respondents' vakil, render the debt personally binding on any but the 2nd defendant.

I would amend the decree of the District Court by reducing the defendants' liability to the items occurring after the 24th May 1897 and by limiting the liability of all the defendants other than the 2nd defendant to their share of the joint family property. The plaintiffs should be allowed proportionate costs in the lower court, defendants bearing their own, and the appellants should recover their costs in this court from respondents.

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1. (1872) 9 B. H. C. R. 429.
2. (1897) I. L. R. 22 B. 606.
3. (1894) I. L. R. 17 M. 293.
4. (1909) I. L. R. 32 A. 11.
5. (1881) I. L. R. 6 C. 447.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Ramaswami Chetty .. Appellant*

v.

Ponna Padayachi & others .. Respondents.

Ramaswami Chetty *v.* Ponna Padayachi.

Limitation—Adverse possession of mortgaged property—Effect of, on mortgagee.

The existence of a mortgage at the time of the commencement of adverse possession of mortgaged property cannot prevent the person in possession from acquiring ownership of the land both as against the mortgagor and mortgagee—unless it be the case that the adverse possession was intended to be limited to the mortgagor's interest only. The mortgagee's cause of action arises against the adverse holder on the date on which the latter obtained such adverse possession of the mortgaged estate.

[*Aimadar Mandal* v. *Makhan Lal Dey*[1] and *Venkatachalla Achari* v. *Subramania Chetty*[2] dissented from; *Heath* v. *Pugh*[3] distinguished; *Ammu* v. *Ramkrishna Sastri*[4], *Rama Coomar Sen* v. *Prosunna Coomar Sen*[5], *Prannath Roy Chowdry* v. *Rookea Begam*[6], *Sheoumber Sahoo* v. *Bhowanudeen Kunwar*[7], *Karan Singh* v. *Bakar Ali Khan*[8] relied upon.]

Second appeal from the decree of the District Court of South Arcot in A. S. No. 29 of 1909, presented against the decree of the District Munsif of Panruti in O. S. No. 134 of 1098.

12th defendant, appellant, got a decree on a simple mortgage against 1st defendant and 13th defendant in 1898, the mortgage being in 1890. When 12th defendant wanted to sell the property through court in 1908 plaintiff brought a suit in 1908 for a declaration that the mortgagee-decree-holder's right was barred and to prevent him from selling alleging that his (plaintiff's) vendor was the owner and was in possession by partition with the 1st defendant long before the mortgage and that the plaintiff himself was in adverse possession from 1894, the date of plaintiff's purchase.

T. Ranga Chariar for appellant.

K. R Subramania Sastri for respondents.

T. Ranga Chariar:—The finding is that the sale to the plaintiff was in 1894 by the co-sharers of the 1st defendant. We shall

* S. A. No. 1689 of 1909. 22nd November, 1910.

1. (1906) I.L.R. 33 C. 1015. 2. (1910) I. C. 264.

3. (1881) 6 Q.B.D 345; 1882 7 A.C. 235. 4. (1879) I.L.R. 2 M. 226 at p. 229.

5. (1864) W.R. 375. 6. (1859) 7 M.I.A. 323 at p. 355.

7. (1870) 2 N.W.P.H.C.R. 223. 8. (1882) I.L.R. 5 A. 1; 9 I.A. 99.

Ramaswami Chetty *v.* Ponna Padayachi.

Abdur Rahim J.

take, as the District Judge finds, that from 1894 adverse possession against the mortgagor, the 1st defendant, began as the previous partition was found against. Adverse possession against the mortgagor will not be adverse possession against the simple mortgagee who was not entitled to possession—S. A. 682 of 1909; *Aimadar Mandal* v. *Makhan Lal Dey* [1]. Adverse possession against the mortgagor cannot affect any right carved out before the mortgage. The converse case is to be found in *Ittappan* v. *Manavikraman* [2]; *Tarubai* v. *Venkatarao* [3]—*i. e.*, adverse possession against a usufructuary mortgagee, is not adverse to the mortgagor. As to who is affected by adverse possession see *Kherodemoney* v. *Doorgamoney*[4]; BANNING on *Limitation*, p. 170; *Karan Singh* v. *Bakar Ali Khan* [5]. What is sold in a mortgage decree is the right of the mortgagor as it existed at the date of mortgage—*Hassanbhai* v. *Umaji.*[6]

K. R. Subrahmania Sastri:—As against *Aimadar Mandal* v. *Makhan Lal Dey* [1] and S. A. 682 of 1909 I quote *Ammu* v. *Ramakrishna Sastri* [7] and *Ram Coomar Sein* v. *Prosunno Coomar Sein* [8]. A mortgagee's right to sue for money within sixty years may be curtailed by adverse possession against him for 12 years—*Ram Lal* v. *Masum Ali Khan*[9], *Sheoumber Sahoo* v. *Bhowaneedeen Kunwar* [10], *Karam Singh* v. *Bakar Ali Khan* [5], MITRA on *Limitation*, 5th edn., p. 197. [*T. Ranga Chariar.*—The author doubts the correctness of the statement and gives the law as settled in my favour in p. 198 in cases where the mortgagee is not entitled to possession.] No notice is necessary when a trespasser prescribes for the whole title—*Ittappan* v. *Manavikraman.*[2]

T. Ranga Chariar in reply:—All this contention of prescription is based on S. 28 of the Limitation Act. But that section speaks of right to possession. So where there is no right to possession in the mortgagee, as in the case of a simple mortgagee, no question of adverse possession against him can arise. The cases quoted on the other side are all cases where the

1. (1906) I.L.R. 33 C. 1015.
2. (1897) I. L. R. 21 M. 153 ; 164.
3. (1902) I. L. R. 27 B. 43.
4. (1878) I. L. R. 4 C. 455 at 467. 468.
5. (1882) I. L. R. 5 A. 1 (P.C.)
6. (1903) I. L. R. 28 B. at 162.
7. (1879) I. L. R. 2 M. 226.
8. (1854) W. R. 375.
9. (1902) I. L. R. 25 A. 35.
10. (1870) 2 N.W.P. H. C. R. 223. 12.

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mortgagee can get possession under the document. Adverse possession can arise against a person only if he is capable of suing—*Bhavrao* v. *Rakhuran.* [1]

The Court delivered the following

Abdur Rahim J.

JUDGMENT:—*Abdur Rahim* J.—This appeal is by the 12th defendant in a suit, the object of which was to have it declared that certain lands (marked Nos. 3 and 4 on the plan) belong to the plaintiff and were not liable to be sold in execution of a decree obtained by the 12th defendant against the 1st defendant in Original Suit No. 292 of 1898 on a simple mortgage bond executed by the latter in favour of the former in 1890. The Munsif found, on the question of the plaintiff's title, that the lands which were originally the joint property of the 1st and 8th defendants and their two brothers, Chinnathambi and Muthukannu, fell to the share of the two latter at a partition effected between them about 24 years before the institution of the suit and long prior to the mortgage by the 1st defendant to the 12th defendant. The District Judge's finding on this point, such as it is, cannot be said to be satisfactory, but he has dismissed the appeal preferred by the 12th defendant against the decree of the Munsif, which was in favour of the plaintiffs, holding, in effect, that the 1st and 13th defendants (the 13th defendant had also joined in the execution of the mortgage) not having been in possession of the land as the evidence showed since 1894 for a period of more than 12 years before the attempt of the 12th defendant to bring the property to sale in execution of his mortgage decree, and the plaintiff's predecessors-in-title and the plaintiffs having been all this time in adverse possession of the property, the right of the 1st defendant and the 13th defendant in the property, if they had any, became extinguished, and the propery could not, therefore, be sold in execution of the mortgage-decree obtained against them by the 12th defendant. If this view of the learned judge be correct, there would be no necessity to remit the case to him for a proper determination of the question relating to partition. Mr. T.Rangachariar who appeared before us for the appellant (12th defendant) has not disputed the finding of the District Judge as to the duration and character of possession of the plaintiffs and their predecessors-in-title, and in answer to a question which I put to him in the

1. (1890) I. L. R. 23 B. 137, 141,142,

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course of the argument, Mr. Rangachariar stated that he would accept the finding on the point to mean that the plaintiffs' predecessors-in-title and the plaintiffs intended to prescribe for an absolute title and not merely for a title subject to the rights of the 12th defendant as mortgagee. His contention is that, though the rights of the mortgagor in the mortgaged property may be extinguished by adverse possession by a person for 12 years after the execution of the mortgage, yet, in no case, would the mortgagee's remedy against the mortgaged property be lost, if his right to enforce the mortgage against the mortgagor is not barred, for instance, when it has been kept alive by payment of interest or acknowledgment. He relies for authority on *Aimadar Mandal* v. *Makhan Lal Dey* [1] which has been followed by *Munro* and *Krishnasawmi Aiyar* JJ. in *Venkatachala Asari* v. *Subramania Chetty*[2] without, as far as it appears, any further discussion of the question; and, if these decisions are right Mr. Rangachariar's contention must prevail. I am, however, unable to take the view of the law expressed in those cases. *Maclean* C. J. who delivered the judgment of the court in the Calcutta case, thinks that the proposition which he lays down, namely, that it is only when a mortgagee buys the mortgaged property on its being sold under the decree that time begins to run against him because, prior to that, he had no title to the property and the decree and sale gave him a new right, is supported by *Heath* v. *Pugh*[3]. But, with all respect to the learned judge, I do not find anything in that case, either in the judgment of the Court of Appeal delivered by *Lord Selborne* L. C., or in the judgment delivered in the House of Lords, from which such a proposition can be deduced as being applicable to a case in which the person sought to be ejected does not hold the property under a title derived from the mortgagor. *Heath* v. *Pugh*[3] was not a case of adverse possession at all; there the mortgagee, who had the legal estate in the mortgaged property vested in him, brought a suit for foreclosure, impleading in that suit the defendant who had purchased the equity of redemption from the mortgagors (who held the property in trust) or from

1. (1906) I. L. R. 33 C. 1015=10 C. W. N. 904. 2. (1910) 8 M. W. N. 866.
3. (1882) 7 A. C. 235.

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one of them, subsequent to the mortgage and obtained a decree within the time allowed by the statute, but when he instituted a suit to recover possession, 12 years had elapsed from the date of the mortgage and he was met by the plea that the suit was barred under 3 and 4 William IV, Cap. 27. The Court of Appeal held that the decree for foreclosure gave the mortgagee a new right against the defendant who, it is to be observed, was a party to the suit for foreclosure and that time would count only from the date of the decree. The defendant in that case derived his title from the mortgagor who was in possession and not by adverse possession, and the decision proceeded on the reasoning that until foreclosure the mortgage was merely a security for the debt, that although the legal estate had been conveyed to the mortgagee (which, it may be noted, is not the case here) the interest in the land itself remained in the mortgagor, the equity of redemption being an estate in the land ; that the order of foreclosure vested the ownership for the first time in the mortgagee as if by a new purchase and that, though the mortgagee might have claimed possession by virtue of legal estate conveyed to him under the mortgage, yet "there can be no two things more distinct or opposite than possession as mortgagee and possession as the owner of the estate." The entire argument treats the position of the defendant as in no way distinct from that of the mortgagor and it could not be contended in that case that it would be otherwise. In *Prannath Roy Chowdhury* v. *Rookea Begum*[1] it is laid down : "Where a mortgage is subject by law to be foreclosed, the title to foreclose is in the nature of a limit to the title to redeem. It by no means follows, as a consequence, that the mortgagee-foreclosing will be able in a suit for possession to make good against all occupants a title to possession." It is clear that a mortgagee who has obtained a decree for sale will not be in a better position than a mortgagee foreclosing.

Now, if we were to apply the arguments of *Lord Selborne* in *Heath* v. *Pugh*[2] to a case like this and the one reported (*Aimadar Mandal* v. *Makhan Lal Dey*[3]) it seems to me that the

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1. (1859) 7 M. I. A. 323; at p. 355 1859 4 W. R. 37. 2. (1882) 7 A. C. 235
3. (1906) I.L.R. 33 C. 1015.

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conclusion in a case where the mortgaged property has been in peaceable possession of a stranger for more than the statutory period must be the opposite of that reached in *Heath* v. *Pugh.*[1] A person who is in adverse possession of land for 12 years acquires a title to the land, the rights of the owner of the land being extinguished, and since a mortgage is merely a security for the debt and the interest in the land remained in the mortgagor, it is difficult to see how the existence of the mortgage at the time adverse possession commenced can prevent the person in such possession acquiring the ownership of the land. It is conceded that the interest of the mortgagor in the land would be extinguished, but it is contended that the title by prescription must be subject to the liability of the land being sold for payment of the anterior mortgage debt. The mortgagee's right is to sell the interest of the mortgagor in the land and the mortgage decree, under which the land is attempted to be sold, cannot bind persons who do not derive their title from the mortgagor, and were not parties to the suit in which the mortgage decree was passed but claim a statutory title adversely to the mortgagor. There may be cases in which a person claiming to have acquired a title by prescription, would acquire it, subject to the existing mortgage but that would depend upon whether the person in possession intended to acquire an absolute title or only a title subject to the rights of the mortgagee. This is laid down in clear language by *Turner,* C. J. and *Muthuswamy Iyer* J. in *Ammu* v. *Ramakrishna Sastri*[2] where they observe at page 229 :—" But there are other cases in which the rights and interest of the mortgagor and mortgagee are equally invaded, *e. g.*, when under a sale for arrears of revenue, a purchaser acquires possession and thenceforward holds adversely both to the mortgagor and mortgagee or *when the mortgagor has remained in possession and a stranger ousts him from the lands.*" The latter portion of the passage applies to the present case. In the case of *Ammu* v. *Ramakrishna Sastri*[2] the suit was brought for redemption, and it was held that the claim against the defendant who was in possession but did not claim under the mortgagee was barred under Article 145 and Article 148 had no application to the case. The

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1. (1882) 7 A. C. 235.
2. (1879) I.L.R. 2 M. 226.

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decision reported in *Ram Coomar Sein* v. *Prosunna Coomar Sein*[1] went even further, so far as the position of a person who has dispossessed the mortgagor is concerned. There it was held, relying on *Prannath Roy Chowdhury* v. *Rookea Begam*[2] that, though there may be cases in which the possession of a person who does not derive his title from the mortgagor may be adverse to the mortgagor but still not adverse to the mortgagee, yet where the mortgagor is dispossessed, and his title disputed and another person obtains possession of the estate, the possession of the new holder becomes adverse to both the mortgagor and the mortgagee, and the mortgagee's cause of action arises against the new holder on the date on which the latter obtained such adverse possession of the mortgaged estate. To the same effect was the law laid down in *Sheoumber Sahoo* v. *Bhowaneedeen Kulwar*[3] namely, that a mortgagee is bound to come in within 12 years to vindicate his title to the land against a third party in adverse possession who does not claim under the mortgagor. Here I would observe that these two cases make it clear that the mortgagee is not without remedy against a trespasser taking possession of the mortgaged land, although it may be that he is not entitled to possession under his mortgage, and I myself do not see any valid reason why the mortgagee should not be able under such circumstances to protect his interests by proper proceedings. On the other hand, no authority has been cited to us in support of the proposition to the contrary, on which is based one of the grounds for the decision in *Aimadar Mandul* v. *Makham Lal Dey*.[4]

I am further of opinion, although the learned judges who decided the Calcutta cases thought otherwise, that the point is really covered by what is laid down by the Privy Council in *Karan Singh* v. *Bakar Ali Khan*.[5] The facts of the Privy Council case are substantially the same so far as they effect the question now raised as those of the present case. There the suit was instituted by the holders of certain mortgage bonds to recover the sum due and the plaintiffs further claimed to enforce payment of the sum due under

1. (1864) W. R. 375. 2. (1859) 7 M.I.A. 323 at p. 355: 4 W.R. 37.
3. (1870) 2 R.N.W.P.H.C. 223. 4. (1906) I.L.R. 33 C. 1015.
5. (1882) I.L.R. 5 A. 1; 9 I.A. 99.

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the bonds by sale of the mortgaged property. Their Lordships were of opinion that the claim to sell the property would have been barred under Article 145 of the Limitation Act of 1871—Article 144 of the Limitation Act of 1877 by which the case is governed is to the same effect—if it were proved that the defendant who set up a title distinct from that of the mortgagors had been in adverse possession for more than 12 years before the institution of the suit. Their Lordships treated the suit as one for possession of immovable property or an interest in immoveable property. I may also observe that, if the argument of the appellant were to prevail, the result would be that when a property is under mortgage and the mortgagor or his successor in interest goes on paying interest on the debt or otherwise acknowledges his liability, persons in peaceable and unchanged possession and enjoyment of such property in assertion of their own rights, whatever the length of the time during which their possession and enjoyment might have lasted, would not be secured in the title. I am of opinion that the weight of authority as well as reason is against the contention of the appellant and the appeal must be dismissed with costs.

Ayling J.—I agree.

[But see S. A. No. 844 of 1907 reported *infra* he which *Benson and Munro* JJ. upheld the contrary view ED.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sankaran Nair.

Biram Beni Ammal & others	.. ..	Appellants*
v.		(*Plaintiffs*).
Syed Shumsuddin & others	.. ..	Respondents
		(*Defendants*).

C. P. C., O. 23, r. (1), Cl. (3), (O.C., S 373)—"Instituting a fresh suit"—Proceedings in execution against defendants against whom suit was withdrawn—Obstruction by exonerated defendants.

Where a suit is with-drawn against certain defendants with leave to file a fresh suit and in execution the said defendants obstruct delivery, the decree-holder is precluded from proceeding with his application to remove the obstruction by O. 23; r. 1 (S. 373, O. C.)

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* S. A. 1359 of 1905. 8th December, 1910.

Biram Beni Ammal *v.* Syed Shum-suddin.

Second appeal from the decree of the District Court at Tinnevelly in A. S. No 456 of 1904, presented against the decree of the Court of the District Munsif of Srivilliputhur in O. S. No 115 of 1903.

A suit for the recovery of certain site and some shops thereon from two sets of defendants was compromised with the first set and withdrawn without liberty to bring a fresh suit as against the second. A decree was drawn up accordingly. In execution, the second set of defendants obstructed delivery and put in a claim under S. 331, C. P. C. The application for execution was numbered and registered as a suit as between the decree-holders and the obstructors. Both the lower courts dismissed this suit as barred by S. 373, C. P. C.

N. Rajagopalachari for *A. K. Sundaram Aiyar* for appellants (decree holders).

R. Rangaswami Aiyangar for *K. Srinivasa Aiyangar* for respondents.

N. Rajagopalachari—S. 373 bars only the *bringing* of a *fresh suit*. As *I* have not *brought* a fresh suit, S. 373 is no bar. All that I did was to put in an execution application for delivery and I was obstructed. The obstructor it was who by his claim set the law in motion. The obstructor's *claim* was numbered and registered as a *suit* and not my application under S. 331, C. P. C, though in that suit the decree-holder is, on the wording of S. 331, C. P. C., to be called a plaintiff, and the obstructor, defendant. Moreover, S. 331 talks only of registry "*as if* a suit had been brought by the decree holder." These words show that the proceedings cannot be considered in the same way as a bringing of a suit by me so as to make me liable for all the consequences of a bringing of a suit — *Sambasivan* v. *Punchanada*[1].

This is not a suit but only a continuation of the execution proceedings. The object of the legislature was expressly not to drive me to a fresh suit but to give me a cheap remedy by conferring a special jurisdiction on the executing court in execution of the decree in the *original suit* — *Sitalakshmi* v. *Vythilinga*[2]; *Katima* v. *Naman Kutti*[3]; *Moula Khan* v. *Gori Khan*[4]. No court fee is collected from me as in a suit, though

1. (1907) I. L. R. 31 M. 24.
2. (1884) I. L. R. 8 M. 548.
3. (1890) I, L. R. 13 M. 520.
4. (1890) I. L. R. 14 B 627.

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the consequences of the investigation of the claim may be as in suit (*e. g.,*) *res judicata*; *T. K. Murnetha* v. *T. K. Cheria Kunhend*[1]. The matter is really one under S. 331 and not in a separate suit—*Jathavedan Nambudri* v. *Kunhu Achen.*[2] Moreover this objection of S. 373 was not pleaded and was also waived.

R. Rangaswami Aiyangar :—It is really the decree-holder that set the law in motion by his application. It is his application that is really registered as suit as in this case—*vide* the judgment in *Jatevedan Nambudri* v. *Kunchu Achen*[2]; *Sukhan Singh* v. *Baij Nath Goenka.*[3] The words 'as a suit' really make the proceedings a suit with all its incidents—*Gowri Shankar* v. *Maida Koer.* [4] The want of plea of a bar under S. 373 does not matter. S. 373 is imperative.

N. Rajagopalachari in reply distinguished the cases quoted by the vakil for respondent.

The Court delivered the following

JUDGMENT:—The suit is for possession of property. The plaintiffs and appellants before us previously brought O. S. No. 635 of 1900 against the same defendants Nos. 1 to 8 for the recovery of possession of the same property. The matters in dispute between the plaintiffs and the defendants Nos. 1 and 2 were compromised and there was a decree in accordance with the terms of the compromise. The suit against the defendants Nos. 3 to 8 was withdrawn without permission to bring a fresh suit. In executing the decree against the defendants 1 and 2, the plaintiffs were obstructed by the defendants 3 to 8 and the plaintiff's application to remove the obstruction was registered under S. 331 as a suit between the decree-holder as plaintiff and the defendants 3 to 8 as defendants. Both the lower courts have dismissed the suit on the ground that S. 373 bars the suit. It is contended before us in second appeal that the above section only precludes the plaintiff "from bringing a fresh suit" and that this suit cannot be treated as one brought by the plaintiffs as under S. 331. It is the claim of the person obstructing the execution of the decree that is or ought to be numbered and registered as a suit. We are unable to agree

1. (1881) I. L. R. 4 M. 308.
2. (1906) I. L. R. 30 M. 72.
3. (1907) 12 C. W. N. 115.
4. (1904) I. L. R. 31 C. 516

with this contention. In *Jathavedan Nambudri* v *Kunchu Achen*[1] and *Sukhan Singh* v. *Baij Nath Goenka*[2] it has been held, and we think rightly, that it is the decree-holder's application to remove the obstruction and give him possession of the property that should be registered as a suit, and the words of the section that the decree-holder must be treated as the plaintiff support that view. There is no reason, therefore, why this suit should not be treated as one brought by the plaintiff.

Biram Beni Ammal *v.* Syed Shumsuddin.

In *Gowri Shankar* v. *Maida Koer*[3] it was held that an application registered as a suit under S. 525, Civil Procedure Code, must be treated as a suit brought by the applicant under the terms of S. 373, Civil Procedure Code.

We think the decision is right and dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Karunakara Menon and others .. Appellants*
v. (*2nd Plff. & 2nd Deft's repres.*)
The Secretary of State for India in Council.. Respondent
(*1st Defendant.*)

Karunakara Menon *v.* Secretary of State for India.

C. P. C., (*XIV of* 1882, *S.* 331)—*Scope of—Government's right to come in after grant of patta.*

S. 331 of the Code of 1882 applies only where the resistance or obstruction has been occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor.

When Government grants a patta for land it ceases to have possession of any kind whatsoever and the fact that charge is made for *jenmabhogam* in addition to the assessment does not affect the matter; and consequently the Government is not entitled to come in under S. 331. [*Pullanapally Sankaran Nambudri* v. *Vittil Thalakrat Muhamad*[4], followed.]

Second appeal from the decree of the Subordinate Judge of Calicut in A. S. No. 500 of 1907 presented against the decree of the District Munsif of Parapanangadi in O. S. No. 134 of 1906.

Suit by a *kanomdar* to redeem land alleging that the defendant was holding under a previous kanom from the *jenmi*.

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* S. A. 377 of 1909. 16th November 1910.
1. (1906) I. L. R. 30 M. 72.
2. (1907) 12 C. W. N 115.
3. (1904) I.L.R. 31 C. 516.
4. (1904) I.L.R. 28 M. 505.

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The suit was decreed; in execution, the plaintiff was obstructed by the respondent who contended that the *Pudiakovilagom* whose title the plaintiff in the suit pleaded was not the jenmi but that the respondent was the jenmi and had given a patta to the defendant reserving *swamibhogam.* The land was originally the bed of a stream. The stream was small one, but was about 11 miles in length and passed through various Amsoms, and between various jenmis' lands. The land on both sides of the stream at the point in question belonged to the Pudiakovilogam. The claim was registered as a suit, the 1st court decreeing the plaintiff's claim, but the appellate court, reversing the decree and remanding the suit for retrial with a direction to make the jenmi a party. The suit was re-tried with the ultimate result that the Sub-court held that the jenmi had not made out a right to the stream bed. The plaintiff and the jenmi appealed.

P. R. Sundara Aiyar for appellant.

The Government Pleader (*C. F. Napier*) for respondent.

P. R. Sundara Aiyar for appellants—contended that the Government, after granting the patta, had no right to possession left in it, whether swamibhogam was reserved or not; that swamibhogam was only a kind of cess—*Pallanapathy Sankaran Nambudri* v. *Vittil Thalakat Muhamad*; *Krishna Nambudri* v. *The Secretary of State* [2]; Logan's *Malabar Manual*, Vol. p. 718; *Malabar Gazetteer* Vol. *pp.* 336, 349; Board's *Standing Orders*, Vol i., p. 47. When a patta is once granted, the result is the pattadar becomes the owner and his title can be terminated only in the manner indicated in the Revenue Recovery Act or the Land Acquisition Act—*Sappani Asari* v. *The Collector of Coimbatore*[3]; *Venkatanarasimha Naidu* v. *Dandamudi Kottayya*[4]. Under these circumstances, the respondent had no right of present possession actually or constructively and therefore the claim was improperly registered as a suit. Relying upon *Brajabala Devi* v. *Gurudas Mundle*[5], he contended that even supposing that the Government was in constructive possession through its pattadar owing to some peculiarity of tenure, the pattadar being the judgment-debtor, it was not open to the court to register the claim as

1. (1905) I.L.R, 28 M. 505.
2. (1908) 19 M.L.J. 347.
3. (1902) I.L.R. 26 M. 742.
4. (1897) I.L.R. 20 M. 299 at 302.
5. (1906) I. L. R. 33 C. 487.

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a suit so as to nullify the provisions of Ss. 328, 329. The court could give effect to the objection even at this stage regard being had to S. 591, C. P. C.—*Lala* v. *Narayan*[1]. He also contended that the jenmi's title not being in question in the suit, the only question being as to the right to possession, the decree for possession could in no sense be said to affect the possession of the Government or the dispossession of the defendant be said to be dispossession of the Government.

C. F. Napier for respondent—relied upon *Mancharow* v. *Fahidchand*[2] and also contended that the Government was in posesssion constructively though the pattadar, there being absolutely no difference between the position of the Government as jenmi and the ordinary jenmi. [*Sankaran Nair* J.—What about waste lands ?] When the Government makes a grant with a swamibhogam reserved, it does not part with its right as effectively as when it gives an ordinary ryotwari patta. [*Sankaran Nair* J.—How do you explain *Pallanapally Sankaran Numbudri* v. *Vittil Thalakat Muhamad*[3] where swamibhogam also used to be paid?] The point was not noticed.

Thr Court delivered the following

JUDGMENT:—The plaintiff obtained a decree for possession of the suit land against Marakarut Veerankutty's son Cheriya on the basis of a *Kanom Kychit*. When she attempted to take possession, she was resisted by the village officials on behalf of the Government. She then put in M. P. No. 150 of 1906 making the Secretary of State for India the counter-petitioner and asked that the property might be put in her possession, removing the obstruction of the counter-petitioner. The District Munsif, holding that there was evidence that the Government was in possession, directed under S. 331 of the Code of Civil Procedure that the claim should be numbered and registered as a suit between the decree-holder as plaintiff and the Government as defendant. The written statement put in on behalf of the defendant alleged that the land in dispute was a portion of a public *Thodu* belonging to Government which was filled up and converted into paddy land, that the land was assessed and a *pattah* granted in *Fasli* 1304 to Veerankutti, father of

1. (1895) I.L.R. 21 B. 392. 2. (1900) I.L.R. 25 Bom. 478.
3. (1905) I.L.R. 28 M. 505.

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the 2nd defendant in the suit in which the plaintiff obtained that which she was seeking to execute, on *jenmabhogam* assessment which had been collected ever since. Now S. 331 of the Code of Civil Procedure, 1882, only applies where the resistance or obstruction has been occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the Judgment-debtor. The question then arises whether the defendant is such a person. All that the defendant relies upon is the fact that in the *patta* granted to Veerankutti, a charge is made for *jenmabhogam* in addition to the assessment and it is argued from this that the defendant, though not in actual possession was in constructive possession of the land. We are unable to accede to this contention. We think that when the defendant granted *patta* for the land, he ceased to have possession of any kind whatsoever. In *Pullanapally Sankaran Nambudri* v. *Vittil Thalakat Muhamad* [1], the circumstances were very similar. There land which had been at the absolute disposal of Government was held by a person who paid to Government assessment and jenmabhogam and cess as in the present case. It was held that he was holding as a ryot under Government and that he was entitled to hold the land as long as he paid the revenue and in default could only be averted under the provision of Act II of 1864. We think that the fact that part of what the Pattadar has to pay is called jenmábhogam can make no difference. We, therefore, do not think the defendant was entitled to come in under S. 331 of the Code of Civil Procedure or any other claim section of the code, and the claim should not have been numbered and registered as a suit but should have been rejected. We must, therefore, set side the decrees of the courts below and the order of the District Munsif directing the claim to be registered as a suit. The District Munsiff should take up M.P. No. 150 of 1906 and dispose of it according to law. Objection has been taken by the Government Pleader to our disposing of the second appeal on this point on the ground that it should have been taken earlier and that all the isues have been determined by the courts below. No good purpose would be served by our going into the issues raised in the suit. Even if

1. (1905) I. L. R. 28 M. 505.

we found that the defendant was the jenmi of the land, the right of the plaintiff to possession under the decree against the pattadar would not be affected as the defendant is not entitled to any sort of possession. If we found the question of jenmi right for the plaintiff, we could not pass a decree for possession against the defendant as the defendant is not in possession. We, therefore, think the only satisfactory course is to deal with the point and correct the error into which the Distinct Munsif fell. The parties will bear their own costs throughout.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

In-re Muthukumara Reddy—Petitioner.*

In-re Muthukumara Reddy

Cr. P. C., S. 360—*Evidence Act, S.* 91—*Perjury.*

A deposition read out in the presence of the accused and his pleader, but while another witness in the case was being examined, is a deposition good in law so as to found a prosecution for perjury on it, especially when no objection was actually taken to the reading out of the deposition when the exmination of the other witness was going on.

Petition, under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sessions Judge of North Arcot, in Cr. Ap. No. 19 of 1910, preferred against the sentence passed on the accused by the Head Assistant Magistrate of Ranipet in C. C. No. 130 of 1909 on his file.

A deposition was read out in the presence of the pleader of the accused, but as he was engaged at the time in the examination of another witness, he did not presumably hear it. Its accuracy, however, was not impeached by the accused. Under these circumstances, the question was whether the deposition could be said to be properly taken down so as to justify its reception as evidence of his deposition.

L. A. Govindaraghava Aiyar for petitioner.

The Public Prosecutor (C. F. Napier) contra.

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* Cr. R. C. No. 483 of 1910, 17th January 1911.

In-re Muthukumara Reddy

L. A. Govindaraghavier—for the the accused—relied upon *Kamatchinathan* v. *Emperor* [1], *Mohendra* v. *Emperor* [2]; *Jyotish Chunder* v. *Emperor* [3] and Weir, Vol. ii. p. 435. He submitted that Mr. Justice *Miller's* judgment in *Bogra, in re* [4] went against the trend of authorities above stated and also is in direct opposition to S. 91, Evidence Act. The result of his Lordship's view is either that the witness has only to deny its accuracy and then it would be inadmissible or that its accuracy is impeachable by other evidence, which would be defeating the very object of S. 91. He submitted that the irregularity is not one that can be waived under S. 533, Cr. P. C.

C. F. Napier—for the Crown—relied upon *Rakkhal Chundra* v. *Emperor* [5], that there was a substantial compliance with the requirements of law, if not a literal compliance; any way no damage being alleged the conviction ought not to be set aside.

The Court made the following

ORDER :—The only objection to the conviction that needs to be considered is that founded on S. 360, Criminal Procedure Code, and S. 91 of the Indian Evidence Act.

The petitioner has been convicted of giving false evidence in a certain criminal trial, and the statement which is alleged to be false has been proved by putting in evidence the deposition in which the false statement was made by the petitioner. It is contended that this deposition is inadmissible in as much as, when it was read over to the petitioner, another witness was being examined in the case in which the petitioner had given evidence. It is not alleged that the petitioner's deposition was not correctly recorded, and the gist of the objection is that the accused in the case in which the petitioner gave evidence or his pleader could not have been listening to the petitioner's evidence when it was read out to him. S. 360 of the Criminal Procedure Code requires that the deposition, after it has been recorded, should be read out in the presence of the accused or his pleader. This was admittedly done in the present case and it is not shown that the accused or his pleader made any representation to the

1. (1904) I. L. R. 28. M. 308. 2. (1908) 12 C. W. N. 845.
3. (1909) I. L. R. 36 C. 955. 4. (1910) 20 M. L. J. 943.
5. (1909) I. L. R. 36 C. 808.

Magistrate that they wanted to hear the petitioner's evidence read out and they could not do so as another witness was being examined. It was quite open to them, if they wanted to hear the petitioner's evidence which was being read out to the petitioner in their presence, to ask the Magistrate to stop the examination of the next witness when the deposition was being read out. They made no such application, and we must hold that the provisions of S. 360 of Criminal Procedure Code were complied with both literally and in spirit. That being so, the deposition of the petitioner was rightly admitted under S. 91 of the Evidence Act.

In re Muthukumara Reddy.

The petition is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :— Mr. Justice Benson and Mr. Justice Abdur Rahim.

Maradugula Venkataratnam & others .. Appellants*

v.

Kotala Ramanna & others .. Respondents.

Contract Act, S. 87—Sale of goods not in existence—Appropriation—Evidence.

Venkataratnam *v.* Ramanna.

The question whether there was appropriation of the goods by their owner for the benefit of a particular creditor is one of fact and the law does not require any particular mode or form of appropriation. If there has been a specific appropriation, then the consignor, if he is still in possession of the goods, will hold it merely as trustee for the consignee.

Timber was prepared with the help of money advanced by plaintiffs to the 1st defendant under an agreement that they were to be sent to the plaintiffs so that the plaintiffs would sell and appropriate the sale proceeds towards the discharge of the debt owing by the 1st defendant to the plaintiffs, and the timber, having been despatched from the forest where it was cut in pursuance of this agreement, was in the course of transit when it was attached by the 2nd defendant as property of the 1st defendant. The timber was intended for the plaintiffs and it had been cut and despatched under the directions of two persons appointed under the power-of-attorney executed by the 1st defendant. The sole object of which was that these two men should carry on the 1st defendant's business in timber in order to discharge the large debt owing by the 1st defendant to the plaintiffs :

Held that the plaintiffs acquired a right to the timber as soon as it was cut.

Appeal from the decree of the District Court of Godaveri in O. S. No. 28 of 1902.

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*A. No. 19 of 1909. 22nd December, 1910.

Venkata-ratnam v. Ramanna.

T. Prakasam for appellants.

T. R. Ramachandra Aiyar for respondents.

T. Prakasam :—On the findings of the lower court on issues I, III and IV, the plaintiffs are entitled to a decree. The plaintiffs have got an equitable lien or charge on the timber. The terms of the contract as found are that the plaintiffs should make the advances, the 1st defendant should consign his timber to plaintiffs for sale by them; and the plaintiffs should credit the net sale proceeds towards the advances, commission and interest. As soon as advances are made and the goods come into existence, the plaintiffs acquire an interest in the goods—S. 202, Ill. (*b*), Indian Contract Act; Shepherd and Cunningham's *Commentaries*, p. 441. The moment the goods are ascertained and consigned, the plaintiffs acquire an equitable lien on them—*Velji Hirji* v. *Bharmal Shripal*[1]. Even granting that the advances were not made on the particular goods, the lien attaches—*Lusher* v. *Comptour.*[2] Consignment for general balance of account divests the consignor of all control over the goods—*Virtue* v. *Jewell*[3]. The interest of the consignee need not be absolute. Qualified interest is enough. The consignee acquires an interest to the extent of his advances.—*Anderson* v. *Clarke*[4]. The consignor cannot stop the goods *in transitu*—Shepherd and Cunnngham's *Commentaries* on I. C. A., S. 99, pp. 307 and 308. An equitable lien may be acquired over future goods. The moment the timber is cut, lien attaches; no fresh act on the part of the consignor is necessary—*Holroyd* v. *Marshall*[5]; *Tailby* v. *Official Receiver*[6]; *Baldeo Pershad* v. *A. B. Miller* [7]; Shepherd and Cunningham's *Commentaries*, p. 290. As soon as the timber is cut and put in the course of transmission the 1st defendant has appropriated the goods to the plaintiff. The test is whether there is an intention to appropriate the particular goods—Baron *Parke* in *Bryans* v. *Nyx.* [8] The fact that they are in the consignor's possession is immaterial—*Bryans* v. *Nyx.*[8] Possession may be actual or constructive. Mere placing the goods apart by the consignor himself is enough to divest

1. (1896) I.L.R. 21 B 287 at 293.
2. (1876) 1 Q. B. D. 709 per *Lord Mellor.*
3. (1814) 4 Camp. 31.
4. (1824) 2 Bing. 20.
5. (1861) 10 H. L. C. 191.
6. (1888) 13 A. C. 523 at 543.
7. (1904) I. L. R. 31 C. 667.
8. (18394) M. and W. 775 at 790.

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him of the property therein—Lord *Loughborough* in *Mason* v. *Lickbanow*.[1] [*Abdur Rahim* J.—That is a case of vendor and vendee.] The consignor and consignee are exactly in the same position as vendor and vendee—Lord *Blackburn* in *Ireland* v. *Livingstone*.[2] [*Abdur Rahim* J.—That is a case of a commission agent consigning goods to a foreign principal.] The same principle applies in the case of a consignee to whom the goods are consigned by a principal—ABBOT on *Merchant Shipping*, 14th Ed., p. 816. Intention is therefore the test. Any act evidencing the intention is enough. The moment the timber is cut in pursuance of the contract there has been an appropriation—*The Official Assignee of Madras* v. *Lupprian*.[3] Further, the finding here is that the goods have been put in the course of transmission and were intended to be deliverable to plaintiff.

My second point is, even admitting that the carrier was the servant of the consignor, there is a valid equitable assignment in favour of the plaintiffs. *Burn* v. *Carvalho*[4] is an authority for the position that an order upon one's own agent to deliver goods in payment of a debt operates as an equitable assignment. The power-of-attorney, Exhibit XXIX, given by the 1st defendant in favour of his agent operates as a complete assignment in favour of the plaintiffs. Exhibit XXIX was executed for the sole purpose of liquidating the plaintiff's debt with the income within 5 years and after that by sale or mortgage. Exhibit LL shows that the goods had been ascertained before the close of the 5th year. As soon as the timber came into existence, the property in it passed to plaintiffs. Thus there was a complete assignment wherever the timber may have stood, whether in the jungle or the yard of the 1st defendant—*Shair Mull* v. *Singaravelu Mudaly*[5]; *Jadowgi Gopal* v. *Jeetha Shamji*[6]; *Ex parte Scudamore*[7]; *Palianappa* v. *Latchmanan*[8]; *Gurnell* v. *Gardner*[9] (even a part assignment is enough); *Alexander* v. *Steinhardt*[10] (an assignment was held to have taken effect upon mere posting the letter

1. Smith's Leading Cases, (1896) Edn. Vol. I, p. 695.
2. (1872) L. R. 5 H. L. 395.
3. (1910) I. L. R. 33 M. 145 at 149.
4. (1839) 7 Sm. 109. S. C. on appeal 48 RR. 213.
5. (1883) I. L. R. 6 M. 294.
6. (1879) I.L.R. 4 B. 333 at 343.
7. (1796) 3 Ves. 85.
8. (1883) I.L.R. 6 M. 429.
9. (1863) 4 Giff. 626 = 66 E. R. 827
10. (1903) 2 K. B. 208.

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containing the authority, where the facts were similar); *Harding* v. *Harding* [1]; *Ranken* v. *Alfaro*[2]. If there is an engagement to pay out of a specific fund it is enough—*Ex parte Brett: In re Irving*[3]; *Jagabhai Lallubhai* v. *Tamji Nasarwanji*[4], (power-of-attorney in favour of the creditor himself); *Gopalakrishna Iyer v. Gopalakrishna Iyer*[5] (a similar case); *Manickam Pillai* v. *Audinarayana Pillai*[6]. The plaintiff, though no party to the document, is entitled to enforce the charge. It was brought about at his instance—*Suppu Ammall* v. *Subramanian.*[7] The form of assignment is immaterial provided the intention is clear—*Dunlop's case.* [8] A mere mandate to one's agent may be revoked but becomes irrevocable when acted upon. In this case admittedly it has been acted upon for 5 years. The agent then becomes the agent of the creditor—WHITE and TUDOR'S *Leading Cases*, 7th Edn., Vol. I, p. 111. In this case the agent's possession is my possession. The fact that the power-of-attorney is intended to continue for 5 years does not *ipso facto* terminate the power after the lapse of that period—CHITTY on *Contracts*, 15th Edn., p. 256. The principal cannot revoke the authority when it has been exercised—S. 204, I. C. A.; *Hodgson v. Anderson* [9]. The power-of-attorney operates as an equitable assignment not only during the 5 years within which the debt should be discharged with the income but also after that so long as the power of sale or mortgage remained with the agent.

Thirdly, the power-of-attorney operates as a trust deed in favour of the plaintiffs for the payment of their debts—S. 6, Trust Act; see also S. 94; *Kernan* J. in *Shair Mull* v. *Singaravelu Mudaly*[10]; STORY on *Equity Jurisprudence*, 2nd Edn., Secs. 1041, 1044, 1045; *Dhondo* v. *Keshay*[11].

The 2nd and 3rd defendants did not act *bona fide*. They entered into partnership of suit timber before sale. The 2nd defendant had notice of the plaintiffs' rights—Exhibit DD.

T. R. Ramachandra Aiyar :—Power-of-attorney is not a trust deed. It is only a power and can be revoked. Plaintiff

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1. (1886) 17 Q.B.D. 442.
2. (1876) 5 Ch. D. 786.
3. (1877) 7 Ch.D. 419.
4. (1885) I.L.R. 9 B. 311.
5. (1909) I.L.R. 33 M. 123.
6. (1910) 20 M.L.J. 407.
7. (1909) I.L.R. 33 M. 238.
8. (1905) A.C. 454 at 462.
9. (1825) 3 B. & C. 842=107 E. R. 945.
10. (1883) I.L.R. 6 M. 294 at 300.
11. (1905) 7 Bom. L. R. 180.

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has not relied on it as a trust. Besides plaintiff was no party to it. [*Abdur Rahim* J. referred to *Suppu Ammal* v. *Subramanyan*[1] and *Khwaja Muhammad* v. *Husani Begam*[2]—a person not a party can enforce.] A trust can attach only to some specific property—see S. 6, Ill. (*e*), Trust Act.

If the plaintiff had no possession, there is no lien Possession is essential to lien. The Contract Act specifies several kinds of lien, all of which require possession. He referred to S. 95 lien of an unpaid vendor), 168 (finder), 170 (factor), 171 (general lien), 173 & 174 (pawnor), 217 & 221 (agent). [*Abdur Rahim* J.—The Indian Contract Act is not exhaustive.] Só also STORY on *Agency*, 7th Edn., S.361. All the cases cited on the other side show entrustment to a carrier. The carrier's possession is possession of the consignee. *Velji Hirji* v. *Bharmal Shripal*[3] is a case of carrier. The judgment is right but the ground of the decision is wrong. *Bryans* v. *Nyx*[4] is a case on which I rely. See observations at p. 792. The distinction is clearly drawn there between a case where there is possession and where there is no possession. In the latter the claim was disallowed. [*Abdur Rahim* J.—There was no contract to send all the oats. He had not appropriated it to his part of the contract,] See also Cyclopædia of Law and Procedure, Vol. 25, p. 664; GHOSE on *Mortgage*, 4th Edn. p. 25; S. 91, I. C. A. *Lusher* v. *Comptour*[5] is distinguishable on two grounds: there was an express agreement of hypothecation and delivery to a carrier. *Anderson* v. *Clarke*[6] is a case where the plaintiff's agent had possession. There can be no lien over moveable property unless there is possession—JONES on *Liens*, Vol. I, p. 68; S. 83, I. C. A; POLLOCK & MULLA'S *Contract Act*, 2nd Edn., p. 367. *Burn* v. *Carvalho*[7] and *Virtue* v. *Jewell* are cases of complete assignment. I rely on *Stut* v. *Murphy*.[9] It is similar to the present case. The observations relied on in *The Official Assignee of Madras* v. *Lupprian*[10] are favourable to me. There must be some specific act of appropriation. S. 202, Ill. (*b*), contemplates possession.

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1. (1909) I.L.R. 33 M. 238.
2. (1910) I.L.R. 32 A. 410 (P.C.)
3. (1891) I. L. R. 21 B. 287 at 293.
4. (1839) 4 M. and W. 775.
5. (1876) 1 Q. B. D. 709.
6. (1824) 2 Bing. 20
7. (1839) 7 Sm. 109.
8. (1814) 4 Camp. 31.
9. (1841) 3 Moore's P. C. 92=13 E. R. 181.
10. (1909) I. L. R. 33 M. 145 at 149.

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The case of the 3rd defendant stands on a different footing. He is the auction-purchaser. This being a case of moveable property, he gets freed from all liens No sale of moveable property can be set aside even if there is fraud—see. S. 298, C. P. C. of 1882; *Dorab Ali Khan* v. *Abdul Aseez*[1]; Trust Act, and S. 108, I. C. A.

T. Prakasam in reply.—Equitable lien is independent of possession—ASHBURNER on *Equity*, pp. 337 and 340. He referred to STORY'S *Equity Jurisprudence*, S. 1060. Implied trust strictly means implied lien—STORY, S. 1243. The 3rd defendant, though an auction-purchaser, cannot stand on a higher footing than the judgment-debtor. He takes only his right, title and interest. There is no distinction between movable and immovable property.—*Dorab Ally* v. *Abdul Aseez*[1]; *Shan Sundar* v. *Rahim*[2] *Puran Chunder* v. *Pratap Heering*[3]; *Surraj Prasad* v. *Hirchand*[4].

The 3rd defendant had complete notice of the lien of the plaintiff. The plaintiff can maintain a suit for the recovery of the specific property. I rely on the words "any person sustaining any injury * * * may maintain" for the recovery of the specific property—S. 298, C.P.C., 1882. Compare also Ss. 274 of Act XIV of 1859.

The Court delivered the following

JUDGMENT:—The appellants instituted a suit in the District Court of Godaveri to establish their right to 650 logs of teakwood and for the recovery of the logs or their value, Rs. 25,000, from the defendants. The lower court has dismissed the suit, holding that the appellants failed to establish their title to the logs and hence this appeal.

* * * *

[Their Lordships after discussing the evidence proceeded as follows].

The effect of the transactions between the plaintiffs and 1st defendant seems to be this:—Timber was prepared with the help of moneys advanced by plaintiffs to the 1st defendant under an agreement that they were to be sent to the plaintiffs so that the

1. (1876) 5 I. A. 115 at 125=3 C. 806. 2. (1874) 6 N. W. P, 252 at 253.
3. (1868) 9 W. R. 118. 4. (1870) 14 W. R. 120.

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plaintiffs would sell and appropriate the sale-proceeds towards the discharge of the debt owing by the 1st defendant to the plaintiffs and the timber having been despatched from the forest where it was cut in pursuance of this agreement was in the course of transit when it was attached by the 2nd defendant. The timber was intended for the plaintiffs and it had been cut and despatched under the directions of the two persons appointed under the Power-of-Attorney executed by the 1st defendant, the sole object of which was that these two men should carry on the st defendant's business in timber in order to discharge the large debt owing by the 1st defendant to the plaintiffs. Under these circumstances, there can be no doubt, in our opinion, that the plaintiffs acquired a right to the timber as soon as it was cut.

The learned District Judge is of opinion that these facts gave the plaintiffs no right to the timber. They had no lien on them by the implication of law in as much as, at the time it was attached, it was in the charge of the 1st defendant's men and there could be no lien so long as goods remained in possession of the owner. He has also found that there was no contract between the plaintiffs and the 1st defendant creating a lien on the goods in question. We cannot agree with him either in his view of the law or in the inference he has drawn from facts which must be taken to be well established. It seems to us that the timber having been prepared and put in the course of transit in order that it may be sold by the plaintiffs in discharge of the debts due to them, the timber was specifically appropriated for the satisfaction of such debts and there was thus a valid charge created on the timber. It was contended by Mr. T. R. Ramachandra Iyer, who appeared for the respondent, that there could be no specific appropriation so long as the goods remained in charge of the 1st defendant's servants, but there is no authority for such a contention. No doubt, in most of the reported cases the goods which were held to be liable to a charge in favour of the consignee had been placed in the hands of the master of a vessel or of a railway company. But the question whether there had been appropriation of the goods by their owner for the benefit of a particular creditor is one of fact, and the law does not require any particular mode or form of appropriation. If there has been a specific appropriation, then the consignor, if he is still in

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possession of the goods, will hold it merely as trustee for the consignee. We think this case is exactly covered by the principle of the decision in *Velji Hirji* v. *Bharmal Shripal*[1] which is based on the rulings of the English courts. There, advances had been made against certain goods and those goods were despatched by their owner to the commission agent who had made the advance for sale by him and the consignor drew *hundis* against the goods which the consignee accepted and paid for on receiving the railway receipt for the goods. On the goods arriving at Bombay, where the consignee carried on his business, they were attached by a judgment-creditor of the consignor while the goods were still at the railway station. It was held that the commission agent was entitled to the goods, he having made advances against them and the attaching creditor was in no better position than the consignor himself. The goods which were in the custody of the railway company at the time of the attachment were treated as if they were in the possession of the consignor on account of or in trust for the consignee. We agree with the principle of this ruling which, in our opinion, is well established by the decisions of English courts and is in consonance with obvious considerations of justice. It has long been settled that a contract to sell or mortgage goods answering a particular description, which are to come into existence in the future, passes property in such goods when they actually come into existence. See *Holroyd* v. *Marshal*[2]; *Tailby* v. *Official Receiver*[3] and *Collyer* v. *Isaacs*[4]. In the last of these cases occurs the well-known dictum of Sir *George Jessel* that a man cannot contract to assign property which is to come into existence in the future and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign this becomes a complete assignment. This proposition has been acted upon in India in more than one case, and of these we need only mention *Palaniappa* v. *Lakshmana*[5]; *Baldeo Pershad Sahu* v. *A. B. Miller*[6]. In the

1. (1896) I. L. R. 21 B. 287.
2. (1861) 10 H. L. Cas. 191.
3. (1888) 13 A. C. 523.
4. (1881) 19 Ch. D. 342.
5. (1892) I. L. R. 16 M. 429 at 434.
6. (1904) I. L. R. 31 C. 667 at p. 675.

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Calcutta case the assignment, which was in question there, was by way of mortgage of property to come into existence in the future. That such a mortgage was valid in law was fully recognised, though it was held that no lien was created on the indigo produced in the factory, which was the property in dispute there, to which money was advanced, because it was found that the money was not advanced for the protection of the factory. In the present case the logs were prepared with the money lent by the plaintiffs under an agreement that the logs so prepared should be sent to them in discharge of the debt due to them by the 1st defendent. In our opinion, directly the timber was cut under these circumstances the plaintiffs acquired what has been called a special property in it. The timber when cut became specifically appropriated to the contract, and it was even more clearly appropriated when it was despatched. See *Virtue* v. *Jewell* [1]; *Anderson* v. *Clarke*[2]; *Bryans* v. *Nixy*[3]. In those cases, no doubt, the goods were put in possession of the master of the vessel and bills of lading had been sent to the consignee, but as we have just pointed out a contract to assign goods for valuable consideration passes property in the goods in equity if the goods had been specially appropriated, and the law does not require that the appropriation should be in any particular form. Nor does it make any difference in what form the contract is expressed. It might be that if the assignment has been by delivery of a bill of landing, that would amount to assignment in law so as to enable the consignee of the goods to maintain an action in favour of or against the master of the vessel. But we are not concerned with any such question here. In this case there was an agreement that the 1st defendant should carry on the business through his agents Lakshmiah and Mutyalu solely for the discharge of the debt due to the plaintiffs and that the plaintiffs would be entitled to sell all timber cut with the help of the money advanced by them in satisfaction of the debt due to them. We think the effect of this contract was clearly to create a charge on the timber and that, therefore, at the time the timber was attached, the plaintiffs had a special property in it. This is not a case of the sort of lien mentioned in the

1. (1811) 4 Campbell 31. 2. (1824) 2 Bing. 20; S. C. 27 R R 544 1824.
3. (1839) 4 M. & W. 775; 1 H & H. 480; 8 L. J. Ex. 137.

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Contract Act which an unpaid vendor, a bailee, a factor, a banker, an agent, a pawnee or a finder of goods has on the goods in his possession. The contention of Mr. T. R. Ramachandra Iyer, therefore, that the plaintiffs acquired no right to the timber because it was in the possession of the 1st defendant at the time of the attachment, can have no weight. Mr. T. R. Ramachandra Iyer also argued that 5 years mentioned in the power of attorney executed in favour of Lakshmiah and Mutyalu had expired on the date of the attachment, but that can make no difference in as much as the timber was cut while the 5 years had not yet expired.

* * * *

[Their Lordships after discussing other important questions disposed of the suit on the merits.]

In the result, we must allow the appeal and reverse the judgment of the District Judge. The plaintiffs will have a decree declaring the right to the 650 logs of timber in question. The plaintiffs shall have the costs of the suit in this court and in the lower court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller.

Kuthulingam Pillai ... Petitioner* (*Plaintiff*)
v.
Packiyam Fernandez ... Respondent (*Defendant*).

Kuthulingam Pillai v. Packiyam Fernandez.

C. P. C, O. 21, rr. 80, 81—*Sale of negotiable instrument—Transfer by vesting order—Right of transferee—Vesting order obtained after suit but before decree.*

A negotiable instrument can be transfered otherwise than by indorsement as an actionable claim.

Rule 80 of O. 21, C.P.C., is merely an enabling section and where a court passes a vesting order under Rule 81 of O. 21 in respect of the negotiable instrument, the transferee is entitled to sue on it on the strength of the vesting order; and it is enough that he obtains the vesting order before decree.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court of Tuticorin in S. C. S. No. 1475 of 1908.

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*C.R.P. N. 1909. 9th September, 1910.

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The suit was upon a pro-note purchased by plaintiff in court auction in execution of a decree against the payee. Plaintiff obtained a vesting order from the court, vesting the right, title and interest in the suit pro-note in the plaintiff as purchaser in court auction after the suitwas filed. The defence was that plaintiff's title was not perfected inasmuch as the pro-note was not duly indorsed over to him by court as provided for in O. 21, Rule 80, C.P.C. The Subordinate Judge dismissed the plaintiff's claim on the ground that the plaintiff ought to have obtained a transfer by indorsement of the pro-note from the court, the same being a negotiable instrument, as provided in O. 21, Rule 80, C. P. C.

S. Srinivasa Aiyar for petitioner.

V. Ryru Nambiar for respondent.

S. Srinivasa Aiyar.—Neither sale nor payment is denied. The sale becomes absolute on payment of the purchase money. The provision as to delivery does not effect the title. Independent of the vesting order the title was complete. The vesting order does not give title. It is only evidence of title. Rules 76, 77, 78, 80 and 81 referred to. The rules as to sale of immoveable property are analogous. In the sale of immoveable properties title passes on the sale being made absolute before the issue of the certificate. The certificate is only evidence of title—*Mussamut Behari Koer* v. *Lalla Behari Lallega*[1]; *Narayan* v. *Shama Rao*[2]; *Balwant* v. *Hira Chand*[3]; *Yashwunt Behari* v. *Govind*[4]; *Khushal Rama Chandur* v. *Bhima Bhai*[5]; *Shadagopa* v. *Yamuna Bhai*[6]; *Velan* v. *Kundasami.*[7] No endorsement is necessary in this case. A negotiable instrument can be assigned even otherwise. On this point there is almost a number of cases both in this court and in England. No doubt the original view was that it could not be, but that has been overruled in a number of decisions. [*Miller* J.—There can be no doubt about that.] An endorsement may place me on a better footing. I need not be subjected then, to the equities binding on the original

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1. (1872) 14 M.I.A. 496 at 523. 522
2. (1903) I.L.R. 27 B. 379 at 389.
3. (1903) I. L. R. 27 B. 334.
4. (1886) I.L.R. 10 B. 453.
5. (1886) I. L. R. 12 B. 589.
6. (1882) I.L. R. 5 M. 54 60.
7. (1887) I. L. R. 11 M. 296, 208.

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payee. A transfer otherwise than by endorsement will subject me to the equities binding on the original payee.

V. Ryru Nambiar.—The vesting order under Rule 81 applies only to moveable properties "not hereinbefore provided for." It does not apply to negotiable instruments. It must be endorsed over—Rules 80 and 81. At the date of the suit no vesting order was passed. The cases cited stand on a different footing. They relate to immoveable properties.

S. Srinivasa Aiyar in reply, cited *Krishnaji Ravji Godbal* v. *Ganesh Bapuji Patwardhari.*[1] Even though the plaintiff had only an imperfect title on the date of suit, it is enough if it is perfected before decree. Here the vesting order was obtained soon after the suit was filed. That is enough to support my title to maintain the suit.

The Court delivered the following

JUDGMENT:—I think it is clear, and indeed it is not denied, that in order to effect a transfer of ownership of a negotiable instrument, an endorsement is not in general required by law, but it is contended that the provisions of Order XXI, Rules 80 and 81, of the Code of Civil Proceedure, 1908, show that an endorsement is required when the negotiable instrument is sold by court auction. I cannot accede to this contention: Rule 80, as I understand it, merely enables the court to take such steps as may be required by law to make an effective transfer, and in as much as a negotiable instrument can legally be transferred as an actionable claim without endorsement, Rule 80 does not affect the present case. The property not being property which requires an endorsement for its transfer appears to be property not otherwise provided for within the meaning of Rule 81 and vests in the purchaser on his obtaining a vesting order. The plaintiff obtained a vesting order before his decree though apparently not before the suit. I think his suit is not to be defeated on that account (vide *Krishnaji Ravji Godbal* v. *Ganesh Bapuji Patwardhari.*[1]

The decree is reversed and the suit is remanded for disposal according to law. The costs will abide the event.

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1. (1882) I. L. R. 6 B. 139.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr Justice Benson and Mr. Justice Sundara Aiyar.

Nalam Padmanabham .. Appellant* (*Plaintiff*)

v.

Sait Badrinatt Sarda & others .. Respondents (*Defendants*).

Padmanabham *v.* Sarda.

Opium Act, Ss. 4, 5, 9—"Sell"—Partnership agreement—"Partnership," meaning of—"Transfer" and "Transferable," meaning of—Statute—Construction—Policy of the Opium Act.

Held:—A partnership agreement by which two licensed persons agreed to take a third man as a partner in their business of vending opium with a view to enable the plaintiff to carry on the opium business without a license being taken out by him for the purpose was illegal and no action was sustainable thereon even though it be that the third person was not to sell opium himself but was only to share the profits of the sale which is to be conducted by the licensed persons, as all partners must be taken to be selling the opium belonging to the partnership and the managing partner, their agent.

The provisions of the Abkari and Opium Acts are not intended merely to protect the public revenue [*Natla Bapiraju* v. *Puran Achuta Rajajee*[1] distinguished] and the prohibitions therein are based on public policy.

Held also that the partnership was illegal, being a "transfer" in contravention of Cl. (26) of the license.

Every contract of partnership is not *necessarily* a transfer, but it may in many cases involve a transfer. If two persons agree to start a business in partnership and to contribute capital therefor, there is then no transfer. But if one person carrying on a trade or possessing stock and capital admits another into partnership with himself making the stock and capital the joint property of both, there is a transfer therein.

Meanings of the words "transfer" and "transferable" dwelt upon. Principles of construction of statutes like the Opium Act, the Stamp Act and the Registration Act and distinctions therein referred to. *Gouri Shankar* v. *Mumtaz Ali Khan*[2] commented on.

Appeal from the decree of the Court of the District Judge of Godaveri at Rajahmundri in O. S. No. 13 of 1904.

The facts of the case appear sufficiently from the judgment.

T. R. Ramachandra Aiyar for appellant.

C. Madhavan Nair and *T. Prakasam* for respondents.

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*A. No. 54 of 1908. 22nd March, 1911.

1. (1910) M.W.N. 549. 2. (1879) I.L.R. 2 A. 411.

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T. R. Ramachandra Aiyar :—The question in this case is whether a partnership with a person who alone has a right to sell opium is illegal. The rule made under S. 55 of the Opium Act which prohibits a transfer, sale or sub-letting, etc., does not prohibit a partnership. [*Sundara Aiyar* J.—Does not 'partnership' mean transfer of a portion of the interest which was vested in the other?] Not necessarily. I do not control the business. [*S. Aiyar* J.—Is there not a transfer of the privilege of selling opium?] Nobody else can sell without the Collector's sanction. [*T. Prakasam.*—The evidence of the plaintiff is that the agents who were the agents of all including the plaintiff managed the business.] [*S. Aiyar* J.—Even ordinarily people would be partners even with a stipulation that one of them is not to manage.] Partnership will not be illegal if it is merely participating in the profits. *Marudamuthu Pillai* v. *Rangasami Moopen*[1] is not against me. I refer to *Thithi Pakurdasu* v. *Bheemudu*[2], *Gauri Shankar* v. *Mumtaz Ali Khan*[3]. A person can be a partner even if he merely participates in the profits—LINDLEY on *Partnership*, 7th edition, p. 109; *Reynard* v. *Chase*[4]. The agreement simply says that I am to have a share in the profits and it does not give me any other privileges. The rule is *ultra vires* as it does not come strictly under S. 5. [*S. Aiyar* J.—A rule can be framed to prohibit a sale by one who has no license. You are as partner selling. Therefore, is not a contract which enables you to sell indirectly, illegal?] The rule regulates only the sale but not the right to sell. Here what is transferred is the right to sell. Partnership is not by itself a transfer. It is so only by operation of law. [*S. Aiyar* J.—Since you want a share of the proceeds of the sale have you not avoided the taking of a license by your selling indirectly?] No. I could easily have got a license if I had applied for one. Therefore, there was no necessity to have this subterfuge. I refer to *Natla Bapiraju* v. *Puran Achutha Rajajee*[5], S. A. 670 of 1906, and S. A. 822 of 1904. [*Benson* J. Vide S. 4 which prohibits *Sundara Aiyar* J.— If a sale without a license is illegal and if the partnership is to enable one to sell without a license is it not illegal? Moreover the form of the license must have been sanctioned by the

1. (1907) I.L.R. 24 M. 401.
2. (1902) I.L.R. 26 M. 430.
3. (1870) I.L.R. 2 A. 411 (F.B.)
4. 1 Barrow 2.
5. (1910) M.W.N. 549.

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Governor in order to give it validity.] The other side has to to show this. A partnership does not necessarily import a transfer—*Gauri Shankar* v. *Mumtaz Ali Khan*[1]. See POLLOCK'S *Contract Act*, p. 119, and *Hormusji Motabhai* v. *Pestonji Dhanjibhai*[2]. Actual physical sale alone is probibited. [*S. Aiyar* J.—Is the object of the Opium Act to create a monopoly in the Government?] Yes. I quote further, *Bhikanbhai* v. *Hiralal Ramdin Shet*[3].

C. Madhavan Nair:—I rely also upon *Thithi Pakurdasu* v. *Bheemudu*[4].

The Court delivered the following

JUDGMENT :—The suit in this case is for the dissolution and winding up of a partnership relating to an opium business. Defendants Nos. 1 and 2 were farmers of opium revenue under Government.

They, through their agents, entered into an agreement with the plaintiff agreeing to take him as a partner in their business both with respect to their right to vend opium in the Godavari District which they had already obtained, and with respect to any further right they might thereafter obtain in adjoining districts. The partnership existed for some years. The District Judge has dismissed the suit on the ground that the agreement of partnership on which the suit is based was opposed to public policy and unenforceable in law The plaintiff who preferred this appeal contends that the lower court's view as to the nature of the contract is incorrect.

The 1st and 2nd defendants alone obtained a license from the Collector for the sale of opium. Clause 26 of the conditions, subject to which license was given, provides that "except with the permission of the Collector, you shall not sell, transfer or sub-rent your privilege. Nor shall you, if the Collector so orders, appoint any person as your agent for the management of your privilege without previously obtaining the Collector's approval of the agent." It is admitted that the Collector's sanction was not obtained for the partnership agreement. The object and intention of the agreement undeniably were that the defendants and their partner, the plaintiff, should

1. (1879) I.L.R. 2 A. 411 (F.B.)
2. (1887) I.L.R. 12 B. 422.
3. (1900) I.L.R. 24 B. 622.
4. (1902) I.L.R. 26 M. 430.

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be enabled to carry on the opium business without any license being taken out by the plaintiff for the purpose. The question we have to decide is whether the partnership is not illegal and cannot therefore afford a cause of action to the plaintiff for any relief based on it.

We are of opinion that the conclusion arrived at by the lower court is right. Section 4 of the Opium Act (Act I of 1878) runs as follow :—" Except as permitted by this Act, or by any other enactment relating to opium for the time being in force, or by rules framed under this Act or under any such enactment no one shall—

(*a*) cultivate the poppy ; (*b*) manufacture opium ; (*c*) possess opium ; (*d*) transport opium ; (*e*) import or export opium ; (*f*) sell opium."

Section 5 gives the Local Government power to make rules absolutely or subject to any conditions deemed desirable for all or any of the matters including " (*f*) the sale of opium and the form of duties leviable in the sale of opium by retail." Section 9 makes it an offence on the part of any person to sell opium in contravention of the Act or rules made and notified under S. 5. Now a contract entered into with the object of doing any act which is unlawful because forbidden by law, is unlawful and void. The contract in this case was intended to enable the plaintiff to sell opium without a license—an act which is forbidden by S. 4 and made penal by S. 9. Mr. Ramachandra Aiyar for the appellant contends, that according to the terms of Exhibit A, the agreement between the parties, the actual sale was not to be made by the plaintiff as the management of the business was left in the hands of the defendants, and that therefore it could not be said that any breach of S. 4 was intended. This argument cannot be accepted, because all the partners must be taken to be selling the opium, which belongs to the partnership as the sale is made by the managing partner as the agent and on behalf of all the partners. In *Judoonath Shaha* v. *Nobin Chunder Shaha* [1], *Couch* C. J. and *Glover* J. held that an agreement whereby the holder of a license for keeping a wine shop let the shop and the use of the

1. (1874) 21 W. R. 289.

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license for a fixed term receiving rent, was contrary to public policy, although there was in the statute or in the rules no express prohibition for the letting out of the shop. The agreement was held to be contrary to the prohibition of sale without a license. A license, it need hardly be said, is a personal privilege—see the judgment of *Sale* J. in *Behari Lal Saha* v. *Jagadish Chander Saha*[1] where that learned judge pronounced against the validity of an agreement under which a license-holder for the sale of liquor entered into an arrangement with another person whereby the business was to be carried on by the latter on his own responsibility but using the name of the plaintiff, and he was to pay the plaintiff a certain sum per month. He observes :—"S. 11 says no person shall sell any excisable article without the Collector's license. The plaintiff's object was to permit the defendant, Basante Kumar Saha, to sell articles without a license. I am of opinion, therefore, that the object of the agreement is to enable the defendant to carry on the business of vendor in liquor in contravention of the excise law." See also *Raghunath Laemine* v. *Nathu Hirjo Shate*[2]. Every partner is the agent of his co-partners, and it would be unreasonable to hold that the defendants continued to be the sole vendors of the opium when they made themselves the agents of the plaintiff by admitting him as a partner. The learned vakil for the appellant cites *Natla Bapiraju* v. *Puranachute Rajajee*[3] as supporting his contention. In that case *Miller* and *Krishnasawmi Aiyar* JJ. held that S. 13 of the Abkari Act (Madras Act I of 1886) "does not prohibit a person who has no license from holding an interest in the manufacture or vending the liquor jointly with the manufacturer or vendor" but the provision of law referred to by the learned Judges does not include the sale of liquor amongst the acts prohibited by it. We may also point out that the language of S. 15 of the Abkari Act relating to the sale of liquor is "no liquor shall be sold without license from the Collector, while, as already pointed out S. 4 of the Opium Act enacts "no one shall sell opium." Having regard to the difference in the provisions contained in the two Acts it is unnecessary to consider that decision any further. We may point out, however, that the

1. (1907) I. L. R. 31 C. 798. 2. (1894) I. L. R. 19 B. 626.
3. (1910) M. W. N. 549.

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learned Judges observed that they did not feel compelled to decide otherwise by *Marudamuthu Pillay* v. *Rangasawmi Moopen* [1] according to which "the provisions of the Abkari Act as a whole show clearly that every person carrying on Abkari business as a principal must be licensed" and according to which "to hold that a person who has not got a license could still be a partner with one who has a license and as such partner carry on the business with or without the other would enable the unlicensed partner to evade the liabilities intended by the law to be cast on persons carrying on Abkari business" It is well established that the provisions of the Abkari and Opium Acts are not intended merely to protect the public revenue and that the prohibitions contained are based on public policy. See *Thithi Pakurudasu* v. *Sheemudu* [2] and *Hommoji Motabhai* v. *Pestongi Dhanjibhai*.[3] *Shikanbhai* v. *Hiralal*[4] and *Abdulla* v. *Mammood*[5] are not in point. Two other cases cited on behalf of the appellant relate to contracts of ferry and the provisions against the transfer and sub-letting in those cases were not statutory prohibitions. We ought perhaps to mention that the appellant's vakil wishes to make out that his client did not really become a partner with the defendants but merely became entitled to a share of the profits of the business in consideration of financing it, but this contention is obviously contrary to the case set out in the plaint and we must decline to consider it.

We are also of opinion that the partnership in this case was illegal for another reason as it contravened the provisions of clause 26 of the license, which prohibits the transfer of the right of sale granted to the defendants. It is contended for the appellant that the admission of the plaintiff to partnership with the defendants is not a transfer. We are opinion that it is. It is no doubt true that every contract of partnership is not necessarily a transfer, but it is equally clear that such a contract may in many cases involve a transfer. Thus if two persons agree to start a business in partnership and to contribute capital therefor, there is no transfer involved in the transaction. But if one person carrying on a trade and possessing stock and capital

1. (1900) I. L. R. 24 M. 401.
2. (1902) I. L.R. 26 M. 430.
3. (1887) I. L. R. 12 B. 422.
4. (1900) I.L. R. 24 B. 622.
5. (1902) I. L. R. 6 M. 156.

admits another into partnership with himself, making the stock and capital the joint property of both, it is impossible to contend that there is not a transfer in such a case. The word *transfer*, says *James* L. J. in *Gathercole* v. *Smith*[1] is "one of the widest terms that can be used" and, according to *Lush* L. J. in the same case, the word "transferable" is a "word of the widest import and includes every means by which the property may be passed from one person to another." We are not concerned in construing a statute like the Opium Act with the mere form of the transaction but with the substance of it. The form may be more material in interpreting instruments under other statutes such as the Stamp Act or the Registration Act. Our view is in accordance with that laid down in *Thithi Pukurudasu* v. *Sheemudu*[2]. Reliance was placed for the appellant on *Gourishankar* v. *Mumtaz Ali Khan*[3] where *Oldfield* and *Spankie* JJ. were apparently of opinion that the co-partnership in that case did not involve a transfer. The decision itself, however, did not proceed on that ground. The case was one relating to a ferry and according to *Oldfield* J. the statute relied on in the case did not prohibit a partnership. If the learned judges intended to lay down the broad proposition that no partnership can amount to a transfer, we are, with all deference, unable to agree with them. The combined effect of Ss. 4, 5 and 9 of the Opium Act is to make a transfer in violation of the provision of clause 26 in the license, Exhibit I, illegal and the plaintiff could acquire no rights enforceable in law under Exhibit A.

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It is contended that the form of the license used for Exhibit A was not sanctioned by the Revenue Board, and that the transfer is therefore not illegal. This objection was not raised in the District Court and the absence of sanction is not proved.

In the result we dismiss the appeal with costs of the 1st, 3rd and 4th respondents.

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1 (1881) 17 C. D. 1. 2. (1902) I. L. R. 26 M. 430.
3. (1879) I. L. R. 2 A. 411.

Palaniappa Chetty v. Arunachellam Chetty.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Palaniappa Chetty .. Appellant* (*Plaintiff*)
v.
Arunachellam Chetty & others .. Respondents (*Defendant*).

Negotiable Instrument—Discharge of debt by bill of exchange or hundi—Presumption of conditional discharge.

The general presumption is that a bill of exchange or hundi given for a debt operates only as a conditional discharge of the debt. The execution of a formal receipt for the amount covered by the bill of exchange or hundi is not sufficient to rebut the presumption of conditional discharge. An endorsement of receipt on the pro-note is on no better footing.

Appeal from the decree of the Subordinate Judge's Court of Madura (East) in O. S. No. 35 of 1908.

C. V. Anantakrishna Aiyar for *S. Srinivasa Aiyangar* for appellant.

V. Visvanada Sastri for respondent.

C. V. Anantakrishna Aiyar.—A hundi is only a conditional payment. Such is the persumption—*Jumbu Chetty* v. *Palaniappa Chetty*[1]; *In re Romer & Haslam*[2]. If *A* owes money to *B* and *C* gives a hundi for the same, unless payment of the hundi is made *A*'s liability will not cease. Even an acknowledgment of receipt of the amount without an actual payment will not put an end to the liability—*Steadman* v. *Gooch*[3]. There is no duty on the part of the third party to present the hundi.

V. Visvanada Sastry.—The agreement was that the hundi was itself to be considered as payment of the liability and there was a novatio as appears from the evidence. If novatio had been effected, and on that account, accounts had been adjusted between the parties in such a manner that they cannot be relegated to their original positions, owing to limitation, etc., the original parties to whom money was due could not recover. The intention of the parties must govern when a bill or note is taken on account of a debt—Daniel Vol. II, 287.

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*A. No. 176 of 1908. 7th March, 1911.

1. (1902) I.L.R. 26 M. 526. 2. (1893) 2 Q. B. 296.

3. (1793) 1 Esp. 5.

Palaniappa Chetty v. Arunachellam Chetty.

The Court delivered the following—

JUDGMENT:—The question in the appeal is whether the hundi, Exhibit B, for Rs. 1,000 was accepted by the plaintiff in part satisfaction of the amount due. The established rule is that a bill of exchange or hundi given for a debt operates only as a conditional discharge of the debt (see *Jambu Chetty* v. *Palaniappa Chettiar*[1]) although it might be proved that in any particular case it was taken unconditionally in satisfaction of a debt. In this case the hundi was drawn by the defendant on his uncle in favour of a third person to whom the plaintiff had to pay money. That person was under no obligation to present it for payment to the drawee nor is there any evidence that when the hundi was drawn he discharged the plaintiff from the liability to pay him his debt. It is extremely improbable that the plaintiff would unconditionally accept the hundi in part payment of the debt under these circumstances. No doubt the fact that payment of Rs. 1,000 was endorsed on the original pro-note executed by the defendant's father to the plaintiff is in favor of the view that the hundi was accepted unconditionally. But it has been held that the execution of a formal receipt for the amount carried by a bill of exchange is not sufficient to rebut the presumption of the discharge being only conditional. See *Stedman* v. *Gooch*[2]; *In re Romer and Haslam.*[3] An endorsement of receipt on the pro-note in this case cannot stand on a higher footing. There is no case in which the hundi in favor of a third party who might or might not present it for payment has been held to be an unconditional discharge. We must modify the decree of the lower court and give the plaintiff a decree as prayed for in the appeal. The plaintiff is entitled to his costs of the appeal and to the whole of his costs in the lower court. The 1st defendant must pay his own costs throughout.

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1. (1903) I. L. R. 26 M. 526.
2. (1793) 1 Esp. p. 5.
3. (1893) 2 Q.B. 256.

Vedapuratti and Mooppil Nair v. Koppan Nair.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Mankara Kovilagam Manager Vedapuratti *alias* Valia Thampuratti Avergal & others .. Appellants*

and (*in S. A. No.* 1089 *of* 1906).

Mannnarghat Mooppil Nair .. Appellant (*in S. A. No.* 1210 *of* 1906).

v.

Malamkattil Koppan Nair & others .. Respondents (*in both*).

Tort—Animals ferae naturae—Elephants—Liability of custodian and owner.

Elephants in India are of that class of animals, the custody of which throws upon both the custodian and the owner thereof the responsibility of keeping them safe. [*Maung Kya Dum* v. *Makyin and Narayana Chetti*[1] not foll.] The absolute liability of a person for any harm done by his animal, independently of any intent or negligence on his part, does not depend, on the manner in, or extent to, which such animals are employed, but upon the nature of the class to which such animal belongs or the particular kind of mischief committed.

A person borrowed two elephants from individual people and when in his use, one of them gored the other to death. *Held*:—That the borrower as well as the owner of the animal which attacked were liable in damages to the owner of the deceased animal.

Second appeals from the decree of the District Court of South Malabar in A. S. Nos. 166 and 149 of 1906 presented against the decree of the Subordinate Judge's Court of South Malabar at Palghat in O. S. No. 21 of 1904.

Suit for the value of an elephant gored to death by the 5th defendant's elephant during a procession in 1st defendant's temple for which both the elephants had been lent. The court of the first instance decreed the claim against the 5th defendant on the ground that there was negligence on his part he having had knowledge of the vicious nature of the elephant and yet not taken sufficient precautions and also against the 1st defendant on the ground that he too, though, aware of the vicious nature of the animal had taken no precautions. The District Judge on appeal held that the elephant is an animal *ferae naturae* and therefore the defendants were liable for the damage done by their animal apart from all question of negligence. Hence the appeal.

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* S. A. Nos. 1089 and 1210 of 1906. 24th March 1911.

1. 2 U. B. Rul. 570.

Vedapuratti and Mooppil Nair v. Koppan Nair.

J. L. Rosario and *C. V. Ananthakrishna Aiyar* for appellants.
The Advocate-General (*P. S. Sivaswami Aiyar*) and *K. P. Govinda Menon* for respondents.

J. L. Rosario, for appellants, contended that whether an elephant is a wild animal or a domesticated one is a question of fact to be determined upon evidence, and relied upon *Mahadar Mohanta* v. *Balaram Gagoi*;[1] *Chyur Churn* v. *Collector of Sylhet*[2]; *Peal* v. *Campbell*;[3] INGHAM on *Animals*, p. 373; BEAVAN, Vol I, p. 515. *Filburn* v. *People's Palace Aquarium Company*[4] lays down no different rule. If it does, the conditions of the two countries are so entirely different, that that rule ought not to be applied here. From time immemorial, elephants have been used in this country for all the various purposes for which horses are used in England. Just as the fact that buffaloes sometimes grow wild, or horses similarly do, has not been considered a reason to hold them animals *ferae naturae*, elephants being found wild in the forest is no ground for holding them *ferae naturae* The question is really one of fact. Is it or is it not negligence to take elephants in procession, or into crowds, of men ? Only one answer is possible here in India. No doubt, elephants may not generally be let loose, but for the matter of that, are horses let loose any more than elephants ?

C. V. Anantakrishna Aiyar, for the 5th defendant:—If the elephants are animals *ferae naturae*, how can plaintiff who with such knowledge has let his elephant go to places where other wild animals come claim any damage? It is a case where the principle *volunti non fit injuria* applies. Then again the person in possession was the 1st defendant; the 5th defendant is not liable for the damage caused by the elephant while in possession of the 1st.

The Advocate-General (P. S. Sivaswami Aiyar) for the respondents, contended that the decision in *Filburn* v. *People's Palace Aquarium Company*[4] did not proceed upon any peculiarities of the English conditions but upon the nature of elephant as an animal. Elephant has not yet come to the stage of being considered a tame animal like cattle ; it hardly breeds while in domestication. It is still regarded as a ferocious animal. If people use elephants,

1. (1908) I.L.R. 35 C. 413.
2. (1873) 21 W. R. 75.
3. (1878) 3 C. and P. 515.
4. (1890) 25 Q. B. D. 261.

Vedapuratti and Mooppil Nair v. Koppan Nair.

they use them on a view of the balance of advantages, the possible disadvantage against the many advantages flowing from their use. A distinction ought to be borne in mind between this question and the question of property in the animal. The animal, however wild, is capable of being owned and any person who causes injury to it is liable. See Lord *Esher's* remarks at p. 260 in *Filburn's case.*[1] In SALMOND on *Torts* p. 364, HALSBURY, Vol. I, para 817, and ADDISON on *Torts* p. 713, the law is stated as laid down *in Filburn's case* [1] without demur; see also American Encyclopedia of Law and Practice, Animals, p. 367 The very concession of the right of property in elephants answers the difficulty in the plaintiff's animal being *ferae naturae* for damages to be recoverable. 1st defendant and 5th defendant are joint wrong-doers and cannot apportion the wrong. There is a cumulative remedy both against the owner of the animal and the possessor.

The Court delivered the following

JUDGMENT:—The 1st defendant, Mannarghat Nair, had in his possession the elephants—both tuskers—of the plaintiff and of defendants Nos. 5 to 14 (who represent the Mankada Kovilagam) which he had obtained from them for processional purposes in a temple. The Mankada elephant gored the plaintiff's elephant to death. The plaintiff brought this suit for damages. The Subordinate Judge found that the Mankada elephant was known by the defendants to be vicious and accordingly awarded damages against the 1st defendant and the Mankada Kovilagam. In appeal the Judge, Mr. Munro, held that the Mankada elephant is an animal *ferae naturae* and that it was therefore unnecessary to consider whether it was vicious or there was any negligence, and confirmed the decree of the Subordinate Judge.

It is contended in appeal that this finding is not correct in law and in the absence of any negligence or knowledge on the part of the defendants of the vicious nature of the elephant, if it is vicious the defendants are not liable. There is also a further contention on the part of the 5th defendant that she is not liable in any event, as the elephant was in the possession of the 1st defendant when it killed the plaintiff's elephant.

The leading case is *Filburm* v. *People's Palace Aquarium Company*[1]. In that case Lord *Esher* lays down: "The law of

1. (1890) 25 Q. B. D. 261.

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England recognises two distinct classes of animals, and as to one of those classes, i) cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous are not. As to another class, the law assumes that animals belonging to it or not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he new that it was dangerous. As to the latter class he lays down that there are some animals which everybody recognises as not being dangerous on account of their nature thought they might be *fera naturae* so far as rights of property are concerned: there is another set which the law has recognized in England as not being of a dangerous character such as horses, dogs, oxen, etc: unless an animal falls within these two classes, the man who keeps it must take the responsibility of keeping it safe." It is impossible to say, as the same-learned Judge points out, that an elephant is harmless by nature. The contention before us is that it falls within the same category as a horse. The test, according to Lord *Esher*; for determining this is whether years ago and continuously up to the present time the progeny of this class of animals has been found by experience to be harmless. In that case the law assumes the result of this experience to be correct. It is true that in ancient Rome it is said that elephants were bred in captivity and the Romans made use of them in war, in the amphitheatre and in military pageants. The results of their experience have not been handed down to us. Though common in those days elephants are said to have been almost unknown for centuries in Europe after the decline of the Roman Empire. The kings of ancient India, like the Carthagenians, employed them in wars but whether they were bred in captivity it does not appear. It is certain, however, that though elephants have been known to breed in captivity it is of the rarest occurence in India, although in Burma it is said such births or common, owing to the fact that domesticated females or allowed to aoam in jungles. Domesticated or tamed animals in India have been reclaimed from the wild states, and it is conceded in this case that the Mankada elephants when wild, even after they are tamed, their nature often asserts itself. If, therefore, we apply the test laid down by Lord Esher in India we cannot presume that the elephant is

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not of a dangerous nature. Lindley L. J. and Bowen L. J. also lay down that the question is whether the particular class of animals is dangerous, though individnal animals may be tamed, and if a person keeps an animal belonging to a class which is dangerous, he takes the risk of any damage it may do. Elephants, undoubtedly, as a class, are dangerous, though individuals may be tamed and perhaps domesticated.

In SALMOND on the *law of Torts*, p. 365, the lawis stated in the following terms: "Whether any particular kind of mischief is natural or not to a particular species of animal is, it seems, a question of law." Thus it is a rule of of law and not a mere proposition of fact that it is not natural for a dog to bite mankind. "The law," says Lord *Holt*, " takes notice that a dog is not of a fierce nature but rather the contrary." So it has been decided that " it is natural for strange horses to kick one another when left at large in a field or for a stallion to bite and kick a mare, but that it is not natural for .a horse straying in the highway to kick a human being." It is clearly in the nature of a tusker, when left at large, to attack another.

A case *Maung Kyaw Dum* v. *Ma Kyin & Narayanan Chetti*[1], has been cited in which Mr. Justice *White*, sitting as a single Judge, laid down the law in these words: "It could not, I think be laid down in this country that a man is liable for damages done by his elephant without any proof of negligence or that he knew it to be of a vicious disposition. In view of the manner in, and extent to, which elephants are emplyed in this country, such a proposition would be manifestly unjust." These remarks apply to Burma, where the circumstances are not altogether similar to those in India, but it was argued before us that considering the extent to to which elephants are employed in India, the same principle should be followed. The absolute liability of a person for any harm done by his animal, independently of any intent or negligence on his part, does not depend, as we have pointed out, on the manner in, or extent to, which such animals are employed, but upon the nature of the class to which such animal belongs or the particular kind of mischief committed.

We think that the Mankada Kovilagam the owner, also is liable. Both the owner and the 1st defendant are responsible for

1. Upper Burma Rulings Vol. II 579.

the loss sustained by the plaintiff. No authority has been cited to support the 5th defendant's contention that the 1st defendant alone is liable. Whether, on account of any implied contract between her and the 1st defendant, the latter was not bound to take due care to prevent any damage and is not, therefore, bound to compensate the 5th defendant is not a question that now arises for consideration. The second appeals are dismissed with costs of the plaintiff.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Justice Sundara Aiyar.

The Public Prosecutor .. .. Appellant*

v. ..

Shaik Ahmed .. Accused.

Penal Code Section 341—*Wrongful restraint of intending Emigrant—Emigration Act.*

The fact that a person either is or pretends to be an intending emigrant and goes to the depot and is there treated as such receiving meals and an advance of money does not confer either on the Emigration Agent or his watchman power to prevent him from leaving the depot whenhe desires to do so and a person who restrains him from going out of the depot is guilty of wrongful restraint within the meaning of S. 339, Penal Code.

Appeal under S. 417 of the Code of Criminal Procedure from the judgment of acquittal passed on the accused in Calendar Case No. 31,016 of 1910 by the Second Presidency Magistrate, Georgetown, Madras.

The accused in the case was a peon of Binny and Co., who are the Agents for Emigration to Natal. The complainant was admittedly lodged and boarded for a day in the Emigration depot. How exactly he came to be there was a point in dispute between the prosecution and the defence. According to the latter he was in there as an intending emigrant. According to the prosecution, he was taken there on a false representation as to the place by the Agents of Binny and Co. Next morning when he attempted to go away, he was prevented from so doing by the accused who said he had instructions from his superiors not to allow the people inside the shed to get out without the permission of the

* Cr. A. No. 39 of 1911. 27th March, 1911.

The Public Prosecutor v. Sheik Ahmed.

superior officers. The accused was acquitted on the ground that he was justified in refusing to allow the accused to go out without the permission of his masters. The Crown appealed :

S. Swaminadhan for the accused.

The Crown Prosecutor. (John Adam) for the crown.

The Court delivered the following

JUDGMENT.—We are unable to agree with the Magistrate that the accused in this case was justified in refusing to allow the 1st prosecution witness to leave the depot without the permission of Messrs. Binny & Co. No doubt the story told by the 1st prosecution witness as to the circumstances under which he went to the depot in the evening and remained there until nearly noon on the next day is one that cannot be believed.

We think that he either was, or pretended to be, an intending emigrant, and went to the depot and was there treated as such, receiving meals and an advance of money. But these facts did not confer on Messers. Binny & Co., or their watchman, the accused, any power to prevent him from leaving the depot when he desired to do so. The accused was therefore guilty of wrongful restraint, but under extenuating circumstances as he, no doubt, thought he was justified by the orders of Messrs. Binny & Co., in refusing to let the 1st prosecution witness leave without the firm's permission.

The Crown Prosecutor, on behalf of Government, states that he does not press for anything more than a correction of the erroneous decision of the Magistrate as to the powers of restraint exercisable by Messrs. Binny & Co., and their agent, the accused.

In all these circumstances the case is one that calls for only a nominal sentence. We set aside the acquittal and convict the accused, Shaik Ahmed, of an offence punishable under S. 341 of the Indian Penal Code, and sentence him to pay a fine of one Rupee or, in default, to suffer one week's simple imprisonment .

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim.

The Sessions Judge, Tanjore .. Petitioner*

v.

Sundra Singh .. Accused in S. C. No. 35 of 1906.

Sessions Judge Tanjore *v.* Sundra Singh.

Cr.P.C., Ss. 180, 188—*Dacoity committed in British India—Stolen property found in Native State—Native Indian British subject—Trial—Certificate of Political Agent, necessity for.*

The general provisions of S. 180, Cr.P.C.. are controlled by S. 188 Cr.P.C., and where an offence is committed by a native Indian subject of His Majesty in the territory of a Native State, he can be tried for the offence in a court in British India only if the Political Agent of the State certifies that the charge ought to be tried in British India.

Application praying that, in the circumstances stated therein, the High Court will be pleased to quash the order of committment (of the accused in S. C. No. 35 of 1909 on the file of the Sessions Court of Tanjore) made by the 2nd Class Sub-Magistrate of Kumbakonam in P. R. No. 10 of 1909.

The Public Prosecutor (*C. F. Napier*) for petitioner.

P. R. Srinivasa Aiyangar for accused.

The Court made the following

ORDER:—What happened in this case was that a dacoity was committed in British territory and the accused, a native Indian subject of His Majesty was found in possession of property alleged to have been stolen at that dacoity, in the Pudukottah State. He is charged with an offence under S. 412, Indian Penal Code. S. 180, Criminal Procedure Code, no doubt makes an offence such as that under S. 412, Indian Penal Code triable at the place where the property is retained or where the theft or dacoity took place.

But then S. 188, Criminal Procedure Code, enacts that if an offence is committed by a native Indian subject of His Majesty in the territory of a Native State—and that is the case here—he can be tried for such offence in a court in British India only if the Political Agent of the State certifies that the charge ought to be tried in British India. There can be no doubt that the general provisions of S. 180, Cr. P. C., are governed by S. 188 Cr. P. C. No such certificate has been obtained in this case. I therefore quash the commitment as recommended by the Sessions Judge.

Cr. M. P. No. 280 of 1909. 19th January, 1910.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present :—Sir Arnold White, *Kt.*, *Chief Justice.*

Srirajah Velugoti Govinda Krishna Yachendrulavaru Bahadur, Zemindar Garu of Venkatagiri .. .. .. Appellant. *

v.

Vadlapudi Chinna Venkanna and others .. Respondents.

Zamindar of Venkatagiri *v.* Venkanna.

Res-judicata, plea of—Not taken in the first court or grounds of revision—Plea taken for the first time on the hearing of the revision petition allowed.

Petitions under S. 25 of Act IX of 1887 praying the High Court to revise the decrees of the District Munsif's Court, Ellore, in S. C. S. Nos. 185, 186, 187, 188 and 190 of 1908.

S. Subramania Aiyar, for appellant.

P. Narayanamurti, for respondent.

[His Lordship followed *Mahammad Ismail* v. *Chatter Singh*[1] and allowed the plea.—ED.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Venkatachellaya and others .. Appellants†

v.

Subrahmania Aiyar and others .. Respondents.

Venkatachellaya *v.* Subramaniya Aiyar.

Statute—Construction—Retrospective effect—Limitation Act—C. P. C., S. 104 (2)—Application to set aside an exparte decree dismissed—Order of dismissal—No appeal.

An amendment in the Limitation Act cannot take away the rights to obtain reliefs in court vested in parties prior to the amendment.

Appeal from the order of the District Court of Madura in Appeal Suit presented against the order of the Court of the District Munsiff of Mana Madura in E. A. No. 289 of 1909, in O. S. 5. No. 113 of 1906.

The facts of the case will appear from the rulings relied on by the District Judge in the court below and the order passed by him.

The District Judge in the court below relied upon the ruling in *Khusalbai* v. *Kabhai* [2] where it was clearly pointed out that an amendment in the Limitation Act cannot takeaway the rights which were vested in parties to obtain certain reliefs

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* C. R. P. Nos. 778 to 782 of 1908. 1st February 1910.

1. (1881) I. L. R. 4 A. 69.

† A. A. A. O. 264 of 1909. 28th October 1910

2. (1881) I. L. R. 6 B. 26.

in court prior to the amendment. Under the old Limitation Act the petitioners had a vested right to apply to the court to set aside an *ex parte* order passed against them within the time specified in Article 164, Schedule 1, of the old Act and S. 7 of the old Act, and that right they still have after the passing of the amendment of the Limitation Act. The District Judge also relied upon the rulings in *Haji Sajan Lalji* v. *N. C. Macleod*[1] and *Official Assignee of Madras* v. *Mary Dalgairns* [2]. He set aside the order of the lower court dismissing the petition on the ground that it was barred by limitation and remanded this case for disposal on its merits.

Venkata. chellaya *v.* Subramaniya Aiyar.

S. Srinivasa Aiyangar for appellant.

T. V. Muthukrishna Aiyar for respondents.

The Court delivered the following

JUDGMENT:—This appeal is barred under S. 104 (2) of the Code of Civil Procedure. There is no ground to interfere in revision. The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Vinukonda Veerabadram and others .. Appellants*

v.

Kontalapalli Jagannadha Row & others .. Respondents.

Hindu Law—Joint family—Fathers power's of alienation.

A sale or mortgage of joint family property by a Hindu father for a justifiable necessity is binding on the sons even though the transaction be unsupported by an antecedent debt. [*Venkatramanaya* v. *Venkatramana Das* [3] distinguished.]

Veerabadram *v.* Jagannadha Row.

Second appeals from the decrees of the Subordinate Judge's Court of Masulipatam in A. S. No. 758 and 757 of 1907 and 20 of 1905 presented against the decree of the Court of the District Munsif or Bezwada in O. S. No. 473 of 1905.

S. Swaminadhan for appellants.

P. Naghabhushanam, *T. Prakasam* and *P. Narayanamurthi* for respondents.

The Court delivered the following

JUDGMENT:—The Subordinate Judge is in error in thinking that a sale or mortgage by the father cannot bind the son's share in the absence of an antecedent debt. The ruling

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*S. A. Nos. 1594, 1595 and 1596of 1908. 20th October, 1910.

1. (1908) I. L. R. 32 B. 321. 2. (1902) I.L. R. 26 M. 440 at 44.

3. (1905) I. L. R. 29 M. 200.

in *Venkatramanayya* v. *Venkatramana Das* [1] must be read with reference to the facts of that case.

If there is justifying necessity for the sale or mortgage, the son's share would, undoubtedly, be bound, and this is not disputed before us. The erroneous view of the law taken by the Subordinate Judge has vitiated his judgment.

We, therefore, set aside his decree and remand the appeals for disposal according to law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Wallis.

Velu Pillai .. Petitioner* (*Plaintiff*).

v.

Appasami Pandaram & others .. Respondents. (*Defendants*).

Velu Pillai *v.* Appasami Pandaram.

Arbitration—Award—Decree before 10 *days allowed by Art.* 158 *of Limitation Act for application to set it aside.*

A decree passed in terms of the award before the expiration of the time allowed by Art. 158 of the Limitation Act for an application to set it aside is bad in law.

Petition under S. 115 of Act V of 1903 praying the High Court to revise the decree of the District Munsif's Court of Tiruvalur in O. S. No. 494 of 1908.

G. S. Ramachandra Aiyar for the Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The award was on the 27th September 9109, and the decree was passed on the 29th September 1909. Under Rule 16 of Schedule II of the new Civil Procedure Code the court is empowered to pass the decree after the time for making an application to set aside the award has expired. A period of ten days is allowed for this purpose by Article 158 of the Limitation Act of 1908, whereas the court allowed only two. The decree is set aside and the case remanded for disposal according to law. Costs will abide the event.

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* C. R. P. No. 102 of 1910. 21st December 1910.

1. (1905) I.L.R. 29 M. 200.

Rajagopala Reddi v. Govinda Reddi.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White *Kt.*, Chief Justice and Mr. Justice Ayling.

Rajagopala Reddi .. Appellant.* (*Defendant*)

v.

Nathu Govinda Reddi and others .. Respondents (*Plaintiff*).

Hindu Law—Adoption—Suit to set aside—Onus of proof.

Where the parties who rely on an adoption admit the interest of the party who impeaches the adoption as presumptive reversionary heir, the onus is on the party who relies on the adoption to establish it, notwithstanding the fact that a widow's estate intervenes between the presumptive reversionary heir and his right to possession.

Appeal from the decree of the District Court of South Arcot in O. S. No. 9 of 1905.

R. Sadagopachariar, *T. Rangachariar*, and *T. Narasimha Aiyangar* for appellant.

P. R. Sundara Aiyar for respondents.

The Court delivered the following

JUDGMENT.—This is a suit by a reversioner to the estate of one Ramaswami Reddi (deceased) for a declaration that an alleged adoption by Ramaswamy's widow (the 2nd defendant) of the 1st defendant is invalid. In his plaint the plaintiff alleges that Ramaswami died leaving him surviving his mother, the 3rd defendant (a widow), his widow (the 2nd defendant), and no issue male or female. He further alleges that the 3rd defendant is the nearest reversioner to the estate of the deceased Ramaswami, and that he (the plaintiff) is next in grade to her. These allegations are not denied in the written statements of the 1st and 2nd defendants. The 1st defendant admits that the plaintiff is a *dayadi* of the deceased Ramaswami. The 3rd defendant does not defend the suit.

The first question for consideration is whether the District judge was right in holding that the onus of establishing the adoption is on the defence. It is common ground that the plaintiff is entitled to sue for a declaration and that he is not entitled to immediate possession.

The learned vakil for defendants No. 1 and 2 relied on *Asharfi Kunwar* v *Rup chand*[1] where it was held that where the plaintiff asks for a declaration that an alleged adoption is in-

*A. No. 25 of 1906. 16th August 1910.

1. (1908) I. L. R. 30 A. 197.

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valid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is on him to make out a *prima facie* case that the adoption is invalid. The learned judges in that case were of opinion that the question was concluded by authority. In *Brojo Kishore Doss Dassee* v. *Srinath Bose*[1] there are some general observations by Sir *Barnes Peacock* which support the view taken by the Allahabad High Court. The learned judge observed. "The plaintiff asks in this regular suit to have it declared that Radhanath's adoption is invalid. It appears to us that the onus rested upon him, as it does upon any one who asks for a decree declaring the illegitimacy of another person, to prove the illegitimacy. The person who asks a court to declare that a thing is invalid is bound to prove that it is so. The Act which enables the court to make a declaratory decree does not enable the court to call upon a man to prove his title at the instance of one who asks to have a declaratory decree that he is not entitled." In this case of *Brojo Kishore Dassee* v. *Srinath Bose*[1] not only was there no admission of the plaintiff's reversionary interest, but the court held, that if the adoption were set aside, other parties were the presumptive heirs. In *Hur Dial Nag* v. *Roy Krishto Bhoomick*[2] the judges do not appear to have drawn the distinction referred to in *Asharfi Kunwar* v. *Rup Chand*[3]. The suit was for possession of property on the ground that an alleged adoption was invalid and it was held that it was too late to contend that the burden of proof of the adoption did not lie on the defendant. In *Tarinicharan Chowdhry* v. *Saroda Sundari Dasi*[4] the learned judges, referring to *Brojo Kishore Dassee* v. *Sreenath Bose*[1] observe that in that case the plaintiff asked for a declaration during the lifetime of the widow, that an adoption made by her was invalid, and the rule laid down by the court was, that when a plaintiff sues for a declaration that an adoption is invalid, he is bound to prove the invalidity, because in such a case he does not ask for possession. But, so far as we can see the learned judges in *Brojo Kishore Dassee* v. *Srinath Bose*[1] do not distinguish, at any rate in so many words, between a case where a plaintiff only asks for a declaration and where he asks for possession. And the learned judges in *Tarini Charan Chowdhry* v.

1. (1868) 9 W. R. C.R. 463.
2. (1875) 24 W. R. 107.
3. (1908) I.L.R. 30 A. 197.
4. (1869) 3 B. L. R. 145.

Sarodha Sundari Dassi [1] merely point out that the case of *Brojo Kishore Dassi* v. *Sreenath Bose* [2] was distinguishable from the case before the Calcutta court. In AMIR ALI & WOODROFFE'S *Law of Evidence*, 4th edn., p. 549, the learned authors, without any discussion of the question, say that if plaintiff sues as reversionary heir during the lifetime of the widow for a declaration that an adoption is invalid, the onus is on him to prove the invalidity, and they cite *Brojo Kishore Dassi* v. *Sreenath Bose* [2] and the case on which we have commented. (The reference in the Footnote to 8 W. R. is a printer's error).

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In *Kusum Kumari Roy* v. *Satya Ranjan Das* [3] *Sale* J. deals with the case on the assumption that there was no dispute between the parties as to the fact of adoption. The plaintiff set up the incapacity of the alleged adopted son and the learned judge held it was for the plaintiff to establish this as a question of law, not a question of fact. We think this case is distinguishable from the case before us where there was an issue as to the *factum* of adoption and the plaintiff's case was that no authority to adopt had in fact been given.

We think the District Judge was right in his view that the principle of the decision of the Privy Council in *Sukh Dei* v. *Kedar Nath* [4] with regard to the onus of proof applied to the present case. The law allows a reversioner who does not and cannot claim immediate possession to sue for a declaration that a transaction which would bar his reversionary interest is invalid. It is well settled that if he were entitled to claim, and did claim immediate possession the *onus* would be on the party who relies on the transaction to establish its validity. We cannot see on what principle the fact that a widow's estate intervenes between the reversioner and his right to immediate possession, and that this being so, the plaintiff can only ask for a declaration, should alter the burden of proof. The fact that the interest of a presumptive reversioner, who is not entitled to possession, is merely a *spes successionis* which may or may not be a right of possession when the inheritance falls in, as it seems to us, is no good ground for the distinction. We do not think there is anything in the judgment of the Privy Council in *Rajendra Nath Haldar*

1. (1869) 3 B. L. R. 145.
2. (1868) 9 W. R. 463.
3. (1903) I. L. R. 30 C. 999.
4. (1901) I. L. R. 23 A. 405.

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v. *Jogendra Nath Banerjee* [1] which is inconsistent with the view we have indicated.

We do not desire to decide anything which is not necessary for the purpose of this particular case. All we say is that where, as here, the parties who rely on the adoption admit the interest of the party who impeaches the adoption as presumptive reversionary heir, the *onus*, in our opinion, is on the party who relies on the adoption to establish it, notwithstanding the fact that a widow's estate intervenes between the presumptive reversionary heir and his right to possession.

Turning to the facts of the present case we see no reason to differ from the decision of the learned District Judge who has found against the alleged authority to adopt. The oral evidence in support of the authority, as well as the probabilities of the case, have been fully dealt with in the judgment. The evidence of the defendant's witnesses who support the authority is not entitled to much weight, and the District Judge is probably right in his view that Ramaswami Reddi died unexpectedly before the arrival of his wife's relations from Reddiyur, and the whole story of his giving her in their presence authority to adopt is a subsequent invention. The absence of any reference to such authority in the petition, Exhibit *B*, which bears date of the 14th December 1891, is very significant; and so is the extraordinary delay of over nine years in carrying the alleged authority into effect. The widow's minority had expired long before this. On the other hand the plaintiff's delay in bringing the present suit is explained by the depletion of his resources owing to the previous litigation, and to the fact that, in any case, he cannot recover possession of the property during the 2nd defendant's lifetime, and had, therefore, nothing to lose by delay, provided it did not exceed the limitation period.

The appeal is dismissed with costs.

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1. (1871) 14 M. I. A. 67.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

Haidar Syed Bacha Sahib .. Appellant*
v. (*Plaintiff*)
Karuppanna Pillai & others .. Respondents
(*Defendants* 4 *&* 5 *to* 8).

C. P. C., S 11—"*Heard and decided*"—*Consent decree.*

A consent decree passed for rent due to the plaintiff for certain faslis on the basis of the admission by the defendant in the case will not be *res judicata* in a subsequent suit for rent due in respect of subsequent faslis on the question of the share which the plaintiff is entitled to. **Bacha Sahib *v.* Karuppanna Pillai.**

Second appeal from the decree of the Temporary Subordinate Judge's Court of Madura in A. S. 718 of 1907 presented against the decree of the Court of the District Munsiff of Dindigul in O. S. No. 571 of 1905.

The Advocate-General (*P. S. Sivaswami Aiyar*) for appellant

T. R. Ramachandra Aiyar for respondents.

The Court delivered the following

JUDGMENT:—The only question raised by the present appeal relates to the construction of Exhibit XI (*c*) that is, a decree in pursuance of a compromise between the parties in a previous suit (O. S. No 256 of 1900) for recovery of the amount due to the present plaintiff, appellant, on account of his share. The question is, did the decree settle the dispute between the parties as to the share to which the plaintiff was entitled? The decree does not in so many words purport to decide what is the proper share of the plaintiff. Does what is decided thereby involve then a decision as to the share to which the plaintiff was entitled? Paragraph 1 recites that the 4th defendant in that suit, the 1st respondent, admitted that the plaintiff was entitled to a 7⅝th share with his brother.

The parties consented to a decree in favour of the plaintiff for certain faslis on that basis. But the acceptance by the plaintiff of the amount due to him for a particular period calculated on the basis of his share admitted by the 4th defendant, does not imply that the parties necessarily intended to settle what should

* S.A. No. 1957 of 1908. 23rd September, 1910.

Bacha Sahib v. Karuppanna Pillai.

be the shares of the plaintiff for future years—*In re the South American and Mexican Company*[1]. The decree for the exact amount claimed due for the 2nd instalment and the dismissal of the counterclaim with reference to the 1st instalment, necessarily involved a decision of the question as to the truth of the grant. Further in that case there were other circumstances set out in the judgment of Lord *Herschell* which clearly pointed to the parties having settled the dispute as to whether the agreement propounded was true. In the present case all that is embodied in the decree, Exhibit X (*c*), is consistent with the plaintiff having agreed to accept what was admitted to be due without the parties having decided the question as to future years. The respondents having failed on the question of *res judicata*, and the plaintiff being found to be entitled to ⅓rd of Rs. 111-2-0 of the third *pangu*, the decree of the Subordinate Judge will be varied by adding Rs. 68 to the amount awarded by him. Each party will bear his or their own costs.

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

Present:—Mr. Justice Krishnaswamy Aiyar and Mr. Justice Ayling.

Ghulam Ahmed & another .. Appellants*

v.

Shah Mahomed Yusuf .. Respondent.

Religious Endowments—Suit for removal of trustee and appointment of fresh trustee—C. P. C. (1882) *S.* 539—*Religious Endowments Act XX of* 1863, *Ss.* 14 *and* 18.

Ghulam Ahmed v. Shah Muhammed Yusuf.

A suit for the bare removal of a trustee of a mosque may be instituted with the leave of the court under S. 18 of Act XX of 1863.

But a suit for the appointment of a new trustee requires sanction under S. 539, C. P. C.

A suit for both the removal of a trustee and the appointment of a new trustee, instituted with leave obtained only under S. 18 of Act XX of 1863, but not with leave under S. 539 C. P. C. (1882), may be proceeded with in regard to the first prayer only; and in such a case the suit will not be bad for want of a prayer for possession.

Appeal from the decree of the District Court of Nellore in O. S. No. 21 of 1906.

T. V. Seshagiri Aiyar and *T. V. Muthukrishna Aiyar* for appellants.

S. Subramania Aiyar for respondent.

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*A. No. 178 of 1907. 20th December, 1910.

1. (1895) I. Ch. p. 37 (C.A.)

Ghulam Ahmed v. Shah Mahomed Yusuf.

The Court delivered the following

JUDGMENT :—This is a suit by two worshippers who have obtained leave under S. 18 of the Religious Endowments Act to remove the trustee of a mosque and to have another appointed by the court in his stead. The defendant objected to the suit on the ground that no leave had been obtained under S. 539 of the Civil Procedure Code to enable the plaintiff to ask for the appointment of a trustee in place of the trustee asked to be dismissed. There is, no doubt, force in the objection so far as the prayer for the appointment of a new trustee is concerned. But a suit for the removal of a trustee of a mosque may be instituted with the leave of the court under the authority of S. 14 of the Religious Endowments Act itself. Such leave having been obtained by the plaintiffs under S. 18, it was perfectly competent to them to maintain the suit so far as the prayer for the removal of the defendant was concerned. We must set aside the decree of the District Judge and remand the case to the court below for disposal according to law, so far as the prayer for the removal of the defendant is concerned. We may add, to save the judge from misapprehension, that the plaintiffs are entitled to sue for removal under the Act without asking for possession themselves. The plaintiffs are not trustees and they are not entitled to possession, nor are they to appoint the trustee themselves and ask that possession may be given to such a trustee. The only course open to them would be to get a fresh trustee appointed by the court and as that cannot be done in the present suit no leave under Civil Procedure Code S. 539 having been obtained, the plaint is in proper form in not asking for possession of the properties of the mosque being given to the plaintiffs. Costs hitherto incurred will be provided for in the revised decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim.

The Maharajah of Vizianagram through G. Appiah, Muktear .. Petitioner* (*Plaintiffs*)

v.

Meduri Suryanarayana & another .. Respondents (*Defendants*).

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* C. R. P. No. 111 of 1910. 27th October, 1910.

Maharajah of Vizianagaram. v. Suryanarayana.

C. P. C., S. 115—Failure to exercise jurisdiction—Dismissal of suit on the ground of discrepancies between the pronote and the plaint.

It amounts to a failure to exercise jurisdiction on the part of a judge if he dismisses a case barely on the ground of discrepancies between the suit pronote and the plaint based on it; and the High Court is bound to interfere with the judgment in revision.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Temporary Subordinate Judge's Court of Vizagapatam in A. S. No 376 of 1906 (O. S. 21 of 1907 on the file of the District Munsif's Court, Rajam).

C. V. Anantakrishna Aiyar for *S. Srinivasa Aiyangar* for the petitioner.

V. Ramesam for respondent.

The Court delivered the following

JUDGMENT:—I think the Subordinate Judge's judgment in appeal ought to be set aside. He has not disposed of the case on the evidence and does not say that he disagrees with the findings of the Munsif on the issues raised in the case. He would have been quite within his rights if he had considered whatever discrepancies there were between the descriptions of the pro-notes in the plaint and the terms of the pro-notes themselves as circumstances in dealing with the question whether the pro-notes were given and executed for consideration. But he has dismissed the plaintiff's suit simply on the ground of such discrepancies. It is urged by Mr. Ramesam that even if the judge is wrong in the way he has disposed of the appeal, the error is not one relating to jurisdiction. But I cannot accept his contention. To my mind the method adopted by the Subordinate Judge in dealing with the case amounts to a failure to exercise jurisdiction and at least is a very material irregularity in the exercise of such jurisdiction within the meaning of S. 115 of the Code of Civil Procedure. The Subordinate Judge was not competent to reverse the judgment of the Munsif without coming to a conclusion on the questions raised by the issues and decided by the Munsif in favour of the plaintiff.

The judgment of the Subordinate Judge is set aside and he must be asked to dispose of the appeal according to law. Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Krishnaswami Aiyar.

R. Rungasawmi Aiyangar ... Petitioner*

v.

C. R. Srinivasa Aiyangar .. Respondent.

Runga-sawmi Aiyangar *v.* Srinivasa Aiyangar.

Limitation Act, Art. 90—*Principal and agent—Suit for recovery of Money entrusted to defendant for payment to third party.*

A suit for recovery of money paid by the plaintiff to the defendant for payment to a third person, on default of payment to the third person, is governed by Article 90 of the Limitation Act.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court of Mayavaram at Kumbakonam in S. C. S. No. 1711 of 1908, in so far as it relates to an item of Rs. 50.

K. S. Krishnaswami Aiyangar for *T. Narasimha Aiyangar* for petitioner.

Respondent *not represented.*

The Court delivered the following

JUDGMENT:—I think the Subordinate Judge is wrong in his view regarding the claim with reference to the sum of Rs. 50 asked to be paid to Abu Bakar Sait. The facts are:—The plaintiff gave a certain sum of money to the defendant and asked him to make a payment of Rs. 50 to one Abu Bakar to whom the plaintiff owed money. The position of the defendant was that of an agent who defaulted to make the payment. Abu Bakar sued the plaintiff and obtained a decree. It is perfectly clear that on the date of the decree, at all events, the plaintiff knew that his agent, the defendant, was guilty of misconduct in not making the payment which he had required him to make. The Subordinate Judge calculates the period of limitation from the date of the payment by the plaintiff to Abu Bakar. I cannot see how that furnishes the starting point for limitation. The case appears to me to fall within Article 90 of the Limitation Act and this view is supported by the decision in Civil Revision Petition No. 763 of 1908 and also by the decision of the Allahabad High Court in *Ram Lal* v. *Gulam Husain.* [1] I modify the decree of the

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* C. R. P. No. 787 of 1909. 10th November, 1910.

1. (1907) I. L. R. 29 A. 579.

Subordinate Judge as regards this sum of Rs. 50 with interest and the costs incurred by the plaintiff in respect of his defence to Abu Bakar's suit. I modify the decree with costs here.

[But see the judgment of *Krishnaswami Aiyar* J., in C.R.P. 293 of 1910.—ED.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

V. Venkataramayya Pantulu .. Appellant*
v. (*Plaintiff*)
V. B. Narasinga Row & others .. Respondents.
(*Defendants*).

Venkataramayya Pantulu *v.* Narasinga Row.

Mortgage—Equitable mortgage by deposit of title deeds—Essentials.

Where the only document that is deposited shows no kind of title in the depositor to the property and there are documents in existence showing his title to the property which are not deposited, an equitable mortgage cannot be said to have been validly created.

Appeal from the decree of the District Court of South Canara in O. S. No. 66 of 1906.

T. Ethiraja Mudaliar for appellant.

G. Annaji Row for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff institutes the suit on what he calls a mortgage by deposit of title-deeds. The 1st defendant is the mortgagor. The only document which is deposited with the plaintiff is a sale-deed in the name of the first defendant's father, dated the 10th of May 1879. Subsequent to the sale the father executes a deed of gift, Exhibit *XV*, in favour of his grandsons of a deceased son. Disputes having arisen amongst the members of the family, there is a reference to arbitration and an award dated the 10th November 1896. This award is filed in court under S. 525 of the Civil Procedure Code and a decree, Exhibit *I*, passed in terms of the award whereby the grandsons are directed to deliver the properties, which are the subject of the present so-called mortgage by deposit of title-deeds, to the 1st defendant. His claim of title to the property is not impeached; it is not denied that the property purchased by Anantaya in 1879 was his self-acquisition. The plaintiff does not say that the 1st defendant has acquired the property by descent from Anantaya on his death. The decree, the award before it and

*A. No. 92 of 1908. 21st December, 1910.

Exhibit *XV*, the deed of gift, are none of them deposited. We cannot hold that the mere deposit of the sale deed in the father's name is a good deposit of title-deeds of the properties by the first defendant so as to create a valid mortgage in favour of the plaintiff. Mr. T. Ethiraja Mudaliar, who appears for plaintiff-appellant before us, relies on paragraph 28 of FISHER on *Mortgage.* We do not think that the paragraph in question is any authority for the position that where the only document that is deposited shows no kind of title in the depositor to the property and there are documents in existence showing his title to the property which are not deposited, an equitable mortgage is validly created by the deposit of the document which shows no title in him. We must, therefore, dismiss the appeal with costs.

Venkataramayya Pantulu *v.* Narasinga Row.

As the court-fee has not been paid on the memorandum of objections, we dismiss it with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim.

Sawmi Aiyangar *alias* Srinivasa Varthachariar. .Petitioner*

v.

Lakshmi *alias* Echammal .. Counter-Petitioner.

Limitation Act, S 20.—Payment by principal—Whether saves limitation against surety.

Payment by principal does not save limitation against the surety. [*Gopal Daji* v. *Gopal Bin Sonu*[1] followed].

Srinivasa Varadachariar *v.* Echammal.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the District Munsif of Srirangam in S. C. S. No. 177 of 1909.

This was a suit to recover with costs Rs. 199-0-0 being the amount due on two pro-notes executed by the 2nd defendant in favour of the plaintiff for Rs. 50 and Rs. 100. The 1st defendant took the money from the plaintiff promising to repay the same. The second defendant was *ex parte.* The following issues were framed :—

(1) Whether the Rs. 50 and Rs. 100 of the suit pro-notes (Exhibits A and B left by the plaintiff with the 1st defendant) were by him lent to the 2nd defendant, without the plaintiff's

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* C. R. P. No. 483 of 1910. 7th November 1910.

1. (1903) I. L. R. 28 B. 248.

Srinivasa Varada-chariar v. Echammal.

previous knowledge and consent and on his own responsibility, and whether the 1st defendant also undertook responsibility for the same?

(2) Whether the amount of Rs. 8 and Rs. 12 endorsed on the pro-notes were received by the 1st defendant?

(3) Whether the suit is bad for misjoinder of parties and causes of action?

(4) Whether the 1st defendant's responsibility ceased because the plaintiff herself obtained from the 2nd defendant an endorsement for Rs. 4 on the 100 Rs. pro-note?

Issues Nos. 1 and 2 were found in the affirmative and 3 and 4 in the nagative.

P. R. Ganapathi Aiyar for petitioner.

N. Rajagopala Chari for counter-petitioner.

The Court delivered the following

JUDGMENT:—It is admitted by the pleader for the plaintiff-respondent that there is no evidence to shew that the 1st defendant made any payment by which limitation would be saved so far as the claim against him is concerned. But it is argued that no issue was framed on this point and it is alleged in paragraph 6 of the plaint that two sums of twelve rupees and nine rupees were paid in 1906. But paragraph 5 of the 1st defendant's written statement traverses that statement as false. The two bonds were executed on the 24th October 1904 and the 12th February 1905, respectively, and it is for the plaintiff to make out that her claim under these bonds was subsisting against the 1st defendant on the date of her suit which was instituted in 1909, and as she failed to do so, the Subordinate Judge ought to have dismissed the suit.

It is conceded by the plaintiff's pleader that the position of the 1st defendant was that of a surety. That being so, payment of interest by the 2nd defendant, his principal debtor, would not save limitation against the 1st defendant—see *Gopal Daji* v. *Gopal Bin Sonu*[1], and the respondent's pleader has not attempted to argue that the exposition of law in that case is not correct.

The petition must be allowed and the plaintiff's suit dismissed against the 1st defendant with costs here and in the court below.

1. (1903) I. L. R. 28 B. 248.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Dwarka Doss Govardhana Doss and another... Plaintiffs*

v.

Chirakala Krishnaiya & another ..Defendants.

Limitation Act, Art. 65—*Suit against surety—Cause of action.*

Govardhana Doss *v.* Krishnayya

A surety's liability arises from the contract of guarantee and not by the mere fact of the loan. Time runs against him from the date of default and Art. 65 applies to the suit against him.

Case stated under S. 69 of Act XV of 1882 and Rule 423 of the Rules of Procedure of the Presidency Court of Small Causes, Madras, by the Registrar of the Court of Small Causes in Suit No. 228 of 1910.

The facts of the case are these:—

The 2nd defendant who is the father of the 1st defendant gave a letter, Exhibit B, to the plaintiffs to the effect that they may advance money or have dealings with the 1st defendant from Rs. 1 to Rs. 2,000 and that "if he does not pay the amount due by him to you according to the account I shall stand forward and pay you that debt." This letter was written on the 9th March 1904. Accordingly a sum of Rs. 1,000 was advanced by the plaintiffs to the 1st defendant on the 12th March 1904 and they took a pro-note from him for the said sum of Rs. 1,000 which is marked as Exhibit B. As this promissory note was about to become time-barred a fresh pro-note was executed by the 1st defendant for the same amount on the 22nd February 1907. This pronote is marked Exhibit A, and the old pronote Exhibit B was cancelled. The 1st defendant became insolvent and the plaintiffs now sue upon the pro-note Exhibit A for balance of Rs. 803-2-6 and also seek to recover that sum from the 2nd defendant under his letter of guarantee, Exhibit B. Several pleas were set up by the 2nd defendant of which the most important were that the taking of the 2nd pro-note operated as a discharge of the surety and that his liability was barred by limitation. The following judgment was delivered by the Chief Judge of the Presidency Small Cause Court:

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* Ref. Case 5 of 1910. 21st November, 1910.

Govardhana Doss v. Krishnayya.

"With regard to the former plea I think that the true construction of Exhibit B is that the 2nd defendant offered himself as surety for the repayment of any loan made by plaintiffs to 1st defendant up to Rs. 2,000 for the purposes of his business, and that this offer was accepted by the plaintiffs when they advanced the sum of Rs. 1,000 on 12th March 1904.

"The facts that the plaintiffs thought fit also to take a negotiable instrument from the 1st defendant, as further evidence of a security for the loan, and that this security was subsequently exchanged for another instrument of the same kind, do not, I think, in any way affect the original transaction of the loan. There is no evidence that the plaintiffs intended to accept either pro-note in discharge of the original contract of loan, or that they promised to give time to or not to sue the first defendant on that contract; and the acceptance of the first pro-note amounts, in my opinion, to nothing more than a forbearance to enforce their remedy on the old pro-note which does not of itself discharge the surety (see Contract Act, S. 137). It was also argued that since the original cause of action on the loan would have become barred but for the actual payment of the 1st defendant, the surety was discharged by the forbearance of the creditor to sue the principal debtor throughout the whole period allowed by the Limitation Act, and *Ganga Prasad* v. *Ramdayal*[1] was relied upon.

"That decision and the previous cases in the Allahabad High Court cited therein proceed upon the view that the legal consequence of the creditor's omission to sue is the discharge of the principal debtor; and with all respect I think that this is not the correct view of the operation of the Limitation Act which merely prevents the creditor from suing and does not put an end to the contractual obligation which still subsists and may be availed of in other ways, such for example as by the appropriation of moneys paid by the debtor to the barred debt. For this reason I prefer to follow the decisions of the Bombay and Calcutta Courts in *Hajarimal* v. *Krishna Rao*[2] and *Krishto Kishori Chowdrain* v. *Radha Roumi Runshi*[3].

"With regard to the plea of limitation, it must be noted in the first place that the Contract Act distinguishes between a contract

1. (1901) I. L. R. 23 A. 504. 2. (1881) I. L. R. 5 B. 647.
3. (1885) I. L. R. 12 C. 330.

Govardhana Doss v. Krishnayya.

of indemnity (Ss. 124 & 125) and a contract of guarantee (S. 126). The liability of a person who has agreed to indemnify another against a specified loss only arises when the loss has been incurred, but the liability of a surety is co-extensive with that of the principal debtor, both parties having promised to perform the same act, and for this reason the surety may be sued in case of default although no suit has been brought against the principal debtor (see SHEPHARD on *Contract*, 9th Edn., p. 327). For the same reason, the Limitation Act contains no special article with regard to suits by the creditor against a surety, since the period of limitation must be calculated with reference to the particular contract agreed, and not with reference to a breach of the contract by or other act or default of the principal debtor. The wording of Article 83 of the Act shows, I think, that this article must be confined to contracts of indemnity, under which the cause of action arises when the specified loss occurs, and in respect of which, therefore, time only begins to run in favor when the plaintiff is actually damnified.

" In the case of a loan to one person, of which payment is guaranteed by another at the date of the loan, time begins to run in favor of both principal debtor and surety from the date when the loan was made (Limitation Act, Art. 57) ; the surety's obligation is now barred by limitation—*Parr's Banking Co.* v. *Yates.*[1] In the case of *Brishumbur* v *Hungsherkne*[2] the contract was construed to be one ' to secure the plaintiff from loss' and was, therefore, a contract of indemnity, and not one of guarantee. There must be a decree against the 1st defendant with costs of Rs. 40, and execution will be stayed during the insolvency proceedings or until further orders.

"The plaintiff's vakil applies for a reference to the High Court under S. 69 of Act XV of 1882, and I therefore give judgment for the 2nd defendant contingent upon the opinion of the High Court upon the questions (1) whether upon the true construction of the letter of guarantee of the 2nd defendant dated 9th March 1904, the plaintiff's cause of auction arose on that date or upon default in payment of the 1st defendant ; (2) whether Art. 57 or Art. 65 or 83 applies to a contract of guarantee."

1. (1898) L. R. 2 Q. B. 460. 2. 4. C. L. J. 34.

Govardhana Doss v. Krishnayya.

S. Venkatasubba Row and *Radhakrishnayya* for plaintiffs.

T. S. Rajagopalier for defendants.

The Court delivered the following

JUDGMENT :—The liability of the principal debtor in this case arises in respect of each loan on the date of the loan. Article 57 of the second schedule to the Indian Limitation Act XV of 1877 would clearly apply if the suit were brought against him on the footing of the loan. It cannot apply to the suit against the surety. He becomes liable on his contract of guarantee and not by the mere fact of the loan. It extends to each loan as soon as it is made and he is liable to be proceeded against as soon as default is made by the principal debtor. The default occurred at once. Time runs as against the surety from each date of default which is the date of each loan. We hold that Article 65 of the second schedule to Act XV of 1877 applies and that the suit is barred under that article. We answer the questions accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

S. Kandappa Chetty .. Appellant* (*Petitioner in C. R. P. No. 575 of 1909 on the file of the High Court*)

v.

Chinnappa Gounden .. Respondent (*in the above*).

Kandappa Chetty v. Chinnappa Goundan.

C.P.C., Ss. 491, 497—Appeal from award of compensation for improper attachment.

An appeal lies against an order awarding compensation for improper attachment. [*Narasinga Bakshi* v. *Govinda Bakshi*[1]; distinguished *Lokanath* v. *Amir Singh*[2] not followed.]

Appeal under S. 15 of the Letters Patent against the judgment and order of Mr. Justice Sankaran Nair in C.R.P. No. 575 of 1909.

V. Venkatachari for appellant.

Respondent *not represented.*

V. Venkatachari for appellant:—Here the question is whether there is an appeal from an award of compensation by the

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* L. P. A. No. 50 of 1910. 29th March, 1911.

1. (1902) I. L. R. 24 M. 62. 2. (1908) I. L. R. 28 A. 81.

Kandappa Chetty. *v.* Chinnappa Gounden.

decree for wrongful attachment or injunction. *Loka Nath* v. *Amir Singh* [1] is an authority the other way and it purports to follow *Narasinga Bhakshi* v. *Govinda Bhakshi* [2] where, however, the order was not embodied in the decree. If no appeal is allowed, most anomalous results may follow. Suppose an order for compensation is made when the suit is dismissed and on appeal the decree is reversed. What is to become of the order of compensation?

Respondent *not represented.*

The Court delivered the following

JUDGMENT:—In this case the District Munsif in his decree in O. S. No. 1116 of 1907 granted Rs. 100 to the defendant against the plaintiff as compensation for improper attachment of the defendant's moveable property before judgment. The plaintiff in his appeal against the decree objected to any compensation being awarded. The lower appellate court held that no appeal lay against the award of compensation, relying on the decision in *Narasinga Bhakshi* v. *Govinda Bhakshi*[2], and the learned judge, from whose judgment this appeal is preferred, affirmed that view. In our opinion the decision in *Narasinga Bhakshi* v. *Govinda Bhakshi*[2] is distinguishable from this case. There the appeal was one objecting to the amount awarded as compensation by the party to whom it was awarded, and the contention was that a larger amount should have been awarded. The appeal, therefore, was not against an award of compensation contained in the decree. In the present case, on the other hand, the appeal was against a portion of the decree itself, *viz.*, the portion of it which gave compensation to the defendant. In our opinion, where a decree gives compensation an appeal lies against such award, though no appeal might lie where no award is made. In cases of injunction under S. 497 of the C. P. C., no doubt a larger right of appeal was given, but this does not affect the existence of a right of appeal where there is an award of compensation in the decree. The Allahabad High Court, no doubt, applied *Narasinga Bhakshi* v. *Govinda Bhakshi* [2] to a case similar to the present (see *Loka Nath* v. *Amir Singh*[1]) but we are, with all respect, unable to agree with that decision. We set aside the order of *Sankaran Nair* J. and of the lower appellate court and

1. (1908) I.L.R. 28 A. 81.
2. (1902) I.L.R. 24 M. 62.

remand the appeal for fresh disposal according to law. The costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Kodali Mallaya ... Appellant* (*Plaintiff*)

v.

Tangoppala Ramayya .. Respondent (*Defendant*).

Mallaya *v.* Ramayya.

Pro-note, unstamped—Suit on—Suit on original cause of action—Vendor and vendee—Enforcement of lien.

Where a document which cannot be used in evidence is executed to evidence a complete pre-existing right, a suit may be maintained on the original right itself unless it be shewn that it was intended to merge the right in the document; but where at the time that an obligation comes into existence, a document is executed as the evidence and record of that obligation, a suit to enforce it can be only on the document itself. [*Pothi Reddi* v. *Velayuda Sivan*[1]; *Yarlagadda Veera Raghavayya* v. *Gorantla Ramayya*[2]; *Sheik Akbar* v. *Sheik Khan*[3] referred to.]

The plaintiff sold lands to defendant, received an unstamped pro-note on the same day for the purchase-money and sued on the note for a personal decree. *Held* that the suit was not maintainable.

Quaere:—Whether a suit for the enforcement of the vendor's lien is maintainable?

Appeal under S. 15 of the Letters Patent against the judgment of Mr. Justice Krishnaswami Aiyar in C. R. P. No 742 of 1910 presented against the decree of the Court of the District Munsif of Bezwada in S. C S. No 897 of 08.

T. Prakasam for appellant.

P. Nagabhushanam for respondent.

The Court delivered the following

JUDGMENT:—This is an appeal from the judgment of *Krishnaswami Aiyar* J. in C. R. P. No. 742 of 1908 in which the learned Judge confirmed the judgment of the District Munsif of Bezwada who dismissed the plaintiff's suit to recover the amount due to the plaintiff for the balance of purchase money due to

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* L. P. A. No. 51 of 1910. 30th March 1911.

1. (1886) I.L.R. 10 M. 94. 2. (1905) I.L.R. 29 M. 111.

3. (1881) I.L.R. 7 C. 256.

Mallaya v. Ramayya.

him from the defendant for the sale of certain land. The plaintiff received from the defendant on the date of the sale an unstamped document which has been held by both the Munsif and by the learned judge to be a promissory note, and as the document could not consequently be acted on, the learned judge held that the suit was rightly dismissed. It is contended in this appeal that as the transaction of sale itself gave the plaintiff a complete cause of action he is entitled to a decree for the amount, apart from the promissory note. It is no doubt true that the sale entitled the plaintiff to the payment of the balance of purchase money, and the law gave him also a lien on the property for the amount. The promissory note by itself would not, according to the allegation in the plaint, extinguish the lien, as the sale was not in consideration of a covenant to pay the balance of the purchase money, but in consideration of the payment of the money itself. But this suit is not one to enforce the lien on the property, but to enforce the personal obligation of the defendant to pay. In a suit to enforce this obligation the principle laid down in *Pothi Reddi* v. *Velayudasivan*[1], *Yarlagadda Veera Ragavayya* v. *Gorantla Ramayya*[2], *Sheikh Akbar* v. *Sheikh Khan*[3] is applicable. That principle is that where a document which cannot be used in evidence is executed to evidence a complete pre-existing right a suit may be maintained on the original right itself unless it be shewn that it was intended to merge the right in the document, but where at the time that an obligation comes into existence, a document is executed as the evidence and record of that obligation, a suit to enforce it can be only on the document itself. In this case the plaint does not show that the case falls within the former category of cases. Whether the plaintiff may not still be entitled to institute a suit for the enforcement of his lien, it is unnecessary to consider. We agree that this suit was rightly dismissed The appeal is dismissed with costs.

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1. (1886) I. L. R. 10 M. 94. 2. (1905) I. L. R. 29 M. 111.
3. (1881) I. L. R. 7 C. 256.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

Umade Rajaha Raja Damara Kumara Thimmanayanim Bahadur Varu .. Appellant* (*Defendant*)

v.

Sri Ranga Bhupala Bali Row Garu & another .. Respondents (*Attaching Creditors*).

Umade Raja *v.* Bali Row.

Madras Court of Wards Act I of 1902, *S.* 47—*Limitation—C.P.C.* (*Act XIV of* 1882) *S.* 325-*A.*

There is nothing in the language of S. 47 of the Court of Wards Act to show that only the last clause of S. 325-A, C. P. C. of 1882, and not the whole of S. 325-A, has been made applicable to proceedings for execution in the civil court.

Appeal from the order of the District Court of North Arcot in E. P. R. No. 8 of 1907.

L. A. Govindaraghava Iyer for appellant.

T. V. Muthukrishna Iyer for respondent.

The Court delivered the following

JUDGMENT :—We do not find it necessary to consider the point dealt with in the lower court, but think it clear that S. 325-A of the Code of Civil Procedure which is made applicable by S. 47 of the Madras Court of Wards Act, 1902, is sufficient to save limitation. Section 325-A expressly excludes from calculation the period during which the decree is before the Collector for execution and the exclusion is obviously made applicable to proceedings for execution in the civil court.

There is nothing in the language of S. 47 of the Court of Wards Act to support the contention that the last clause of S. 325-A of the Code of Civil Procedure is only made applicable and it would be contrary to the manifest intention of the legislature so to hold.

The conclusion is right and the appeal is dismissed with costs.

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* C. M. A. No. 85 of 1909. 22nd July, 1910.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr.Justice Benson and Mr.Justice Sankran Nair.

Kelu Manikaran .. Appellant* (*1st Defendant*)

v.

Pakarvoor Manakal Jatavedan Nambudripad's L. R. Narayanan Somayajipad, & another .. Respondents (*1st Plff's Assignee and 2nd Plff.*)

C. P. C., S. 260, Cl. (2)—Scope of—Applicability of section to decree directing abstention.

S. 260, C. P. C. (1882), applies to cases where the judgment-debtor is restrained from doing an act, *e.g*, as in this case, from taking water which the decree-holders carry through a *thodu*.

Manikaran *v.* Narayanan.

Appeal from the revised order of the District Court of South Malabar in A. S. No. 705 of 1906 presented against the order of the Court of the District Munsiff of Palghat in C. M. P. No. 111 1906.

C. V. Anantakrishna Iyer for appellant.

T. R. Krishnaswami Iyer for respondent.

The Court delivered the following

JUDGMENT.—The appellant was restrained by a decree from taking water which the respondents carry through a *thodu*. He has now put up a dam and carried the water to his fields against the terms of the decree, with the result that the 1st respondent has sustained damages estimated at about Rs. 300 by the lower court. Under S. 260 of the C. P. C. the appellant's property has been ordered to be placed under attachment for the satisfaction of the amount. It is conceded that if S. 260 applies this appeal fails, but it is contended that the section does not apply, as the 2nd clause shows that it contemplates only cases where the judgment-debtor may carry out the terms of the decree within the period of one year the property is to remain under attachment before it is sold, and does not therefore apply to this and similar cases where the judgment-debtor is restrained from doing an act, and he has already violated the terms of the decree.

* A. A. A. No. 3 of 1909. 21st January, 1910.

Manikaran v. Narayanan.

We are unable to agree with that contention. In the present case he continues to violate the terms of the decree. The terms of the 1st clause of this section clearly refer to cases where a party is restrained from doing an act and the operation of that clause is not limited to the cases contemplated by the second clause. That the matter is one arising in the execution of a decree there can be no doubt. That the section refers to cases where a party is directed to carry out something is conceded. No reason is suggested why those cases where a party is directed to abstain from doing an act should be placed on a different footing, and the words of the clause are wide enough to include such cases, and we therefore hold that S. 260 applies to the present case. The same view was taken in *Venkatachellam Chetty* v. *Veerappa Pillai*[1]. The question whether the plaintiff is an assignee has already been decided by this court. The objection that the representatives of a deceased decree-holder are not parties was not raised in the court of 1st instance. The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair.

Valliammai (deceased) and others .. Petitioners*
(*Deft's.* 1 *&* 3 *and* 1*st deft's. representatives*)

v.

Raju Shanmugam Pillai .. Respondent
(*Plaintiff*).

Valliammai v. Shanmugam Pillai.

C. P. C., Ss. 328, 331—*Complaint of obstruction preferred beyond "one month"—Registry as suit not proper.*

It is illegal to register an application under S. 328, C.P.C., filed after one month from the date of obstruction as a suit.

Obiter :—Where a suit is found barred by limitation, it is not open to a court to allow the plaintiff to withdraw the suit with liberty to bring a fresh one, if the fresh suit is one which would be barred by the decision in the earlier suit.

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* C. R. P. 858 of 1908. 25th November, 1909.

1. (1905) I. L. R. 29 M. 314.

Petition under S. 622 of Act XIV of 1882 praying the High Court to revise the order of the Additional Subordinate Judge's Court of Madura in O. S. No. 79 of 1908. Valliammai v. Shanmugam Pillai.

C V. Anantakrishna Aiyar for petitioners.

K. V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—I an unable to agree with the judge that when a suit is found to be barred by limitation, it is open to him to allow the plaintiff to withdraw the suit with liberty to bring a fresh suit, if the fresh suit is one which would be barred by the decision in the earlier suit. But I think it is unnecessary to proceed on that ground. In fact that question does not arise. This is an application presented by the decree-holder who seeks to turn out of possession the respondent who claims to be in possession. It is registered as a suit and the judge holds that the suit is barred by the provision of the Civil Procedure Code that the application must be presented within a month of the obstruction complained of. In my opinion the judge is wrong. The application can be entertained and be registered as a suit only if it is presented within one month. As it was not presented within one month, it should not have been registered as a suit. It is manifestly unfair to the applicant-decree-holder that his application should be wrongly registered as a suit and then dismissed so as to make it a bar to a suit, while if his application had been originally dismissed, such dismissal would not have barred a subsequent suit. I accordingly set aside the order or decree in O. S. No. 79 of 1908, the order in M. P. 106 of 1907 registering the application as a suit, and dismiss M. P. 106 of 1907 as having been presented after the period of limitation. The parties will bear their own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRS.

Present:—Mr. Justice Benson and Mr. Justice Munro.

Parthasarathi Naikan and others .. Appellants*

v. (*Defendans*)

Lakshmana Naikan and others .. Plaintiffs

(*Respondents*).

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* S. A. No. 844 of 1907. 9th February, 1911.

Parthasarathi Naikan v. Lakshmana Naikan.

Limitation—Adverse possession—Possession adverse to mortgagor not adverse to simple mortgagee.

The interest in immovable property which is affected by adverse possession is the interest and that interest only, which the person who was entitled to immediate possession at the time the adverse possession began, has at that time. If such a person has the entire interest when the adverse possession begins, he cannot by afterwards transferring the whole interest, as by sale or by transferring a part of the interest as by mortgage, prevent the operation of prescription upon the entire interest. unless he also interrupts the possession which is adverse. If, however, while still in possession he transfers a part of his interest, the transferee will not be affected by the subsequent possession of a third party, if under his transfer he is not entitled to possession of the property.

Possession adverse to the mortgagor is not adverse to a simple mortgagee whose mortgage was prior in date to the commencement of adverse possession. [*Ramasawmi Padayachi* v. *Ponna Padayachi* [1] not followed.]

Second appeal from the decree of the District Court of Tanjore in A. S. No. 559 of 1906 presented against the decree of the Court of the District Munsif of Tirutharapandi in O. S. No. 42 of 1905.

T. Rangachariar for appellants.

The Advocate-General (*P. S. Sivaswami Aiyar*) for respondent.

The Court delivered the following

JUDGMENTS:—*Munro* J.—The suit is to recover, by sale of the mortgaged property, the amount remaining due under a registered simple mortgage-bond executed in favour of the 1st plaintiff by the paternal grandfather of the defendants Nos. 1 and 2 in 1871. It is found that in execution of a simple money decree obtained against the mortgagor, after the execution of the mortgage-bond (the suit property was attached and sold in court auction) that delivery was obtained by the purchaser in 1873, and that thereafter the property was held by him and those claiming under him adversely to the mortgagor, so that before the present suit was brought, the mortgagor's right to the property had become extinguished. It was contended that the plaintiff's mortgage-right had also become extinguished at the same time as the right of the mortgagor. The District Judge negatived the contention and the main question in this appeal, which is by defendants Nos. 1 and 3 to 5, is whether the District Judge was wrong in so doing.

1. (1911) 21 M. L. J. 397.

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It will be observed that under his mortgage the plaintiff was not entitled to possession and that the mortgage was created before adverse possession had begun to run against the mortgagor. A number of cases has been cited by the appellants in support of their contention and it will be convenient first to consider these cases and see whether they really do support the appellants. In *Anundo Moyee Dosse* v. *Dinendro Chunder Mookerjee*,[1] one Srinath Manick, in 1841, mortgaged certain property to Multy Lal Seal, who brought a foreclosure suit and purchased the property with the sanction of the Master of the Supreme Court at Calcutta. He failed to get possession and his executors sued the defendants for possession. It was found that prior to the mortgage the property had been attached in execution of a decree and that the defendants had purchased it in the sale that followed. Their Lordships of the Privy Council, therefore, held that the title of the defendants, independently of the Regulation of Limitation, was paramount and superior to the title of the mortgagees. They added, however, that even if the attachment had been posterior to the mortgage, still the Regulation of Limitation would have been a conclusive bar. They pointed out that a purchaser at a court sale who has no notice of a mortgage on the property purchased, thinks that he is acquiring the absolute title to the property and that he is in possession as absolute owner. They then proceeded thus :—" Under these circumstances they are of opinion that if the title of the mortgagee to enter by reason of a default having occurred before, had accrued, and if the purchaser under such a title had been in possession for 12 years believing himself to be a *bona fide* owner under a claim to the ownership of the property and not being in possession in any way as mortgagor or under the mortgagor, then in accordance with the cases * * they are of opinion that the suit to disturb the possession of such a purchaser ought to be brought within the 12 years after the commencement of his possession." This decision is manifestly an authority for the appellants' contention but is rather against it. Their Lordships were dealing with a case in which the mortgagee had apparently a right to enter into possession of the mortgaged property on the mortgagor's default, and their conclusion is based not only on the purchaser's possession for 12

1. (1871) 14 M. I. A. 101,

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years, but also on the right of entry having accrued to the mortgagee, and I understand their Lordships to mean that time did not begin to run against the martgagee until the right of entry had accrued. The decision is thus in accordance with the general rule that adverse possession begins to run against the true owner when the true owner has the right to immediate possession—see the definition of 'adverse possession' given by *Markby* J. in *Bejocykunder Banerjee* v. *Kalli Prosunno Mookerjee*[1]. *Brojonath Kundoo Chowdhry* v. *Khelut Chunder Ghose*[2] was also a case in which the mortgagee had a right of entry on the mortgagor's default. Default occurred, but the mortgagor was left in possession and sold part of the property mortgaged. The purchaser took possession. Their Lordships observed:— "It is impossible to hold that the defendant, the purchaser, was holding, or supposed he was holding by the permission of the mortgagee; and when both things concur—possession by such a holder for more than 12 years, and the right of entry under the mortgage deed more than 12 yeors old—it is impossible to say that such a possession is not protected by the law of limitation." This decision no more supports the appellants' contention than the decision last quoted. The remarks at p. 157 of the report also clearly apply only to mortgagees who are entitled to possession, for they refer to mortgagees who allow the mortgagor to be the ostensible owner in possession. In *Ammu* v. *Ramakrishna Sastri*[3] the following passage occurs:—"But there are other cases in which the rights and interests of the mortgagor and the mortgagee are equally invaded, *e.g.*, when the * * * mortgagor has remained in possession and a stranger ousts him from the lands." The mortgage in that case was a mortgage under which the mortgagee was entitled to possession, and we are not bound to assume that the learned judges intended their remarks to apply to a mortgagee not entitled to possession under his mortgage. The words "when the mortgagor has remained in possession" are quite consistent with a case where the mortgagee, though entitled to possession, has not taken possession. The passage cannot, therefore, be regarded as an authority for the appellants' contention. In *Nallamuthu Pillai* v. *Betha Naicken*[4]

1. (1879) I. L. R. 4 C. 327.
2. (1871) 14 M. I. A. 144.
3. (1878) I. L. R. 2 M. 226.
4. (1900) I. L. R. 23 M. 37.

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the mortgagee was not entitled to possession under his mortgage. Adverse possession had, however, begun to run against the mortgagor before the mortgage was granted and such possession was treated as adverse to both mortgagor and mortgagee. In the present case adverse possession had not begun to run against the mortgagor, when the mortgage was granted, so that the case cited is clearly distinguishable. In the case cited, the fact that the mortgagee was not entitled to possession made no difference, for time had begun to run against the mortgagor when the entire interest in the property vested in him, and nothing subsequently occurred which could have the effect of interrupting the running of time. Thus both the mortgagor and the mortgagee who derived title from him were equally barred. In *Ram Lal v. Masum Ali Khan*[1] also, the property mortgaged was held adversely to the mortgagor at the date of the mortgage. In *Sheo Amber Sahoo* v. *Bhowaneedeen Kuhvar*[2] the mortgage was a mortgage by conditional sale to become absolute in two years on certain terms. The suit was for possession under the mortgage and was resisted by persons who did not claim under either the mortgagor or the mortgagee on the ground that they had been in adverse possession for 12 years. In holding that the suit was barred the High Court observed: "Where possession of the property alleged to have been mortgaged has been taken by a third party who does not claim under the alleged mortgagor, and has been held by such third party adversely to the mortgagee, the mortgagee is bound to come in within 12 years to vindicate his right." The possession in that case was evidently held to be adverse to the mortgagee but as the facts are not set out in detail we have to conjecture as to the circumstances which were considered to render the possession adverse. The case is distinguishable because the mortgagee was entitled to possession under his mortgage. Further we do not know when the defendant's possession began—a most important consideration as already pointed out. *Prannath Roy Chaudhri* v. *Rookea Begum and others*[3] was also a case of mortgage by conditional sale and so distinguishable. The appellants rely on the following remarks at page 355: "Where a mortgage is subject by law to be foreclosed the title

1. (1903) I. L. R. 25 A. 35. 2. (1870) 2 N. W. P. H. C. R. 223.
3. (1859) 7 M. I. A. 323.

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to foreclose is in the nature of a limit to the title to redeem. It by no means follows as a consequence that the mortgagee foreclosing will be able in a suit for possession to make good against all occupants a title to possession." There is nothing in this to support the appellants' contention. As already indicated there are cases in which a mortgagee can be succesfully met by a plea of adverse possession. *Ram Coomar Sein and others* v. *Prosunno Coomar Sein and others*[1] is also not in point, for there the mortgagee was entitled to sue for foreclosure and possession before the adverse possession began, which was pleaded as a defence to his suit.

Much stress has been laid upon *Karan Singh* v. *Baker Ali Khan*[2]. There the mortgage was created in 1862 and was a simple mortgage, so that so far the case is on all fours with the present case. The defendants' own possession was found to have commenced in 1864, that is after the mortgage. As, however, this possession did not extend over twelve (12) years he sought to tack on the possession of the Collector which began in 1861 before the mortgage on the ground that the possession of the Collector was possession on his behalf and adverse. Their Lordships of the Privy Council observed with reference to the rule of limitation that it was not for the plaintiff, the mortgagee, to prove possession within 12 years but that his suit might be brought within 12 years from the time when the possession of the defendant became adverse to the plaintiff. They then pointed out that the defendant had not been in possession for 12 years and that he could not tack on the Collector's possession from 1861 to the time when in 1863 the Collector delivered possession to him, inasmuch as, since the Collector did not hold for him, he did not claim through the Collector. They did not enter, nor was it necessary to enter, upon the question whether the defendants' possession from 1863 standing by itself should be considered adverse to the mortgagee. It is suggested that we must infer that they considered that possession adverse because they went into the question whether the defendant was entitled to tack on the Collector's possession. Such an inference is not a necessary inference in the circumstances. Had the Collector's possession which began before the mortgage been adverse to the

1. (1864) W. R. 375.

2. (1883) I.L.R. 5 A. 1.

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mortgagor's and had the defendant claimed through the Collector, then the mortgagee's suit would have been barred as in *Nallamuthu Pillai* v. *Betha Naickan* [1]. This supplies a reason why it was considered necessary to consider the question of tacking.

There is nothing in *Nilakant Banerji* v. *Chandra Mullick* [2] which throws any light upon the present question, and the only other decision relied on is the decision of a bench of this court in Second Appeal No. 1689 of 1909—*Ramasamy Padaychi* v *Ponna Padayachi*[3]. That decision undoubtedly supports the appellants' contention. It is, however, mainly based upon *Prannath Roy Chowdry* v. *Rookea Begum and others*[4], *Ammu* v. *Ramakrishna Sastry*[5], *Ram Cooomar Sein and others* v. *Prosunno Coomar Sein and others*[6], *Sheo Amber Sahoo* v. *Bhowaneedeen Kuhvar*[7], and *Karan Singh* v. *Bakar Ali Singh.*[8], which have been dealt with above. The reasons which I have given for holding that these cases do not support the appellants' contention, do not, so far as I can gather from the judgment, appear to have been present to the minds of the learned judges who decided S. A. No. 1689 of 1909. It may also be observed that the precise proposition which they rejected was "that though the right of the mortgagor in the mortgaged property may be extinguished by adverse possession by a person for 12 years after the execution of the mortgage, yet in no case would the mortgagee's remedy against the mortgaged property be lost if his right to enforce the mortgage against the mortgagor is not barred." Enough has been already said in the judgment to show that such a broad proposition cannot be successfully maintained. In *Aimadar Nandal* v. *Makhan Lal Dey* [9] the mortgage was a simple mortgage. Possession which began after the grant of the mortgage was held for more than 12 years prior to the suit by a person claiming under a purchaser of the mortgaged property in execution of a decree against the mortgagor. It was held that limitation did not begin to run against the mortgagee until he became entitled to claim possession after he purchased the

1. (1900) I.L.R. 23 M. 37.
2. (1886) I.L.R. 12 C. 414.
3. (1911) 21 M.L.J. 397.
4. (1859) 7 M. I. A. 323.
5. (1878) I.L.R. 2 M. 226.
6. (1864) W. R. 375.
7. (1870) 2 N. W. P. H. C. R. 223.
8. (1883) I. L. R. 5 A. 1.
9. (1906) I.L.R. 33 C. 1015.

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property in execution of the decree which he obtained upon his mortgage. This decision was dissented from in S. A. No. 1689 of 1909 above referred to, but was followed by myself and *Krishnaswami Aiyar* J. in S. A. No. 682 of 1909, and I shall think it is correct. It is in accordance with what I conceive to be the correct principle, *viz.*, that the interest in immoveable property which is affected by adverse possession is the interest, and that interest only, which the person who was entitled to immediate possession at the time the adverse possession began, had at that time. This principle can be deduced from the language of Article 144 of Schedule II of the Limitation Act of 1877 itself, and the cases already cited supply instances of its application. Under Art. 144, limitation begins to run from the time when the possession of the defendant becomes adverse to the plaintiff. This shows that a claim to immoveable property will not cause time to run against the true owner unless it is accompanied by possession; while the term "adverse possession" clearly implies that the person against whom adverse possession is exercised is a person who is entitled to demand possession at the moment the adverse possession begins. As the possession is thus adverse only to the person having the right to immediate possession, it follows that only the interest which that person has in the property when the adverse possession begins, can be affected by this adverse possession. If such a person has the entire interest when the adverse possession begins, he cannot, by afterwards transferring the whole interest, as by sale, or by transferring, a part of the interest, as by mortgage, prevent the operation of prescription upon the entire interest, unless he also interrupts the possession which is adverse. If, however, while still in possession, he transfers a part of his interest, the transferee will not be affected by the subsequent possession of a third party if under his transfer he is not entitled to possession of the property. In the two cases quoted—*Anando Moyee Dossee* v. *Dhonendro Chunder Mookerjee*[1] and *Brojonath Koondoo Chowdhry* v. *Khelut Chunder Ghose*[2] the mortgagees were affected by the possession of the third party because they were entitled to possession under their mortgages. In *Nallamuthu Pillai* v. *Betha Naickan*[3] and *Ram Lal* v. *Masum Ali Khan*[4] the possession of

1. (1871) 14 M.I.A. 101.
2. (1871) 14 M. I.A. 144.
3. (1900) I.L.R. 23 M. 37.
4. (1903) I.L.R. 25 A. 35.

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the third party began before the mortgage, and the mortgagee was therefore affected by it. Except the decision in S. A. 1689 of 1909 no decision has been brought to our notice which is clearly contrary to the views above expressed. The contention of the appellants must therefore fail.

The only other question is whether Art. 147 or Art. 132 of Sch. II of the Limitation Act of 1877 applies. The courts below have rightly followed the decision of this court in Appeal No. 164 of 1902.

I would dismiss this second appeal with costs.

Benson J.—I concur. The simple mortgage in favour of the defendants was granted before the plaintiffs got possession. When plaintiffs got possession the mortgagee was not entitled to possession; so the plaintiffs' possession, though adverse to the mortgagor, was not adverse to the mortgagee, for it was not inconsistent with his rights. The decision of the lower appellate court is therefore right and the second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Mulla Vittil Suthi Kutti .. Appellant* (*1st Defendant*)

v.

Korambatt Painthali Achutan Nair and others .. Respondents (*Plaintiffs*).

Kutti v. Achutan Nair.

Practice—Plaint—Amendment—Second appeal—New relief, addition of—Scope of amendment.

Where an amendment is necessitated by the plaintiff's carelessness or mistake it would not ordinarily be fair to allow him to rectify his error if the amendment would deprive the defendant of an advantage which he can legitimately claim to have gained by the plaintiff's mistake. But it would be hardly proper to apply this test to cases where the plaintiff cannot be charged with not having exercised reasonable care in the drafting of his plaint.

A prior mortgagee brought a suit for sale without impleading the puisne mortgagee in possession and purchased the property himself and brought a second suit against the puisne mortgagee for possession. The Full Bench decided that the proper remedy for the prior mortgagee purchaser was to bring a suit for sale, thereby setting

* S. A. 864 of 1908. 20th March, 1911.

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at rest what was a doubtful and disputed question of law: *Held* by the Court that in the circumstances the plaintiff should be allowed in second appeal to amend his plaint by substituting therein a prayer for sale for the relief already asked for with liberty to the defendant to put in a fresh written statement.

Second appeal from the decree of the District Court of South Malabar in A. S. No.515 of 1907 presented against the decree of the Court of the District Munsif of Parappanangadi in O. S. No. 111 of 1906.

The case came up for final disposal before this Division Bench after the decision of the Full Bench reported in 21 M. L. J. 213 in which report the facts which led up to the reference to the Full Bench and the other circumstances necessary for the purpose of this report clearly appear.

K. P. M. Menon for appellant.

T. R. Ramachandra Aiyar for respondent.

The Court delivered the following

JUDGMENT:—According to the ruling of the Full Bench the only suit that the plaintiffs in this suit were entitled to institute was one for sale on the footing of their mortgage; and as the plaint contains no prayer for sale of the properties mortgaged to them the suit is liable to be dismissed. They ask for leave to amend the plaint by substituting a prayer for sale for the relief asked for in the plaint. This request is strongly opposed by the learned counsel for the appellant. His opposition is based on several grounds. He contends that the proposed amendment would convert the suit into one of a character inconsistent with its present character as the plaint proceeds purely on the title acquired by the purchase of the property by the 2nd plaintiff at the sale in execution of the decree obtained by the 1st plaintiff. This objection is altogether untenable. The suit is really to enforce the plaintiffs' rights on the mortgage and on the court sale, and the amendment the plaintiffs wish to make now is intended to enforce the right which according to the Full Bench ruling they are entitled to in virtue of the mortgage and the sale. To a suit in ejectment based on the auction purchase only the 1st plaintiff would not be a necessary party at all. The plaint, moreover, sets out the plaintiffs' mortgage and asks the court to hold that the contending defendants have no subsisting right under their puisne mortgage or only the right to

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redeem the first mortgage. The cause of auction in the plaint as proposed to be amended would be the same as in the original plaint. The relief asked for alone would be different.

The second ground of opposition is that the plaintiffs persisted in both the courts below in maintaining their view as to the remedies open to them under the law, although the puisne mortgagees pointed out their error. We think that the plaintiffs can hardly be blamed for the view they took of their rights, having regard to the fact that both the lower courts upheld their contention. Besides, as is apparent from the judgment of the Full Bench, there has been considerable conflict in the judgments of the High Courts including this court with respect to the remedies open to a person in plaintiffs' position. Mr. *K. P. M. Menon* has referred to several cases in which leave to amend was refused in appeal or second appeal when the plaintiffs, notwithstanding the objection taken by the defendant, did not ask for leave to amend in the lower court. We do not consider it necessary to refer to these cases in detail as none of them lays down any rule of general applicability. They proceed merely on the view taken in each particular case of the conduct of the plaintiff. It would not, in our opinion, be reasonable in the present case to refuse leave to amend on the ground that the plaintiffs' advisers adhered in the courts below to their view with respect to a complicated question of law, especially when that view was accepted by two courts.

The third and most important contention of the appellant's counsel is that leave to amend should not be granted where the result of the concession would be that the defendant would be deprived of the advantage which he would have, of raising a plea of limitation if the plaintiffs had to institute a fresh suit instead of amending their former plaint. The decisions in *Weldon* v. *Neal*,[1] *Mallikarjuna* v. *Pullayya*[2]. *Alagappa Chetty* v. *Vellian*[3] and *Pattah Veeran Kutty* v. *Kunhi Kandi Shazhati Veettil Appu*[4] are relied on in support of this contention. It is not argued that these cases lay down any general rule that the court should, in no circumstances, allow an amendment of the plaint on the ground that the defendant would

1. (1887) 19 Q. B. 394.
2. (1892) I. L. R. 16 M. 319.
3. (1894) I. L. R. 18 M. 33.
4. (1911) 2 M. W. N. 182.

not be able in consequence to plead limitation as a defence to the suit. *Weldon* v. *Neal*[1] which is really the basis of all the subsequent rulings, decides merely that the plaintiff will not be allowed to add *fresh causes of action* by way of amendment when if a fresh suit were instituted on these causes of action it would be barred by limitation. Even this position is stated by the learned Judges who decided that case to be subject to exceptions. We cannot hold that the case is applicable where the cause of action is the same, but the plaintiff has made a mistake as to the appropriate remedy which he would be entitled to in law on that cause of action. The established practice of the courts, both in England and in India, is to act with considerable liberality in the matter of granting amendments. *Bowen* L.J. observed in *Cropper* v. *Smith*[1]: "I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct." The true test to be laid down with respect to the defendant's contention appears to us to be this: Where an amendment is necessitated by the plaintiff's carelessness or mistake it would not ordinarily be fair to allow him to rectify his error if the amendment would deprive the defendant of an advantage which he can legitimately claim to have gained by the plaintiff's mistake. But it would be hardly proper to apply this test to cases where the plaintiff cannot be charged with not having exercised reasonable care in the drafting of his plaint—see *Nandlal Thakersey* v. *Bank of Bombay*[2]. On the other hand it would be undesirable, according to the view of the Judicial Committee of the Privy Council in *Mahammad Zahoor Ali Khan* v. *Mussumat Thakooranee Ratta Koer*[3], to allow the defendant to raise a dishonest plea of limitation by refusing permission to the plaintiff to amend his plaint, where he has acted with prudence and care—see *Satappa Chetti* v. *Jogi Sorappah*[4] where leave to amend was granted on the ground that the plaintiff's error was a "not unnatural" one; *Dhani Ram Shaha* v. *Bhaghirathi Saha*[5], where *Banerjee* J. overruled the defendant's opposition because there was no fraud or overreaching on the plaintiffs' part; *Kishendas Rupchand* v. *Racchappe Vithoba*[6] where

1. (1889) 26 Ch. D. 700 at 710.
2. 11 Bom. L. R. 926.
3. (1867) 11 M. I. A., 468.
4. (1893) I. L. R. 17 M. 67.
5. (1875) I. L. R. 22 C. 692 at p. 712.
6. (1909) I. L. R. 33 B. 644.

Batchelor J. points out that the bar of limitation in case a fresh suit if launched would be barred is sometimes a proper ground for allowing an amendment instead of being an objection to doing so.

The cases in *Mallikarjuna* v. *Pullayya*[1] and *Alagappa Chetti* v. *Vallian*[2] are not to the point, as the amendment sought in those cases was by way of introducing new parties into the suit. S. 22 of the Limitation Act expressly lays down that in such a case limitation would run up to the time of the addition of the fresh parties. With reference to the decision in *Pattah Veeran Kutti* v. *Kunhi Kandi Shazhatt Veettil Appu* [3] we do not think that the learned judge who decided that case and proceeded on the authority of *Weldon* v. *Neal* [4] intended to lay down any general rule against allowing amendments where a suit or application would be barred at the date of the amendment, but merely held that in the particular case the party asking for leave to amend was not entitled to the indulgence. We are of opinion that, as no blame can be imputed to the plaintiffs in this suit for considering themselves entitled to the reliefs they asked for, we should allow them to amend their plaint by substituting a prayer for sale for the prayers for ejectment and foreclosure. The defendants concerned will be entitled to put in a fresh written statement if so advised, and any fresh issues arising on such written statement must of course be tried.

The decrees of the lower courts are therefore reversed and the suit is remanded to the court of first instance for trial in accordance with the above directions.

In the circumstances of the case, all costs incurred up to date must be reserved and abide the final decision of the suit.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Munro.

Chinnathayammal .. Plaintiff* (*Appellant*).

v.

Chikkanna Chetti .. Defendant (*Respondent*)

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* S. A. No. 563 of 1908. 21st April, 1910.

1 (1892) I. L. R. 16 M. 319.
2. (1894) I. L. R. 18 M. 33.
3. (1911) 2 M. W. N. 182.
4. (1887) 19 Q. B. D. 394.

Chinna-thayamal. v. Chikkana Chetti.

Madras Acts—Civil Courts Act—Transfer of part-heard appeals to Sub-Judge's file.

A District Judge is not competent to transfer an appeal heard in part and remanded by his predecessor to the Subordinate Judge's file.

Second appeal from the decree of the Subordinate Judge's Court of Salem in A. S. No. 177 of 1905 presented against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 252 of 1904.

T. Subramania Aiyar for appellant.

The Advocate General (*P.S. Sivaswami Aiyar*) for respondent.

The Court delivered the following

JUDGMENT :—The only ground of appeal with which we need deal is the ground of jurisdiction, *viz.*, that the District Judge having heard the appeal in part and remanded issues for trial, he could not transfer the appeal to the Subordinate Judge.

The Advocate-General suggested that in this case the order of transfer was made by the High Court and not by the District Judge. Apparently, however, no order of transfer was made by the High Court. We must take it then the order was made by the District Court. That being so, the case is governed by the decision in *Kumarasami Reddiar* v. *Subbaraya Reddiar*[1] We agree with this decision. We think it is more convenient to deal with the present case on the general principles on which *Kumarasami Reddiar* v. *Subbaraya Reddiar*[1] was decided than —as the Advocate-General has invited us to do—to take into consideration the fact that in this particular case the individual District Judge, who heard the appeal in part and remanded the case for findings, was not the District Judge when the appeal was heard.

We must set aside the decree of the Subordinate Judge and remand the appeal to the District Judge to be dealt with according to law.

Costs will abide the event.

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1. (1900) I. L. R. 23 M. 324.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Munro.

J. M. Rodrigues .. Appellant*

v.

A. M. Mathias & another .. Respondents.

Rodrigues *v.* Mathias.

Court Fees Act, Sch. II, Arts. 1, 11—*Appeal against order in probate proceedings.*

Article 1 of Schedule II of the Court Fees Act is applicable to an appeal from an order in probate proceedings and not Article II of Schedule II; and no *ad valorem* fee need be paid on it.

Appeal from the decree of the District Court of South Canara in O. S. No. 5 of 1909.

K. Narayana Row for appellant.

S. Swaminadhan for respondent.

K. Narayana Row.—The order granting probate is not a decree nor an order having the force of a decree. Therefore it does not come under Article 1 of Schedule I. It comes under Article 1, Schedule II. The proper stamp will be Rs. 2 *Upadhya Thakir* v. *Pershid singh*[1] and *Jamjang Divabha* v. *Goyabhai Kikabhai*[2] referred to.

S. Swaminadhan—contended that the memorandum of appeal should bear an *ad valorem* stamp. A. S. 94 of 1900. A. S. 54 of 1900 referred to.

The Court delivered the following

JUDGMENT :—The petitioners in their application for probate valued the assets at Rs. 14,031-9-2. The counter-petitioner objected that their valuation was too low and the proper valuation was found to be Rs. 26,547-14-6. The counter-petitioner has now appealed and has paid stamp duty *ad valorem* on Rs. 14,031-9-2. It is contended by the petitioner that stamp duty should be paid on Rs. 26, 547-14-6. The counter petitioner replies that he need not have paid more than Rs. 2 stamp duty as the appeal falls under Article 1 or Article 11, Sch. II, of the Court-Fees Act, and that in any case he is not bound to pay on more than the petitioner's valuation. We do not think Article 11 of Sch. II applies, for the order appealed

A. No. 167 of 1910. 5th January, 1911.

1. (1896) I. L. R. 23 C. 723. 2. (1891) I. L. R. 16 B. 408.

Rodrigues *v.* Mathias

against undoubtedly has the force of a decree as it decides the representatives title and to this extent we agree with the decisions of this court in Appeal No. 94 of 1900 and Appeal 54 of 1900. In support of the contention that Article 1 of Sch. II applies, we are referred to the case of *Jamsang Devabhai* v. *Goyabhai Kikhabhai*[1] and *Upadhya Thakur* v. *Pershdi Singh.*[2] These decisions undoubtedly support the contention. The question of the applicability of Article 1 of Sch. II was not considered in Appeals Nos. 54 and 94 of 1900 already referred to, and we are prepared to follow the Calcutta and Bombay decisions. We also think that on principle an *ad valorem* stamp should not be levied in such cases. The only title which the order appealed against gives to the petitioner is the right to administer the estate and if he has to sue to recover the estate he will have to pay stamp duty on its value. We do not think stamp duty on the value of the estate should be twice exacted. On the merits, taking the evidence at the highest, there is no evidence that the witnesses signed in the presence of the testator as required by S. 50 of the Succession Act. The will is therefore not proved and the order of the District Judge is set aside. No costs will be allowed throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Subramania & others .. Appellants *

v.

Muthammal .. Respondent.

Subramania *v.* Muthammal

Hindu Law—Widow's right to recover arrears of maintenance—Demand unnecessary—Waiver, proof of—Vrithams, cost of.

No demand is necessary to entitle a widow to arrears of maintenance.

Where defendant pleads waiver of a widow's right to arrears of maintenance, it is upon him to show that the plaintiff agreed to waive her right or led the defendant to believe as a resonable man that she would not claim arrears. [See *Raja Yeralagadda Mallikarjuna Prasada Nayudu* v. *Raja Yerlagadda Durga Prosada Naidu* [1].]

A Hindu widow is entitled to the cost of performing such *vrithams* as are usually observed by widows. [*Sreemathy Nittokisore Dossee* v. *Jogendro Nath Mallick*[2] referred to.]

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1. (1891) I. L. R. 16 B. 408. 2. (1896) I. L. R. 23 C. 723.

* A. No. 235 of 1909. 25th January, 1911.

1. (1901) I. L. R. 24 M. 147 (P.C.) 2. (1878) L.R. 5 I. A. 55.

Appeal from the decree of Court of the Subordinate Judge at Tinnevelly in O. S. No. 11 of 1908. Subramania v. Muthammal

T. R. Venkatrama Sastri for appellant.

T. R. Ramachendra Aiyar, *N. Rajagopalachari* and *K. S. Ganapathy Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—We accept the finding of the lower court with respect to the annual income of the family and on issue 5. With respect to the rate of maintenance we think that the Subordinate Judge has exercised a sound discretion in fixing the amount at Rs. 15 a month. We dismiss the appeal with costs.

With regard to the memorandum of objections, while we agree with Mr. Ramachandra Iyer that the rate of maintenance should be such as to enable the plaintiff to live comfortably, we cannot agree that Rs. 15 is not ample in the circumstances.

We think that the lower court has misunderstood the principle on which arrears of maintenance are awarded to a widow. No demand is necessary to entitle her to arrears. The defendant has to show that the plaintiff either expressly agreed to waive her right to arrears or led the defendant to believe as reasonable men that she would not claim arrears. See *Raja Yerlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yerlagadda Durga Prasada Nayudu* [1]. We allow arrears from the 15th November, 1906 up to the date of demand, *viz.*, the 13th August 1907 at Rs. 10 a month and at Rs. 15 from the latter date. We also allow a further sum up to Rs. 100 for *vrithams* on demand being made when the expense is actually incurred. The Subordinate Judge is wrong in supposing that a Hindu widow is not entitled to the cost of performing such *vrithams* as are usually observed by widows. See *Sreemathy Nittokisore Dossee* v. *Jogendro Nath Mullick*[2].

The decree must be modified as above. The parties will pay and receive proprtionate costs on the memorandum of objections.

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1. (1901) I. L. R. 24 M. 147. (P. C.) 2. (1878) L. R. 5 I.A. 55.

Nagaraja Pillai v. Vythianatha Iyer.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Nagaraja Pillai .. Petitioner*

v.

Vythianatha Iyer & others .. Respondents.

Charter, Act, S. 15—Revision from interlocutory orders.

S. 15 of the CharterAct is sufficiently wide to admit of interference by the High Court from interlocutory orders, though it may be doubted whether the words of S. 115, C. P. C., were intended to apply to interlocutory orders.

Petition under S. 115 of Act V of 1908 and S. 15 of the Charter Act praying the High Court to revise the order of the District Munsif's Court of Mayavaram in I. A. No. 679 of 1910 in O. S. No. 112 of 1909.

T R. Ramachendra Aiyar and *T. R. Krishnaswami Aiyar* fro petitioner.

T. R. Venkatrama Sastri for respondens.

The Court delivered the following

JUDGMENT :—As regards the preliminary objection that we have no power to revise the order in question we are of opinion that S. 15 of the Charter Act is sufficiently wide to cover a case of this nature (see *Somasundara Chettyar* v. *Manikka Vasaka Desika Gnana Sambanda Pandara Sannadhi* [1] and *Veerabhadra Chetty* v. *Nataraja Desikar*[2]) though it may be doubted whether the words of S. 115 of the Civil Procedure Code of 1908 were intended to apply to interlocutory orders. It is not, however, necessary to decide the latter question.

On the merits we think there can be very little doubt that by the words " production * * is not in the interests of the public service" in the letter of the Engineer to the District Munsif, it was intended to convey that in the opinion of the Engineer the production of the documents would be detrimental to the interests of the public service within the meaning of S. 124 of the Evidence Act under which the privilege was claimed. It is also contended that the District Munsif's finding that the communication in question was made in official confidence is not based on

* C. R. P. No. 363 of 1910. 25th January, 1911

1. (1907) I. L. R. 31 M. 40. 2. (1904) I. L. R. 28 M. 28.

sufficient data and that he was wrong in not inspecting the documents. Nagaraja Pillai v. Vythianatha Iyer.

We are unable to say upon the materials placed before us and in the exercise of our powers of revision that the District Munsif was wrong in the circumstances of the case in saying that the communication in question, being from a subordinate officer, was *prima facie* of a confidential nature. The petitioner, it must be noticed, did not ask the District Munsif to take any evidence on the point. As regards the refusal of the District Munsif to inspect the documents, S 162 of the Evidence Act leaves the matter to the court's discretion, and we are not in a position to hold that the discretion has not been properly exercised in this case. This petition is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Maryammal .. Appellant*

v.

Kaliyammal .. Respondent.

C. P. C., S. 11—"*Directly and substantially in issue.*"—*Probate proceedings—Revocation, question of—Question in issue in probate proceedings.* Maryammal v. Kaliyammal

The bare decision in a probate proceeding that two prior wills of the testator had not been revoked by a third will is not *res judicata* in a subsequent suit where the question is how far the dispositions in the prior wills were affected by the third will.

Appeal from the decree of the Subordinate Judge's Court at Salem in O. S. No. 14 of 1906.

R. Sadagopa Chariar and *T. Narasimha Aiyangar* for appellant.

T. Subramania Aiyar for respondent.

The Court delivered the following

JUDGMENT :—In this case the lower court does not seem to have correctly appreciated the nature of the question arising for decision. The whole case has been disposed of on the first issue "whether the opinion of this court (the District Court of Salem) in O. P. No. 6 of 1905 in the matter of the construction of the three wills of Raja Gounden is *res judicata* so as to

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* A. No. 24 of 1908, 25th January, 1911.

Maryammal v. Kaliyammal

bar the plaintiff from asking the court to place a different construction thereon." O. P. No. 6 was an application by the first defendant herein for probate of the three wills of Raja Gounden dated the 16th of April, the 11th September, and the 19th December, 1902. The plaintiff in the present case while admitting the genuineness of all the three wills contended that the two earlier wills were revoked by the will dated the 19th December 1902. The District Court held that the earlier wills were not revoked by the last will. It expressly refrained from deciding whether on reading the three wills together it would have to be held that any of the dispositions in the earlier wills was superseded by the last will. It merely held in effect that there were no words in the latter expressly or by necessary implication revoking the earlier wills. This it was quite enough for the court to do as a court of probate. The Subordinate Judge is wrong in holding that the District Judge's judgment, Exhibit V, decided that all the dispositions in the earlier wills would remain in force notwithstanding the will of the 19th December. The plaintiff no doubt would be precluded from contending that the last will revoked the earlier wills except by superseding any one or more of the dispositions contained therein, by the dispositions contained in the last will. We do not think it desirable to say anything more as to what dispositions in the earlier will are still in force as the case had not been properly tried and even the three wills had not been put in evidence. The respondent's vakil admits that the decision of the lower court cannot be supported with reference to the plaintiff's claim to manage the charities. The decision of the lower court must be reversed and the suit remanded with directions to restore it to the file and dispose of it afresh according to law. The costs of this appeal must abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sankaran Nair.

The Hindus of Kannamapalaiyam village, Palladam Taluk .. Petitioners*

v.

Kaikkolar Christians of the same place. Counter-Petrs.

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*Cr. R. C. 621 of 1910. 8th December 1910.
Cr. R. P. 512 of 1910.

Hindus of Kannama-palaiyam. v. Kaikkolar Christians.

Cr. P. C., S. 147—" Dispute likely to cause breach of the peace"—Use of well.

S. 147 does not prohibit the lawful use of a public way or right and a Magistrate has jurisdiction to protect, by an order under S. 147, persons exercising their rights (as in this case the right to draw water from a well) when the same is threatened to be interfered with by others.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the District Magistrate of Coimbatore under S. 147 of the Cr. P. C. in M. C. No. 1 of 1910.

T. Ranghachariar for petitioners.

T. Richmond for counter-petitioners.

The Court made the following

ORDER:—The Magistrate has found that the dispute about the right of the Christians to use the well is likely to lead to a breach of the peace at any time. That they have been till now held in check by Father Rondy is not a reason for holding that there is no likelihood of a breach of the peace, as that check may at any time prove ineffective, more particularly when it is found that the petitioners have not been protected in the exercise of their just rights for having obeyed him. It is also contended that the Christians have not exercised their rights within three months next before the commencement of the enquiry. The proceedings alleged to be initiated by the order of the District Magistrate on the 21st September were only a continuation of the proceedings which were commenced on the 20th May when Father Rondy presented his complaint. That complaint is the institution of the enquiry under the proviso to S. 147 of the Criminal Procedure Code, and it is found by the District Magistrate that the Christians were exercising their rights within three months before that date, *i.e.*, till the 20th April.

It is next contended that the Magistrate had no jurisdiction to pass any order under S. 147 of the Criminal Procedure Code, and the decision in Civil Revision Petition No. 402 of 1908, *Kolandai Nayakan* v. *Karabudda Savudri* [1] and in *In re Narayana* [2] were referred to. The two latter decisions had reference to S. 532 of the Criminal Procedure Code (Act X of 1872) and the corresponding S. 147 of the present code must not be taken

1. (1896) 6 M. L. J, 193. 2. (1884) I. L. R. 7 M. 49

Hindus of Kannamapalaiyam, v. Karkkolar Christians.

to authorise the Magistrate to prohibit the lawful use of a public way, and it was pointed out that, where rights are threatened the persons entitled to them should receive such protection from the Magistrate as the circumstances admit of. In this case the petitioners before this court were preventing the Christians from the lawful exercise of their right to take water from the well, and we are of opinion that there is nothing in the section to prevent the Magistrate from passing an order forbidding the petitioners, Hindus, from interfering with the exercise of that right.

The petition is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair.

Muthu Pillai & others .. Petitioners*

v.

The Emperor .. Respondent.

Muthu Pillai v. Emperor.

Cr. P. C., S. 110, C. (*f*)—*Evidence of general repute inadmissible.*

Where a person is solely charged under Clause (f.) of S. 110. of the Criminal Procedure Code, evidence of general repute is not admissible. *Emperor*, v. *Bidyapath*[1], *Katai Haldar* v. *Emperor*[2], *Wahid Alikhan* v. *Emperor*[3] *Parasutla* v. *Emperor*[4] referred to]

Petition under S. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Sub-Divisional Magistrate, Sattur, in M. C. No. 7 of 1909.

K. N. Gopal Counsel for the petitioner.

The Public Prosecutor(*C. F. Napier*,) for the respondent (the Crown)

The Court made the following

ORDER :—The Sub-Divisional Magistate of Sattur passed an order requring the petitioners, six in number, to show cause why they should not be made to execute bonds for good behaviour as he had information that each of them " is so desperate and dangerous as to render his being at large without security hazardous to the community"—see s. 110, Clause (*f*) of the Code of Criminal Procedure.

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* Cr, Rev, C, No. 62 of 1910, Cr. Rev. P. No. 52 of 1910. — 1st August, 1910.

1. (1903) I. L. R. 25 A. 273.
2. (1904) I. L. R. 29. C. 779.
3. (1906) 11 C.W.N. 789.
4. (1909) 13 C.W.N. 244.

After taking evidence he passed his final order directing them to give security. This is a petition against that order. The main contention is that there is no legal evidence on which the order can be sustained. Muthu Pillai *v.* Emperor.

All the prosecution witnesses except the first two and the fourth give evidence of accused being habitual offenders by repute. The first two speak to an assault by some of the accused for which there were tried and acquitted The fourth witness speaks to another assault, but the Magistrate thinks, and I agree with him, that he cannot be believed without corroboration which is not forthcoming.

The only remaining evidence is of general repute and hearsay, and such evidence is only admissible under S. 117 to prove that a person is a habitual offender under S. 110, but not to prove a charge under S. 110, Clause (*f*) of being a desperate and dangerous character. See *Emperor* v. *Bidhyapathi*[1] where the question is discussed with reference to *S.* 107; see also *Kalai Haldar* v. *Emperor*[2]. The ruling in *Kalai Haldar* v. *Emperor*[2] has not been in any way shaken but is followed in *Wahid Ali Khan* v. *Emperor*[3].

It is argued by the Public Prosecutor that though evidence of general repute is not admissible to prove a charge under S. 110 Cl, (*f*) it is admissible to prove that a person is a habitual offender under S. 117 and the fact so proved is evidence which the Magistrate may consider to prove a charge under Clause (*f*) and he relies upon *Parasulla* v. *the King-Emperor*[4] where a person was charged under both clauses (*a*) and (*f*).

Whether, where a person is tried jointly for charges under clause (*f*) and under any other clause, a finding that he is an habitual offender under the other clause may be taken into consideration when deciding the charge under clause (*f*), it is unnecessary to consider, and probably it will not be of any practical use to consider that question, as in that case an order could be passed without reference to Clause (*f*). But I am clearly of opinion where a person is solely charged under Clause (*f*) evidence of general repute is not admissible, as a provision of law which is an exception to the general rules of evidence must be

1. (1903) I. L. R. 25 A. 273.
2. (1904) I. L. R. 29 C. 779.
3. (1906) 11 C. W. N. 789.
4. (1909) 13 C. W. N. 244.

only applied to cases to which it is confined by the Legislature. Excluding such evidence, there is none to support the order appealed against and it is accordingly set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Muttevi Pattabhi Ramanujacharyalu and another .. Appellants* (*Defendants*)

v.

Peddinti Alahaswgaracharyalu & others .. Respondents (*Plaintiffs*).

Pattabhi Ramanuja-charyalu. *v.* Alahaswara-charyalu.

Religious endowment—Archakaship—Succession to—Resignation—Effect of—No bar to subsequent succession.

The plaintiff, an archaka, resigned his office (which consisted of the archakaship of a temple for two days in a month) and was, succeeded by his mother:—*Held* that on the mother's death the plaintiff was in the absence of any disqualifying circumstance, the proper heir to the office and not his (plaintiff's) son.

Second appeal from the decree of the Subordinate Judge's Court of Kistna at Ellore in A. S. No. 160 of 1908 presented against the decree of the Court of the District Munsiff of Ellore in O. S. No. 35 of 1904.

P. Narayana Murthi for appellants.

T. Prakasam for respondents.

The Court delivered the following

JUDGMENT:—The suit out of which this second appeal arises was brought by the plaintiff (Respondent) to recover the office of *Archakar* of a certain temple for 4 days in each month. The post was held by the plaintiff's mother up to her death in 1901, partly in virtue of a demise (Exhibit III) executed by her husband in 1877 shortly before his death, and partly in virtue of the decree of this Court, Exhibit VIII (*b*) in Second Appeal No. 1185 of 1896, declaring her right to succeed to that portion of the office (2 days monthly) which the plaintiff had succeeded to on his father's death and which he resigned in 1894.

The correctness of the present decree in so far as it relates to the first portion is not questioned in the course of the hearing

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* S. A. No. 1516 of 1909. 24th January 1911.

in this court, but the plaintiff's right to succeed to the 2 days' office which he formerly held and resigned is impugned on two grounds:—(1) that he became permanently incapable of holding the office in 1894 by reason of misconduct with a Sudra woman; (2) that in accordance with the ordinary rules of Hindu inheritance, not the plaintiff, but the plaintiff's heirs are entitled to succeed on the death of his mother Rathamma.

As regards the first objection, the District Munsiff has unmistakeably found that the misconduct charged (adultery and taking meals with a Sudra woman) was not established. The Subordinate Judge's conclusion has not been very clearly set forth in paragraph 11 of his judgment; but we understand him to mean that there is not sufficient evidence to establish misconduct of such a nature as to entail disqualification for holding the post of *Archakar*. Looking to the distant period at which the misconduct is said to have occurred, and to the fact that it does not appear to have been followed by any definite action of the plaintiff's castemen, we consider that the lower courts were right in requiring very strong evidence of misconduct, and their findings are justified.

As regards the second point it is admitted that if, instead of his mother, a son of the plaintiff's had succeeded to the office after his (the plaintiff's) registration in 1894, then in the absence of a nearer heir, the plaintiff would be entitled to succeed as heir to his son on the latter's death, in the absence, of course, of any personal disqualification by misconduct. But it is argued that on the death of Rathamma, the office passed in accordance with the ordinary rule of inheritance to the heirs of the last male holder; that is, to the heirs of the plaintiff himself. The plaintiff cannot, it is said, be his own heir, and therefore cannot succeed, and is not entitled to sue.

This argument appears to us to be an attempt to stretch the ordinary rules of inheritance so as to apply them to cases which they can only govern in a modified form. It is impossible to treat an office in this respect as if it were an ordinary piece of property like a house or a field. In the case of the latter there is no process analogous to the resignation of an office by an office-holder. All arguments based on the fiction that the person who resigns is civilly dead, so far as that particular office is concerned

are fallacious; for admittedly, if the plaintiff's successor had been his son, instead of his mother, the plaintiff would be treated as alive and competent to succeed to his son on the latter's death. All that can be said in such a case as the present is, that on Rathamma's death the office reverted to the family of her husband (and certainly not to her own relatives) and the plaintiff being alive and not disqualified, is the proper person to succeed.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair.

Ahmed Bee .. .. Complainant*

v.

Ameena Bee .. .. Counter-Petitioner.

Amed Bee v. Ameena Bee.

Cr. P. C., S. 203—"Record his reasons"—Reference to Police report when enough.

An order of dismissal under S. 203 Cr. P. C. should state reasons. A reference to the police report for the reasons may be a sufficient compliance with the provisions of the section, only if the police report is made a part of the record.

Petition under S. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the 4th Presidency Magistrate, Egmore, Madras, in Application No. 9297 of 1909.

Joseph Satyanadar for Petitioner.

The Public Prosecutor for the Crown.

The Court made the following

ORDER:—In this case the order was apparently passed under S. 203 of the Code of Criminal Procedure. Under that section the Magistrate must record his reasons for the dismissal. In his order the Magistrate only says that he agrees with the Police. This may be sufficient if the Police report is made a part of the order. This has not been done. The reasons for the dismissal must appear in the order itself. Otherwise it is not possible for this court to exercise its powers of revision. The order is set aside and the Magistrate is directed to pass fresh orders.

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* Cr. Rev. C. 712 of 1909. 11th February 1910.
Cr. Rev. P. 551 of 1909.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Munro.

T. Subbarayulu Chetty & others .. Appellants* (*Defendants*).

v.

T. Kamalavalli Thayaramma .. Respondent (*Plaintiff*).

Subbarayulu Chetty *v.* Kamalavalli Thayaramma.

Hindu Law—Maintenance of widow—Decree, form of—Liability of property—Extent of liability.

A partition effected among the members of a Joint Hindu family subsequent to the institution of a maintenance suit by an undivided coparcener's widow will not affect her right to a decree charging her maintenance on the whole property of the joint family as it was on the date of the plaint. [*Hemangini* v. *Kedar Nath*[1] distinguished.]

A widow of an undivided coparcener has a right to have her maintenance charged on the entire joint family property and not merely on the share of those coparceners of her husband whose share might be said to have been accelerated by her husband's death, *i.e.*, the share of the husband's branch of the family. [*Jayanti Subbayya v. Alamelu Mangamma*[2] explained.]

Obiter.—It may be that a decree for maintenance would not be enforceable against a member of the joint family which gave something more than the interest of her deceased husband which had passed by survivorship.

Appeal from the judgment of Mr. Justice Sankaran Nair passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 264 of 1908.

The facts of the case appear sufficiently from their Lordships' judgment.

C. V. Anantakrishna Aiyar for appellants.

Venkatasubba Rao and Radhakrishnayya for respondent.

C.V.Anantakrishna Aiyar for appellants.—It is only the husband that is personally liable and not others. Even after his death his brothers on whom his property might have devolved are not personally liable. Even if they have alienated the property which so devolved, that property alone is liable—MAYNE, para 450. I refer to *Hemangini* v. *Kedar Nath*[1]. [*Munro* J.—Why not one be liable if he got the estate and alienated it?] A woman is entitled to maintenance only out of the property which would have fallen to her husband's share. Therefore no more property

* O. S. No. 9 of 1910. 7th April, 1911.

1. (1889) I.L.R. 16 C. 758 at 763 (P.C.) 2. (1902) I.L.R. 27 M. 45.

Subbarayulu Chetty *v.* Kamalavalli Thayaramma.

than that could be charged. Her right to maintenance does not in any way prevent a partition being entered into. [*Munro* J.—The whole of the undivided estate is said to be liable.] That is to the extent of her husband's share, and that too only as against those of the co-parceners who actually benefit by right of survivorship—*Jayanti Subbaya* v. *Alamelu Mangamma*[1]; MAYNE'S *Hindu Law*, Arts. 270, 477.

Venkatasubba Rao and *Radhakrishnayya* for respondent.—[*Court.*—Why should there be a decree against the other branches of the family which were joint? This the only point on which we want you to argue]. I am not bound by the subsequent partition. The maintenance of widows of the family is a liability upon all the members of the family—MAYNE, Art. 470; WEST & BUHLER, 3rd Edn., p. 791. On the death of one member of the joint family it is all the other branches that benefit by survivorship and not those members only of the deceased's branch. It is clear that if other members of the same branch die, the whole that would belong to that branch would go to the other branches. So long as the family is undivided all the members of the family, to whatever branch they may belong, are equal. Suppose all branches divide without making provision for the maintenance of the widow then all the branches are liable—BHATTACHARJEE'S *Joint Hindu Family*, pp. 390 391. So far as the *Mitakshara* is concerned there can be no doubt. STRANGE'S *Hindu Law*, pp. 166, 170, 173; *Ramachandra Dikshit* v. *Savitribhai*[2]. [*Munro* J.—You say it is like a debt due by the family.] Yes—*Lakshman Ramachandra Joshi* v. *Satyabhamabhai*[3]. From the time a woman becomes a widow, the liability to maintain her attaches; it does not matter whether the partition is before or after the claim for maintenance, made privately or by suit. Except with the consent of the widow, no assignment of the liability to maintain her can be valid. At a partition provision for marriages, etc., of uninitiated members must be made—*Jairam Nathu* v. *Nathu Shamji*.[4] That is going further than the right of maintenance-holder. The statement in *Jayanti Subbayya* v. *Alamelu Mangamma*[1] at p. 48 is composed of two propositions, *viz.*, the liability and the quantum of maintenance. A

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1. (1902) I. L. R. 27 M. 45 at 48.
2. (1867) 4 B. H. C. R. 73.
3. (1877) I. L. R. 2 B. 494 at 514, 520.
4. (1906) I. L. R. 31 B. at 54.

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consideration of the latter ought not to be interpreted as affecting the liability of all the members. [*Chief Justice.*—If the quantum cannot exceed the would-be right of the husband, then why should you make other branches and other property liable?] My right is attached to the whole property, and that cannot be avoided by a subsequent division—Form No. 92, paras 7 and 8, and Form Nos. 93 and 98. of the Original Side Rules. This partition was after the issues were settled in the case. On operation of survivorship, see TREVELYAN'S *Family Law*, p. 243. *Hemangini* v. *Kedar Nath*[1] deals with *Dayabhaga Law*.

C. V. Anantakrishna Aiyar, in reply, drew a distinction between cases of inheritance and survivorship and said that *Mussamut Laltu Kuar* v. *Ganga Bishan*[2] favoured his contention.

The Court delivered the following

JUDGMENT:—*The Chief Justice.*—This is an appeal from a judgment of Mr. Justice *Sankaran Nair* awarding the plaintiff Rs. 25 a month by way of maintenance and giving a decree in her favour for a sum of Rs. 700 which represents the value of certain jewels which she claimed as her property. Three points were raised on behalf of the appellant. The first was that the decree was wrong in as much as it was given against all the members of the family of the plaintiff's deceased husband. The second point was that Rs. 25 a month was too much for her maintenance. The third point was that the learned judge was wrong in giving plaintiff a decree for Rs. 700—for the jewels which she claimed.

I can deal with the 2nd and 3rd points quite shortly and I will take them first. In arriving at Rs. 25 a month as the proper sum to be awarded to the plaintiff for maintenance the learned Judge refers to a discussion that took place after the plaintiff's husband's death and to a decision by certain arbitrators, who were of opinion that the plaintiff should be paid Rs. 10 a month for maintenance; that she should be given jewels worth Rs. 1,500 as her absolute property and a life interest in jewels worth Rs. 500. The learned Judge points out that this really amounts to a payment of almost a sum of Rs. 1,500 as representing the value of jewels to which she is absolutely entitled and a monthly payment of Rs. 10 and a life interest in jewels

1. (1899) I. L. R. 16 C. 758, P. C. 2. (1875) 7 N. P. W. 261 (F.B.)

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Chief Justice.

worth Rs. 500 and taking them into consideration he thinks that Rs. 25 a month in lieu of a monthly payment of Rs. 10, Rs. 1,500 worth of jewels and a life interest in Rs. 500 worth of jewels would be a fair equivalent. He accordingly assesses her maintenance at that rate. I am not prepared to hold that the learned Judge was wrong in assessing the maintenance at that amount. The third point was not seriously pressed by Mr. Ananthakrishna Iyer. The learned Judge says that he is inclined to accept the evidence of the plaintiff that the jewels claimed belonged to her and accordingly found in her favor. I am not prepared to say he was wrong.

We come now to what is really the important point in this case. The contention on behalf of the appellant is that the judge was wrong in giving a decree against all the members of the undivided family of the plaintiff's husband. The actual form of the decree is that the 1st, 3rd, 4th and 5th defendants do pay to the plaintiff her arrears of maintenance and a further sum of Rs. 25 a month and that the arrears and the monthly maintenance be a charge on a certain house, No. 334, Mint Street, which forms part of the family property. Now it appears from the genealogical tree which has been furnished to us that the 5th defendant is the brother of the deceased husband of the plaintiff and represents the plaintiff's husband's branch of the family. The plaintiff's husband was the grandson of the common ancestor Rangiah Chetti, he and the 5th defendant representing one branch of the family. The 4th defendant is the grandson of the common ancestor through another son, and the 1st defendant is a son of the common ancestor. The 3rd defendant is the grandson of the common ancestor through another son. There are thus 4 branches of the family of which Rungiah Chetti was the common ancestor.

After the presentation of the plaint by the plaintiff in this case an agreement was come to amongst the surviving members of the family for a partition of the family property. It is fairly obvious that this was a counter-move to the plaintiff's claim for maintenance. Of course the other members of the family are perfectly entitled in law to take any steps which the law allows to defeat a claim for maintenance which is raised by a widow of a deceased member of the family.

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In regard to the partition agreement, the learned judge observes that no transaction amongst defendants subsequent to the plaint can prejudicially affect the plaintiff's claims, and her claim must, therefore, be treated as that of a widow of an undivided family. It was said on behalf of the respondent that the learned Judge might have put the case more clearly than he did. His reference to the presentation of the plaint was of course with regard to the argument that was presented to him in the case, and it may well be that he could have put it that a completed partition among the defendants before the suit was instituted would not defeat the claim of the widow for maintenance. However, it is not necessary for me to discuss that question. I think it proper to deal with this case on the facts that actually arise. The case we have to deal with is a case where the widow presents a plaint for maintenance against the surviving members of her deceased husband's family and after the institution of the suit—as a matter of fact in this case after the settlement of issues—a partition is arranged between the members of the family. Mr. Ananthakrishna Aiyar contended that the proposition of the learned Judge was wrong. He relied upon the authority of the decision in *Hemangini Dasi* v. *Kedar Nath Kundoo Chowdury*[1]. In that case there is to be found, on p. 766, this passage: "Where there are several groups of sons the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed in accordance to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation." In the course of the judgment reference is made to a passage in *Dayabhaga*, Ch. III, S. I. referred to at p. 764 of the report. It seems perfectly clear that the decision was given with reference to *Dayabbuga Law* and with reference to the special facts of that particular case, which was a case of several groups of sons, and the right to maintenance of their mothers had to be decided. I do not think the judgment in that case is binding upon us in any way with reference to the question which we have to decide under the *Mitakshara Law* as administered in this Presidency. I am of opinion, therefore, that the learned

1. (1889) I.L.R. 16 C. 758. (P. C.)

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Judge was perfectly right when he says that the transaction subsequent to the suit cannot prejudicially affect the plaintiff's claim and that her plaint must be treated as that of a widow of a deceased member of an undivided family.

Now the question is, what are the rights of a widow of an undivided family? Mr. Ananthakrishna Aiyar's argument was this, as I understood it : that the share or interest of the deceased husband of the plaintiff passed not to the members of the undivided family as a whole, but to the surviving members of that branch of the family of which he and the 5th defendant were members, and that the decree against the other members of the family was wrong. In support of that proposition he relied upon an observation of Mr. Justice *Bhashyam Iyengar* in the case of *Jayanti Subbaya* v. *Alamelu Mangamma*[1], the observation appearing on p. 48. The learned Judge there says : " When an undivided Hindu family consists of two or more as father and sons or otherwise and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners *quoad* the share or interest of her deceased husband in the joint family property which has come by surviorship into the hands of the surviving co-parcener or co-parceners, and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet, when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein. " Now Mr. Ananthakrishna Aiyar contended that the words " share or interest of the deceased husband in the joint family property which has come by surivorship into the hands of the surviving co-parcener or co-parceners " were only meant to apply to "surviving co-parceners" who derived an immediate benefit from the fact of their being the survivors in respect of the share or interest of the deceased members of the family. That is to say, to put the case accurately with reference to the facts of this case, he contended that the "surviving co-parceners" meant the 5th defendant, the other member of the plaintiff's branch of the family, and not the other members of the undivided family. The expression "into the hands of the surviving co-parceners" is of course,

1. (1902) I. L. R. 27 M. 45.

figurative, because nothing but an intangible share passes by way of survivorship. It is no doubt true here the 5th defendant's share increases *eo instanti* by right of surivivorship on the death of the only other member of his branch of the family, and the shares of the other members of the family do not increase *eo instanti.*

But I am certainly not prepared to hold that the words of the learned Judge were intended to apply to the members of the branch of the family of which the deceased man was a member, and not to the members of the joint family generally.

We have been referred to various text-books and authorities by the learned vakil for the respondent and I dare say he would have cited more if we had not stopped him. I may refer to a few of them. I shall first take para 470 in MAYNE'S book on *Hindu Law.* Having ascertained what property there is to divide, the next step is to ascertain its amount. For this purpose it is necessary first to deduct all claims against the united family for debts due by it, or other charges on account of maintenance, marriage or ceremonies, which it would have to provide for, if it remained united. So the obligation to maintain is placed in exactly the same basis as an obligation to pay any other family debt. Then in BHATTACHARYA'S *Law Relating to Hindu Joint Family,* Edition of 1885, at p. 390, the learned author observes:—"I have already noticed that in many instances the right of a family member to maintenance founds itself upon two or three relationships. Thus since a *Mitakshara* family may be composed of brothers or cousins of the first degree or those of second or third degrees, as soon as any of the members dies, his widow, as such, gets maintenance from all the surviving members together." In WEST and BUHLER, on page 791, the learned authors say: "Other liabilities, that is provision for maintenance or portions of persons not entitled to shares may be distributed by agreement among the co-sharers. But the estate at large is liable, at least in the hands of the members of the family making a partition; and co-parceners who desire to limit their responsibilities must obtain the assent of the persons interested." I do not propose to cite more authorities.

With regard to so much of the decree as directs that the maintenance will be a charge on the house No. 334, Mint Street, we are certainly not satisfied that the sum ot Rs. 25 a month,

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which the learned Judge has awarded to the plaintiff is more than the value of the share of her deceased husband in the family property or the income derivable therefrom. It may be that a decree would not be enforceable against a member of a joint family which gave something more than the interest of the deceased husband which passed by survivorship to the surviving member. But we have not to consider this. Rs. 25 a month does not represent more than the share to which the husband would have been entitled to if during his lifetime he had obtained partition of the joint family property. I think the learned Judge was right, and I would dismiss this appeal with costs.

Munro J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

P. R. Aiyanachariar .. Appellant* (*Plaintiff*)

v.

Lakshmi Ammal and others .. Respondents (*Defendants*).

Estoppel—Mistaken view of the law—Adoption—Title by prescription.

A mistaken impression of law regarding the validity of an adoption is not a ground on which an estoppel can be based.

The rule of estoppel applicable to persons taking under an instrument as regards their competency to deny the title of others taking under the same instrument has no application to cases where title is acquired solely by prescription. [*Rajijalakshmi* v. *Suryanarayanan* [1] considered. *Dalton* v. *Fitzerald*[2] distinguished.]

A person can acquire property by long possession as adopted son of another under an invalid adoption but it cannot give him the status of an adopted son or put an end to his position as a member of his natural family.

Appeal from the decree of the District Court of Chingleput in O. S. No. 14 of 1906.

The plaintiff in the case claimed to be the reversionary heir of the deceased husband of the 1st defendant, and sued for a declaration that an alienation made by her was not binding on the reversion after the death of the 1st defendant. The

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* A. No. 154 of 1908. 22nd March, 1911.

1. (1893) 3 M. L. J. 100.

2. (1897) 2 Ch. 86.

Aiyanachariar v. Lakshmi Ammal.

1st defendant denied that the plaintiff was the heir at all, and raised various other contentions more fully set out in the High Court's judgment. The denial by the 1st defendant of the plaintiff's heirship rested upon the fact that one Ranga Chari, the father-in-law of the 1st defendant, who, the 1st defendant conceded, belonged originally to the family of the plaintiff, was later on adopted by a widow of another family. The 1st defendant contended that this adoption of Ranga Chari made him and his son (*i. e.*, her husband) members altogether of a different family from that of the plaintiff. The plaintiff, on the other hand, contended that the adoption was not made in fact and that, even if it was made, it was invalid in law as it was made by a widow long after the estate of that widow's husband had vested in her deceased son and then in his (son's) widow. The District Judge found that the adoption was in fact made; that it was for the reasons alleged and proved by the plaintiff invalid in law, but that the plaintiff was estopped from denying its validity for reasons more fully set out in the judgment of the High Court. He, therefore, dismissed the suit on the ground that the plaintiff was estopped from pleading his reversionary character to the estate of the 1st defendant's husband.

Hence the appeal by the plaintiff.

T. R. Ramachandra Aiyar, *S. Gopalasami Aiyangar* and *C. Padmanabha Aiyangar* for appellant.

K. Srinivasa Aiyangar and *R. Rangaswami Aiyangar* for respondents.

After a brief argument on facts by the appellant's vakil the respondents' vakil was called upon to support the judgment of the lower court.

K. Srinivasa Aiyangar for respondents.—I first rely upon estoppel against the members of the natural family as owing to lapse of time the person who was invalidly adopted became barred from claiming a share in his natural family—*Gopalayyan* v. *Raghupathi Ayyan.*[1] [*Sundara Aiyar* J.—The other side is not disputing that you got property as adopted son; so there can be no estoppel. As the question is whether the invalid adoption gave you a new status, you will argue that.] Status also will be changed. *Rajijalakshmi* v. *Suryanarayana.*[2] [*S. Aiyar* J.—

1. (1874) 7 M.H.C.R. 250.
2. (1893) 3 M.L.J. 100.

Aiyanachariar v. Lakshmi Ammal.

It would have made no difference in that case whether it was held as partible or impartible estate. How is the character of the estate changed? Where there is no change in the character of the estate how could the succession be changed ?] If one has held a property as adopted son of *X* then the members of *X's* family can claim maintenance.

A person getting an estate by a deed cannot dispute that deed when it gives remainders to others—*Dalton* v. *Fitzgerald* [1] [*S. Aiyar* J.—That is a case of a deed. How could it apply to a right which accrues to one by law ?] *Rupchand Ghosh* v. *Sarvaeswar Chandra*; [2] *Venkata* v. *Venkata*[3].

T. R. Ramachandra Aiyar for appelant in reply.—Mayne in his *Hindu Law*, para 163, says that no new status can be created by an invalid adoption, however long his adoption might have been acquiesced. The declarations of a man cannot change the character of his property—*Rajijalakshmi* v. *Suryanarayana* [4]. My client never induced the other side to change his position in any way.

The Court delivered the following

JUDGMENT:—This is an appeal from the decision of the District Court of Chingleput in a suit for a declaration that certain alienations made by the 1st defendant, the widow of one Srinivasa Raghavachari, were not binding on the plaintiff who claims to be the nearest reversioner of her husband entitled to succeed on the 1st defendant's death. The lower court has found that the plaintiff is not proved to be the nearest reversioner, and dismissed the suit on that ground without deciding the other issues. The plaintiff's father was adopted by the natural brother of (Rangachari) the father of the 1st defendant's husband (Srinivasa Raghavachari). The case of the defendants is that Rangachari was given away in adoption to one Raghavachari and ceased to be a member of the plaintiff's family. The plaintiff denied the adoption of Rangachari and alleged that the adoption, even if true, was invalid. He also claimed to be Rangachari's reversionary heir, even if the adoption was true and valid. The factum of the adoption was found in the defendant's favour by the lower court, and in fact was conceded by the plaintiff's vakil in the course of the case, and the learned vakil for the appellant does not seriously contest it

1. (1897) 2 Ch. 86, 89.
2. (1906) I. L. R. 33 C. 915.
3. (1908) I. L. R. 31 M. 321, 327.
4. (1893) 3 M. L.J. 100.

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before us. The lower court held that the adoption was invalid, it being a second adoption made by Rangachariar's widow, Kanagammal, long after the estate of her husband had vested in her first adopted son and then in that adopted son's adopted son and finally in the widow of the latter. It was admitted for the respondent that this finding could not be disputed. The lower court has found, however, that Rangachari was all along treated as Raghavachari's adopted son, and that the plaintiff is estopped from disputing the validity of the adoption, and it was further held that, for the purposes of this case, it must be taken that Rangachari consequently ceased to belong to his natural family, and the plaintiff could not claim to be the reversioner of Rangachari as a member of his natural family. The plaintiff's right as reversioner, even in the event of the adoption being valid, is held by the lower court not to be proved. In appeal it is contended that the finding as to estoppel is incorrect and that in any event the result of the estoppel would only be to prevent the plaintiff from disputing Rangachari's right to the property of Raghavachari as his adopted son, but that it could not give him the status of an adopted son or put an end to his position as a member of his natural family. We are of opinion that both these contentions should be upheld. There is practically no evidence of estoppel at all. The facts on which the learned vakil for the respondent seeks to maintain the finding of the lower court are: (1) that Rangachari did not take a share in the property of his natural family along with the plaintiff's father, the whole estate being taken by the latter; (2) that Rangachari's position as adopted son was recognised by his relations; and (3) that the plaintiff's father wrote the letters Exhibits *XIX* (*a*) to *XIX* (*c*) to Kanagammal and her 1st adopted son's widow, Srirangammal, soon after the adoption in which he enquired about the welfare of the "child Rungachari." These facts, in our opinion, are quite insufficient to establish the plea of estoppel. It is not contended that Rangachari claimed any share of the property of his natural family and was refused it by the plaintiff's father. Rangachari was evidently under the impression that his adoption was valid and, it may be, that the plaintiff's father and other relations also shared in that impression, a fact which would account for the letters already referred to. But it is now well established that a mistaken impression of law regarding the

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validity of the adoption is not a ground on which estoppel can be based. Mr. K. Srinivasa Aiyangar does not contend that the estoppel could change the natural status of Rangachari, if the adoption was invalid. But he argues that as Rangachari purported to hold the property in suit as the adopted son of Raghavachari, the reversionary heirs entitled to succeed on the death of the 1st defendant are the sapindas of Raghavachari's family and not of Rangachari's natural family. And he relied on the authority of *Rajijalakshmi* v. *Suryanarayana*[1] and *Dalton* v. *Fitzgerald*[2]. This proposition is quite untenable. Rangachari's title to his adoptive father's family property must of course be held in this case to have been acquired by prescription. It is quite true that, if a person capable of holding one or other of different kinds of estate prescribes for a particular kind of estate, he could not acquire a larger estate or an estate different from that for which he prescribes. The *animus possidendi* is the test for determining the estate which prescription would confer on him. See our judgment in A. S. No. 73 of 1908. Therefore, if a woman prescribes for what is known as a "woman's estate" under the Hindu Law, it must be held at least in some classes of cases that her heir would be the successor to her woman's estate and *Rajijalakshmi* v. *Suryanarayana*[1] similarly holds that if one prescribes for an impartible holder's estate, the property which he acquires by prescription would, in certain circumstances, pass to the heirs who would be entitled to succeed if the property were in fact impartible. But it is impossible to hold that there would be any difference in the estate which Rangachari acquired by prescription, whether he purported to belong to his natural family or to the family into which he was adopted. The title acquired by him would be the same in both cases, namely an absolute heritable estate. The decision in *Dalton* v. *Fitzgerald*[2] has absolutely no application. It merely held that a person obtaining possession of property under a specific instrument and his heirs would not be entitled to dispute the title of other persons claiming an estate in the same property under the same instrument. This is a rule of estoppel applicable to the person taking under an instrument and to his heirs. It has no bearing on cases where title is acquired solely by prescription.

1. (1893) 3 M. L. J. 100.
2. (1897) 2 Ch. 86.

In the view we have taken on this question, it is unnecessary to consider whether the plaintiff's claim as reversioner, even if the adoption set up be valid, is sustainable or not. We must reverse the decree of the lower court and remand the suit for trial on the issues which have not been disposed of. The costs of this appeal will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Krishnaswami Aiyar.

Arimuthu Chetty .. Petitioner*

v.

Vayapuri Pandaram .. Respondent.

Arimuthu Chetty *v.* Vayapuri Pandaram.

C.P.C., (Act XIV of 1882) S. 295 O. 21, Rr. 6, 7, 8—"Receipt of assets"—Sale—Date of deposit and date of full payment—Transfer of decree for execution—Application for rateable distribution before copy of transferred decree s received—Attachment in execution of Munsif's decree—Sale by District Court—Right to share in sale proceeds—Order of events.

"Assets are received," in the case of sales of immoveable properties, within the meaning of S. 295, C.P.C., only on the date of the full payment of the purchase-money and not on the date of the preliminary deposit; and the purchase-money becomes the assets of the judgment-debtor only then and not on mere deposit. [*Ramanadhan Chettiar* v. *Subramania Sastriar*[1] and *Muthalagiri* v. *Muthayan*[2] followed.]

A court to which a decree is sent for execution may not be competent to execute it before copy of the decree is received; but when once an order is made sending a decree to another court for execution, that by itself is sufficient to entitle the decree-holder to apply to the court to which the decree is sent for execution for rateable distribution of his share of the assets for the purposes of S. 73, C. P. C., (Act V of 1908)

Where assets are realized by the District Court and the judgment-creditor seeking distribution is the holder of a decree of the Munsif's Court who had attached the property, the right to share in the proceeds realized by sale of attached property is independent of a transfer of the decree for execution to the District Court and arises by virtue of his attachment. A transfer of the decree of the Munsif to the District Court is unnecessary to entitle the petitioner to rateable distribution in the sale proceeds of the attached property. [*Nimbaji Tulsiram v. Vadia Venkatli*[3] followed, and *Clark* v. *Alexander*[4] approved.]

Where the application for execution is made on the same day in which the assets are received the court is bound to ascertain the order in which they occurred.

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* C. R. P. No. 76 of 1910. 8th December, 1910.

1. (1903) I. L. R. 26 M. 179.
2. (1883) I. L. R. 6 M. 357.
3. (1892) I. L. R. 16 B. 683.
4. (1894) I. L. R. 21 C. 200.

Arimuthu Chetty v. Vayapuri Pandaram.

Petition, under S. 115 of Act V 1908, praying the High Court to revise the order of the District Court of Salem in E. P. No. 62 of 1909.

T. M. Krishnaswami Aiyar for petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT:—The petitioner is the decree-holder in O.S. No. 87 of 1908 on the file of the Principal District Munsif of Salem. Property of the judgment-debtors was attached in execution of another decree against them in O. S. No. 35 of 1906 on the file of the District Court of Salem. It was sold by the District Court in execution of that decree. The purchaser made the deposit on the 17th September 1909 and the balance of the purchase-money was paid into court on the 29th September 1909. It must be taken, having regard to the decision in *Ramanathan Chettyar* v. *Subramania Sastrial*[1], that the assets were realized only on the 29th of September 1909 within the meaning of S. 295 of the old code. There is no doubt a change in the corresponding provision of S. 73 of the present code. But so far as the question before me is concerned the change in the language is immaterial. The purchase-money becomes the asset of the judgment-debtor only when the balance is received and not when the deposit is made. I am bound to hold, on the authority of *Muthalagiri* v. *Muthayan*[2] that an application to the District Court before the receipt of assets for execution is an essential pre-requisite of a general claim to rateable distribution. The District Judge seems to have assumed that, although an application was made apparently before the time when the assets were received, the petitioner had no right to make the application before the Munsif's decree was received by the District Court under the latter's order of transfer. It is true that the decree was only received by the District Court on the 30th of September. It appears to me that this does not preclude the petitioner's claim to rateable distribution, if he had attached the same property in execution of the Munsif's decree. If the property had been attached in execution of the decree of the District Court, the court which should realise the property was the District Court under S. 63. That section provides " the

1. (1903) I. L. R. 26 M. 179. 2. (1883) I. L. R. 6 M. 357.

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court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the court of highest grade." Supposing such a realisation is made by the higher court, there can be no need for a transfer of the decree of the lower court to the higher to entitle the decree-holder of the lower court, who has also attached the property realised, to share in the proceeds of such realisation It seems to me that the right to share in the proceeds realised by sale of attached property is independent of a transfer of the decree for execution to the higher court. Section 38, no doubt, provides that a decree may be executed by the court which passed it or by the court to which it is sent for execution. I am inclined to think that there is no other court which can execute a decree and that S. 38 is exhaustive. What the decree-holder of the Munsif's Court is entitled to, when there is no transfer of his decree to the District Court, is not a general execution of his decree by the District Court or rateable distribution in all the assets of the judgment-debtor received by the District Court, but only to share by virtue of his attachment in the proceeds of the attached property realized. To a relief so limited it appears to me to be not essential that the decree of the Munsif's Court should have been previously transferred to the District Court though this view runs counter to an observation in *Muthalagiri* v. *Muthayan*[1] as to the need of transfer. I do not feel bound by the case on this point though it is followed in *Nimbaji Tulsiram* v. *Vadia Venkali*,[2] as the absence of an application to the higher court was sufficient to sustain the decision. I prefer the reasoning of *Sale* J. in *Clark* v. *Alexander*[3] to the extent at least of holding that a transfer of the decree was unnecessary to entitle the petitioner to rateable distribution in the sale proceeds of the attached property.

It was also argued that the transfer was complete when the order was made by the Munsif, and that the receipt of the decree by the District Court on the next day had nothing to do with the petitioner's right to apply to the District Court for rateable distribution on the 29th itself. The petitioner has put in an affidavit in which he says that the transfer was made by the Munsif

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1. (1883) I. L. R. 6 M. 357. 2. (1892) I. L. R. 16 B. 683.
3. (1894) I. L. R. 21 C. 200 at p. 203.

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first on the forenoon of the 29th; that he then applied to the District Court for execution, and that the assets were received thereafter. I am not at all sure, having regard to the provisions of Rules 6, 7 and 8 of Order XXI, that the court to which a decree is sent for execution is authorized to execute it before a copy of the decree is received; but I think there is force in the contention that, when once an order is made sending a decree to another court for execution, that by itself is sufficient to entitle the decree-holder to apply to the court to which the decree is sent for execution. In this view the application to the District Court, after the Munsif's order sending the decree to the District Court, would be perfectly competent to satisfy the requirements of S. 73. Although the Munsif's order, the application to the District Court and the payment of the balance of the sale proceeds into court were all on the same day, the last two were the acts of parties and the court is bound to ascertain the order in which they were done—*Clarke* v. *Bradlaugh* [1]. I must ask the District Judge to return findings on the following points:—

1. Was the property sold by the District Court in O. S. No. 35 of 1906, attached under the Munsif's decree in O.S. No. 87 of 1908, before realization?

2. Were the Munsif's order of transfer of the decree in O. S. No. 87 of 1908, and the petitioner's application to the District Court to execute it prior in point of time to the payment of the purchase-money into court on the 29th September 1909?

Eight weeks will be allowed for findings and one week for objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Sheik Ibrahim Tharagan & another .. Appellants* (*Defendants*)

v.

K. R. Rama Iyer & others .. Respondents (*Plaintiffs*).

Hindu Law—Joint family—Suit—Manager's right of suit without impleading others—Contract Act, S. 38—Payment to one of several joint promisees in collusion, no payment to all.

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* A. No. 69 of 1908. 30th March, 1911.

1. (1881) 7 Q. B. D. 38.

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Even assuming that payment to one of several joint creditors will operate as a good discharge as against all, yet, a payment fraudulently made solely for the benefit of one of the several creditors and not being for the benefit of all, will not operate as a good payment. [*Baikunt Nath Chakrabarti* v. *Hara Lal Pal*[1] and *Veerasami* v. *Ibramsa*[2] referred to.]

A manager of a joint Hindu family can himself sue for a debt due to the family without impleading the other members of the family. [*Kishen Prasad* v. *Har Narain Singh*[3] followed.]

There is no reason why there should be any difference in this respect between a joint family in Malabar and one elsewhere. The ordinary rule is that all persons in whom the right to any relief exists should be joined as plaintiffs; but it cannot be laid down that in no case has a person a right to sue on behalf of himself and others, where the procedure laid down in S. 30, C.P.C. of 1882, is either not applicable or has not been taken advantage of. There are several statutory exceptions to the rule; there is no reason why there should not be other exceptions based not on any legislative provision but on the substantive law applicable to the parties; and the case of the manager of a joint Hindu family is such an exception.

Appeal from the decree of the Subordinate Judge's Court of Tinnevelly in O. S. No. 22 of 1906.

The facts are fully given in the judgment.

T. V. Seshagiri Aiyar and *P. Kundu Panickar* for the appellants.

S. Srinivasa Aiyar for 1st respondent.

K. N. Aiya Aiyar for 13th respondent.

T. V. Seshagiri Aiyar for appellant:—A payment to any one of the joint promisees is a valid discharge of the liability. It is true that a payment to one of several co-heirs of a deceased person will not be a valid discharge-*Alimisa Bibi* v. *Abdul Kader Saheb.*[4] In *Ramasami* v. *Muniyandi*[5] the judges say at the end that that case can be likened to the previous case. Moreover, the decision in the latest case is obiter. [*Sundara Aiyar* J.—Would it not be better in the interests of both the creditors and the debtor to pay the debt to all, seeing that the debtor can dispense with paying further interest if he gives notice of his readiness to pay all?] May be. [*S. Aiyar* J.—Is not *Husainasaga Begum* v. *Rahamunnissa Begum*[6] against you?] The view is not pronounced. I refer to *Ramaswami Chetti* v. *Manicka Mudali*[7]; *Barbar Maran* v. *Rammanna Gounden*[8]; *Adaikkalam Chetti* v. *Marimuthu*[9]; *Sitaram* v.

1. (1911) 13 C.L.J. 234.
2. (1909) 19 M.L.J. 221.
3. (1911) 21 M.L.J. 378 (P.C.)
4. (1901) I.L.R. 25 M. 26, 39.
5. (1910) 20 M.L.J. 709.
6. (1910) 13 C.L.J. 3.
7. (1899) 9 M.L.J. 155.
8. (1897) I.L.R. 20 M. 461.
9. (1899) I.L.R. 22 M. 326.

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Shridhar.[1] *Vide* Shephard's comments on the latest case of our court in 20 M. L. J., p. 55 at 58. On this point and as regards parties I refer also to *Kishen Prasad* v. *Har Narain Singh* [2] where, as here, the family was a trading family; *Seshan Pattar* v. *Veera Raghavan Pattar* [3]; *Arunachala Pillai* v. *Vaithilinga Mudaliar* [4].

The Privy Council case would not cover this case which is a case of a mortgage. Where proper parties do not sue I can rely upon a payment to one only of the members so as not to make me liable for costs.

S. Srinivasa Aiyar for 1st respondent:—Even though the English cases lay down that a payment to one of several joint promisees is a good discharge, yet, if that be in collusion and fraud of others, it will not be a good discharge. The finding is that the payment was made for some ulterior purpose—*Baikunth Nath Chakrabarti* v. *Har Lal Pal Chowdry*[5]; *Adaikkalam Chetti* v. *Marimuthu*[6]; Halsbury's *Laws of England*, Vol. VII, p. 456, S. 930. [*S. Aiyar* J.—Upon whom is the onus of showing collusion and fraud?]. I would refer to *Piercy* v. *Fynney*[7] *Kishen Prasad* v. *Har Narain Singh*[2] Governs this case on the question of the necessary parties to the suit; see also *Veerasami Naicker* v. *Ibramsa Rowthen*[8]. [*S. Aiyar* J. to *T. V. Seshagiri Aiyar*.— If you pay to the 16th defendant not as for the family but for his own exclusive use, then how would it avail you?]

T. V. Seshagiri Aiyar replied.

The Court delivered the following

JUDGMENT:—The suit from which this appeal was preferred was instituted by the plaintiff as the manager of an undivided Hindu family to enforce payment of the amount due on a mortgage bond executed by defendants Nos. 1 to 15. The 16th defendant in whose name the bond stood is the eldest of the three sons of the plaintiff, and was brought in as a party on account of the plea of defendants Nos. 1 to 15 that the debt was due to him alone and not to his family. They also pleaded that they had paid to the 16th defendant, prior to the suit, a sum of Rs. 650 towards the interest due on the bond, and that, subsequent to the suit, they deposited the total amount due on the bond with the

1. (1903) I.L.R. 27 B. 292.
2. (1911) 21 M.L.J. 378 (P.C.)
3. (1909) I.L.R. 32 M. 284.
4. (1882) I.L.R. 6 M. 27.
5. (1911) 13 C.L.J. 234.
6. (1899) I.L.R. 22 M. 326.
7. (1871) L. R. 12 Eq. 69.
8. (1909) 19 M.L.J. 221.

South Indian Bank, which amount the 16th defendant was at liberty to draw on executing a bond to indemnify them against any claims that might be made by the other members of his family. The 16th defendant also claimed the debt as his own and set up that the family became divided on the 17th December 1904. The Subordinate Judge held that no division took place as alleged by the 16th defendant; that, although the bond was executed in the 16th defendant's name, it was really taken by the plaintiff for the benefit of the family; that the payment of Rs. 650 was not made prior to the suit, and that both the payment and the deposit were not *bona fide* acts but the result of collusion between the defendants Nos. 1 to 15 and the 16th defendant with a view to defraud the other members of the 16th defendant's family, and he accordingly decreed the whole of the claim made in the plaint.

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This appeal has been preferred by the debtors. It is confined to the Subordinate Judge's disallowance of credit for the Rs. 650 alleged to have been paid to the 16th defendant prior to the suit and to the award of interest on the principal amount subsequent to the deposit made by the debtors in the South Indian Bank and of the plaintiff's costs against the debtors; but the points involved in appeal relate to all the questions decided by the Subordinate Judge.

We have no hesitation in concurring with the Subordinate Judge that the partition set up by the 16th defendant is not proved. There is no formal instrument of partition and the only oral evidence adduced to prove it is the testimony of the 16th defendant himself. He relies on Exhibit *III*, a *yadast* executed in his favor by his father, the plaintiff, authorising him to conduct the trade of the family at Cochin and Kottayam, and containing certain other provisions with respect to that trade as well as with respect to his right in the rest of the property belonging to the family. But the language of the instrument and the 16th defendant's deposition both show that though some negotiations went on for effecting a division they were never completed and that the family continued undivided. It is not contended by the 16th defendant that the debt belonged to himself if the family did not become divided.

The next question for decision is whether the payment and the deposit pleaded were made *bona fide* by the debtors and are

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binding on the family. On this question also we confirm the findings of the Subordinate Judge. The 4th defendant, when examined as a witness, swore that he was not aware of the existence of the plaintiff at all till shortly before the suit, but this is an absolute falsehood. Defendants Nos. 1 to 15 had dealings with the plaintiff's family for a considerable time before the execution of the bond Exhibit *A*. Exhibit *C* shows that some months before the date of Exhibit *A* the plaintiff demanded payment of the amount due by the defendants but they were unable to pay. The bond itself was taken from the defendants by the plaintiff himself in the absence of the 16th defendant and it was produced in court by the plaintiff. The correspondence between the debtors and the 16th defendant which culminated in the payment and deposit in question began with an attempt on the part of the debtors to take advantage of the differences in the creditor's family. They gave the 16th defendant notice on the 4th of June 1906 (Exhibit *XI*) that they were ready to pay the amount of the debt, and the 16th defendant had failed to go to them as promised with the mortgage bond for the purpose of receiving the money and making an endorsement of discharge thereon. The subsequent correspondence, fully set out in the judgment of the lower Court, shows that they were apprised of the fact that the 16th defendant was not in possession of the bond; that in consequence they demanded of him, and he agreed to give them, a bond of indemnity instead, and that the 16th defendant, discovering their device, charged them with making a mere make-believe assertion of readiness to pay without being in possession of the money required for payment. This correspondence ended on the 30th June 1906. The plaintiff launched his suit on the 2nd of July 1906. Summonses in the suit were taken to the residence of the defendants on the 15th July 1906, but were not served on them on that date. They then deposited most of the amount due on the 18th of July 1906 in the South Indian Bank. They state that on the 1st July 1906, that is, on the day previous to the institution of the suit, they had paid Rs. 650 to the 16th defendant and produce a receipt bearing that date for the amount. We agree with the Subordinate Judge that the circumstances of the case are in favour of the conclusion that the payment was not really made on that date and that the receipt was antedated so as to

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secure evidence of payment before the institution of the suit. We concur with him also in the reasons given for his finding. We may add that the defendants have not produced their day-books which must presumably have been written up from day to day and would, therefore, be strong evidence of the actual date of payment.

Mr. Seshagiri Aiyar has argued two questions of law arising on these findings. He contends that whenever the payment may have been made it was binding on the plaintiff, as payment to one of several joint creditors must in law be deemed a valid payment to all, and he relies on the decision in *Barbar Maran* v. *Ramanna Gounden*[1]. That decision may be taken to support his contention, but the authority of that decision has been considerably shaken by subsequent rulings of this court. See *Veerasawmi Naicker* v. *Ibramsa Rowthen* [2] and *Ramasami* v. *Muniyandi*[3]. See also *Husaimunissa Begum* v. *Rahimunissa Begum*[4]. The cases of *Ramaswami Chetti* v. *Manicka Mudali*[5] and *Adaikkalam Chetti* v. *Marimuthu*[6] do not really support the appellant's contention as they proceed on the ground that as the bond stood in the name of one member only of the family, payment to him would operate as a valid discharge. We do not, however, consider it necessary to decide the point in this case as the evidence shows clearly that the payment to the 16th defendant and the deposit were not made for the benefit of the plaintiff's family but was tendered to defraud its members other than the 16th defendant and in collusion with him to support his undivided claim to the amount due under the bond. Assuming that the payment to one of several joint creditors will in law operate as payment to them all, there can be no doubt that the rule will not apply where the payment is fraudulently made to one of the creditors and not for the benefit of them all. That question has recently been fully discussed by *Mukerjee* J. in *Baikunth Nath Chakrabarti* v. *Har Lal Pal Chowdhry*[7] where the authorities on the point have been fully considered. This court has held the same view in *Veerasami Naicker* v. *Ibramsa Rowthen*[8]. (See also Halsbury's *Laws of England*, Vol. 7, p. 456, para 930

1. (1897) I. L. R. 20 M. 461.
2. (1909) 19 M. L. J. 221.
3. (1910) 20 M. L. J. 709.
4. (1910) 13 C. L. J. 3.
5. (1899) 9 M. L. J. 155.
6. (1899) I. L. R. 22 M. 326.
7. (1911) 13 C. L. J. 234.
8. (1909) 19 M. L. J. 221.

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and *Piercy* v. *Fynny*[1].) In *Barbar Maran* v. *Ramanna Gounden*[2], it was observed that the payment in the case was unaffected by fraud. We are, therefore, of opinion that the payment and deposit in this case could not bind the plaintiff or his family.

The other contention of law argued is that as the debt belongs to all the members of the family and as two of the plaintiff's sons are not parties to this suit either as plaintiffs or as defendants, the suit is not maintainable. It is not denied that the suit was instituted by the plaintiff in his capacity as manager of the family ; but this, it is argued, is insufficient. There has been considerable conflict of authority in the Indian courts on the point raised, but we are of opinion that the decision of the Privy Council in *Kishen Prasad* v. *Har Narain Singh*[3] has practically settled the point. Before referring to their Lordships' judgment and considering its effect, it may be desirable to refer very briefly to the state of the case-law in this High Court. In *K. P. Kanna Pishardoy* v. *V. M. Narayana Somayajipad*[4] it was held, with reference to a *sabhayogam* or assembly of religious Brahmins in Malabar, that some amongst their members appointed as agents for the management of the property of the assembly could not maintain a suit in their own names for ejectment of a person in unlawful possession of its property. It will be observed that the *sabhayogam* was merely an artificial combination of persons and that its agents possessed no powers under the law of the country, but derived them solely from their appointment as agents by the *sabhayogam.* It is, no doubt, well-established law that a mere agent cannot maintain a suit in his own name with respect to property belonging to his principal, whatever powers of management he may have in regard to it. In *Arunachala* v. *Vythilinga*[5] this court decided that a suit for possession of family property could be maintained by the managing member alone in his capacity as managing member. The same principle was applied in several subsequent cases where the question was whether a decree against a managing member in his representative capacity would be binding on the family. See

1. (1871) L. R. 12 Eq. 69.
2. (1897) I. L. R. 20 M. 461.
3. (1911) 21 M. L. J. 378 (P.C.)
4. (1881) I. L. R. 3 M. 234.
5. (1882) I. L. R 6 M. 27.

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Viraragavamma v. *Samudrala* [1]; *Ramakrishna* v. *Namasivaya*[2]; *Muthia* v *Virammal* [3]; *Guruvappa* v. *Thimmanna*[4]. In *Ramayya* v. *Venkataratnam*[5] it was held that when a suit is instituted by the managing member as such, the omission to include the other members of the family as plaintiffs would be regarded only as an error or misdescription, and the suit would be considered as properly laid. In *Alagappa Chetti* v. *Vellian Chetti*[6], on the other hand, a suit was held to be bad on the ground that all the members of the family, to whom the money sued to be recovered belonged, had not been made plaintiffs before the period of limitation to the institution had expired. But the decision seems to be based on the ground that all the members of the family were carrying on a partnership trade and that in such a case all the partners should join as plaintiffs. And reliance was placed on *Ramsebuk* v. *Ramlall* [7] which was also a case of partnership business carried on by the members of a family. See also *Imamudin* v. *Liladhar*.[8] In *Adaikkalam Chetti* v. *Marimuthu*[9] a suit by the managing members alone was sustained. But this decision may perhaps be regarded as proceeding on the special ground that the bond sued on was in the name of the managing member only. In *Angamuthu Pillai* v. *Kolandavelu Pillai* [10] a suit for the recovery of land was held to be not maintainable by the managing member alone even if it appeared that he was suing to enforce the right of the whole family. The question arose again in *Seshan Pattar* v. *Veera Raghavan Pattar* [11] with respect to the manager's right to sue for money on behalf of the whole family. In that case the rule laid down in *Alagappa Chetti* v. *Vellian Chetti* [6] was preferred to the proposition laid down in *Arunachala Pillai* v. *Vythelinga Mudaliar*,[12] but several of the other Madras cases referred to above were apparently not brought to the notice of the court. The rule laid down in *Arunachala Pillai* v. *Vythilinga Mudaliar* [12] was upheld in *Vadilal* v. *Shah Kushal*[13] although in two previous cases—*Kali*

1. (1885) I. L. R. 8 M. 208.
2. (1884) I. L. R. 7 M. 295.
3. (1886) I. L. R. 10 M. 283.
4. (1887) I. L. R. 10 M. 316.
5. (1893) I.L.R. 17 M. 122.
6. (1894) I. L. R. 18 M. 33.
7. (1881) I. L. R. 6 C. 815.
8. (1892) I. L. R. 14 A. 524.
9. (1899) I. L. R. 22 M. 326.
10. (1899) I. L. R. 23 M. 190.
11. (1909) I.L.R. 32 M. 284.
12. (1882) I. L.R. 6 M. 27.
13. (1902) I. L. R. 27 B. 157.

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das Kevid Das v. *Nathu Bhagavan*[1] and *Balakrishna Moreshwar Kunte* v. *The Municipality of Mahad*[2]—a contrary view had been held, and the latter case had expressly followed *K. P. Kanna Pisharody* v. *V. M. Narayanan Somayajipad*[3]. The ruling in *Radho Proshad Wasti* v. *Esuf*[4] was not accordance with *Arunachala Pillai* v. *Vythelinga Mudaliar*[5]. The Alahabad Court in *Pateshri Partap Naran Singh* v *Rudra Narain Singh*[6] supported the manager's right to sue on behalf of the family; but in *Shamrathi Singh* v. *Kishen Prasad*[7] that court held that the managing member of a family carrying on a trade on its behalf could not maintain a suit to recover moneys due from third persons in connection with the trade without making all the members as plaintiffs. The decision of the Privy Council referred to above was passed on appeal from the decision of the Allahabad High Court in the last case. The Judicial Committee upheld the manager's right to sue. Their Lordships appproved of the decision in *Arunachala Pillai* v. *Vythilinga Mudaliar*[5] and observed that the rule laid down in *K. P. Kanna Pisharodi* v. *Narayanan Somayajipad*[3] was not applicable "to the members of a business carried on for an undivided Hindu joint family" and distinguished the case from that of mere co-owners as *K. P. Kanna Pisharodi* v. *Narayanan Somayajipad*[3]. They also explained *Ramsebuk* v. *Ram Lal Koondoo*[8] and *Imamudin* v. *Liladhar*[9] as resting on the ground that all who are trading as partners must join in a suit relating to the partnership business and observed that the other members of the family interested in the partnership business need not be joined as plaintiffs. The case of *Alagappa Chetty* v. *Vellian Chetty*[10] was distinguished on the ground that the single plaintiff in that case was not shown to be the managing member of the family or to be the only partner or proprietor of the business with which the litigation was concerned." Their Lordships concluded as follows:—"In the opinion of their Lordships, the original plaintiffs in this case were entitled, as the sole managers of the family business, to make in their own names the contracts which gave rise to the claim

1. (1883) I. L. R. 7 B. 217.
2. (1885) I. L. R. 10 B. 32.
3. (1881) I. L. R. 3 M. 234.
4. I. L. R. 7 C. 414.
5. (1882) I.L.R. 6 M. 27.
6. (1904) I. L. R. 26 A. 528.
7. (1907) I. L. R. 29 A. 311.
8. (1881) I. L. R. 6 C. 815.
9. (1892) I.L.R. 14 A. 524.
10. (1894) I.L.R. 18 M. 33.

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and that they properly sued on such contracts without joining the other members of the family." It is clear to us that their Lordships' decision is not based on the ground that the contract was sued on in the name of the actual plaintiffs only as they expressly approved of the judgment in *Arunachala Pillai* v. *Vythilinga Mudaliar*[1] and distinguished it from the case of mere co-owners. In fact, the Privy Council had even previously to their decision in the above case, practically upheld the right of the managing member to represent the family in litigation. A long line of cases beginning with *Ghirdhari Lal* v. *Kantoo Lal*[2] establish the right of a creditor of a Hindu family to proceed against the father or other managing member of the family alone and to effectively bind the whole family property, including the sharers of those not actually parties to the litigation. It need hardly be said that a decree against a mere agent, or guardian of an infant, or a sale in execution of such decree could not bind the principal or the minor, for a suit cannot be instituted against the agent or the guardian as the representative of the principal or the minor. The reason why a decree against the manager of a family in his representative capacity is binding on the whole family is, that amongst the powers which he has according to Hindu Law as manager must be included the power of representing the family in suits. This view has for a long time been consistently held in the case of the manager of a *tarwad* in Malabar whether governed by the *Marumakkathayam* law or *Makkathayam* law—*Ittachan* v. *Valappan*[3], *Barbar Maran* v. *Ramana Gounden*[4]. There is no reason why a difference should be made between a joint family in Malabar and one elsewhere with respect to the right of the manager to sue or be sued on behalf of the family, the only distinction between the two being that a member of a Malabar family has no right to compel a partition of the family property. The ordinary rule no doubt is that all persons in whom the right to any relief exists should be joined as plaintiffs. But this rule is not of universal application. The language of S. 26 of the Civil Procedure Code, 1882, corresponding to Order I, Rule 1, of the present code, is "that all persons may be joined in one suit as plaintiffs in whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative."

1. (1882) I. L. R. 6 M. 27.
2. (1894) 14 B. L. R. 187 (P.C.)
3. (1885) I. L. R. 8 M. 484.
4. (1897) I. L. R. 20 M. 461.

Sheik Ibrahim Tharagan *v.* Rama Iyer.

Section 30 of the Code of 1882, corresponding to Order I, Rule 8, lays down the general rule of procedure where one or more persons wish to sue on behalf of, or for the benefit of, themselves and other persons having the same interest in a suit. But it cannot, in our opinion, be laid down that in no case has a person a right to sue on behalf of himself and others, where the procedure laid down in S. 30 is either not applicable or has not been taken advantage of. There are several statutory exceptions to the rule, and there is no reason why there should not be other exceptions based not on any legislative provision but on the sub stantive law applicable to the parties. The case of the Judicial Committee already referred to shows that the case of the manager of a Hindu family is such an exception. We must, therefore, refuse to uphold this contention also.

In the result we dismiss the appeal with costs. The 16th defendant has preferred a memorandum of objections against the direction of the Subordinate Judge making him liable with defendants Nos. 1 to 15 for the plaintiff's costs of the suit. On the finding that he and defendants Nos. 1 to 15 colluded with each other to put forward an exclusive right in himself to the amount of the mortgage-bond, the lower court's order is right, and we must dismiss the memorandum of objections also with the costs of the plaintiff.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Munro.

Arji Marappa Chetti .. Appellant*

v.

Arji Shunmugappa Chetti .. Respondent.

Limitation Act, Art. 11—*Suit for refund of money paid a second time owing to the default of decree-holder to certify—C.P.C., O.* 21, *r.* 2.

The cause of action for recovery of money paid to a third person, the attaching creditor of the decree-holder a second time by reason of the decree-holder's default to certify payment arises when the judgment-debtor paid the second time, and the suit, if brought within three years from the date of the second payment, will not be barred by limitation.

Obiter:—The case may be otherwise if the suit is for refund of money paid to the decree-holder himself a second time.

*O. S. A. 15 of 1910. 5th April, 1911

Marappa-Chetti v Shunmugappa Chetti.

Appeal from the decree and judgment of the Honourable Mr. Justice Sankaran Nair in the Ordinary Civil Jurisdiction of this Court in C. S. No. 250 of 1907.

In this case after payment of a judgment-debt, an attaching creditor of the decree-holder executed the decree and recovered the amount whose payment remained uncertified. Suit was filed for damages for recovery of the amount paid the second time. The suit was more than three years of the failure to certify, but within three years of the second payment. The lower court held that the suit being for damages sustained was not barred.

C. P. Ramaswami Aiyar for appellant.

K. Ramachandran for respondent.

C. P. Ramaswami Aiyar :—Failure to certify payment within 90 days mentioned in S. 258, C. P. C., gives the judgment-debtor a cause of action as upon a breach of contract. Limitation begins from the end of 90 days. Payment a second time does not give a fresh cause of action—*In the Matter of Medai-Kaliani Anni.*[1] Payment a second time is only damages on account of the failure to certify—*Shadi* v. *Ganga Sahai*[2]; *Periatambi Udayan* v. *Vellaya Gounden*[3]; *Viraraghava Reddy* v. *Subhakka*[4]; *Azizan* v. *Matuk Lal Sahui*[5]. [*Court.*—These cases were all for recovery of the amount first paid. There is no case which deals with limitation in a suit brought after payment a second time].

K. Ramachandran for respondent was not called upon.

The Court delivered the following

JUDGMENT :—Assuming that when the judgment-debtor sues to recover money paid in respect of what the judgment-creditor has failed to certify, limitation begins to run against the judgment-debtor on the expiry of 90 days from the date of payment (though there appears to be no direct authority on the point) we are not prepared to apply this period of limitation to a case where, by reason of the judgment-creditor's failure to certify, the judgment-debtor has been compelled to pay a third party. In the first class of cases the plaintiff sues to recover money

1. (1907) I. L. R. 30 M. 545.
2. (1878) I. L. R. 3 A. 538.
3. (1897) I. L. R. 21 M. 409.
4. (1882) I. L. R. 5 M. 397.
5. (1893) I. L. R. 21 C. 437 at 452.

paid on a consideration which has failed. In the 2nd class he sues to recover damages for loss sustained by reason of the judgment-creditor having failed to discharge the duty cast upon him by the law. We agree with *Sankaran Nair* J. that in the 2nd class of cases, the cause of action arises when the judgment-debtor has to pay the second time. The case in *In the matter of Medai Kalliani Anni*[1] does not touch the question of limitation. It merely decided that the judgment-debtor has a cause of action when the judgment-creditor fails to certify.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Pingai Pahurappa & another	.. Appellants * in Cr. A. 30 of 1911.
Basavan Gowd & others	.. Appellants. in Cr. A. 43 of 1911.
and	
Karnam Nargudappa	.. Appellants in Cr. A. 44 of 1911.
v.	
King-Emperor	.. Respondent.

Pingai Pahurappa *v.* King-Emperor.

Cr. P. C., S. 269—"With the aid of jurors as assessors"—All jurors and not only some of them.

Where an accused is charged at the same trial with respect to offences some of which are triable by a jury and some by assessors, he should be tried in respect of the latter with all the jurors as assessors and not only some of them as assessors.

Appeal from the order of the Court of Session of the Bellary Division in Case No. 82 of the calendar for 1910.

S. Swaminadhan for appellant in Cr. A. 30 and 43 of 1911.
S. Ranganatha Aiyar for appellant in Cr. A. No. 44 of 1911.
The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT:—In this case the accused were charged with an offence under S. 395 of the Indian Penal Code triable by jury and also with offences under S. 147 and other sections triable by a judge with the help of assessors. Five gentlemen were selected to form a jury and two of them were chosen as assessors to help the judge with reference to the charges not

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* Cr. A. Nos. 30, 43 and 44 of 1911. 25th April, 1911.

1. (1907) I. L. R. 30 M. 545.

triable by a jury. The trial of the accused on all the charges was joint. The accused were acquitted by the jury of the offence under S. 395, I. P. C. The Judge, differing from the two assessors convicted them of rioting. It is contended in appeal that according to S. 269 of Cr. P. C. the Judge was bound to constitute all the members of the jury as assessors for trying the non-jury offences and that he not having done so the conviction is illegal. This contention appears to us to be sound and to be in accordance with the principle of the decision in *Ramakrishna Reddi* v. *Emperor*[1], though on the facts that case may be distinguishable. We must set aside the conviction and the sentence passed on the accused and direct a retrial of the accused on the charges triable with the help of assessors. The accused may remain on the same bail as now.

Pingai Pahurappa *v.* King-Emperor.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Ayling.

Malayandi Goundan .. Appellant* in A. S. 115 & Respondent in A. S. 95. (*2nd Defendant*)

v.

Subbaraya Vanavaraya Goundan .. Respondent in A. S. 115 & Appellant in A. S .95 (*1st & 2nd Plaintiffs' Representative.*

Hindu Law—Debt—Father's debt—Decree against father & son—Onus of proof that decree is not binding on son.

Malayandi *v.* Subbaraya.

Where a suit is brought against a Hindu father and son in respect of a debt incurred by the father, it is upon the son to make out that the moneys were not in fact advanced or, if they were, that he was not liable for the original debt under the doctrine of pious obligation and for w ant of famil necessity.

[*Periasawmi Mudaliar* v. *Sitharama Chettiar*[2], *Chidambaram Mudaliar* v. *Koothaperumal*[3], followed; *Chandra Deo Sigh* v. *Mala Prasad*[4], view of, approved.]

The marriage expenses of a daughter in a Sudra family is a family necessity. *Kameswara* v. *Veeracharlu*[5] *Narasimham* v. *Venkatanarasayya*[6] approved].

* A. 95 and 115 of 1906. 4th November, 1910.

1. (1903) I. L. R. 26 M. 598.
2. (1904) I.L.R. 27 M. 243.
3. (1904) I.L.R. 27 M. 326.
4. (1909) 31 A. 176.
5. (1910) 20 M.L.J. 855.
6. (1903) I.L.R. 27 M. 206.

Malayandi v. Subbaraya.

Appeals from the decree of the District Court of Coimbatore in O. S. No. 25 of 1904.

T. Subramania Aiyar for 2nd defendant.

The Advocate General (*P. S. Sivaswami Aiyar*) for plaintiff.

The Court delivered the following

JUDGMENT:—This is a suit on a mortgage executed by the 1st defendant. The 2nd defendant is the undivided son of the 1st defendant. The plaintiffs allege that the mortgage is enforceable against the son's interest in the family property. The 1st defendant did not defend the suit.

APPEAL No. 115 of 1906.

The mortgage sued on, Exhibit *A*, recites the receipt of Rs. 3,000. It contains no reference to any earlier transaction, but the judge finds, and this apparently was not contested at the hearing of the appeal, that this mortgage was given in renewal of an earlier mortgage, Exhibit *IX*, for Rs. 1,500. It is not contended that the Rs. 3,000 referred to in Exhibit *A* was advanced when that document was executed. The plaintiff's case is that Rs. 2,200 was due from the father under Exhibit *IX* and a further advance of Rs. 800 was made at the time of the execution of Exhibit *A*. The 1st defendant admitted in his evidence the advance of Rs.500 on that date. The written statement does not afford us much assistance as to the defence on which the 2nd defendant relies, but the defence put forward on his behalf in the hearing of the appeal was that the original debt under Exhibit *IX* was contracted for immoral purposes, and the original mortgage and the renewal thereof were consequently not binding on the family property; that the further advance made at the time Exhibit *A* was executed was for the expenses of the marriage of the 1st defendant's daughter and that this was a purpose not binding on the family. The District Judge gave a mortgage decree for the amount claimed less the Rs. 300, the alleged further advance under Exhibit *A*. The 2nd defendant appeals against the decree and the plaintiffs appeal against so much of the decree as disallowed the Rs. 300.

There was a good deal of argument with reference to the question whether the admissions made by the 1st defendant, Exhibit *G*, in a proceeding in an earlier suit in which the mortgage sued on was one of the items of property in question, were

Malayandi v. Subbaraya.

evidence against the son, and as to whether the recital in Exhibit *A* was evidence against him. We do not think it necessary to discuss these questions since it seems to us that the decree in favour of the plaintiffs must be upheld on the ground that it was for the 2nd defendant to make out that (1) the moneys were not in fact advanced, or, (2) if they were, that he was not liable for the original mortagage-debt under the pious obligation doctrine and that there was no family necessity for the further advance.

The plaintiffs, as they were entitled to, sued the 1st defendant, the father, and the 2nd defendant, the son. The 1st defendant allowed judgment to go against him by default. This being so, the father's liability must be taken to be established. As regards the son, the law which is applicable is to be found in the judgment of *Sir Bhashyam Aiyangar* in *Periasawmi Mudaliar* v. *Seetharama Chettiar.*[1] After discussing the liability of the son for the payment of the father's debts, the judgment proceeds :—

" Though during the father's lifetime, the suit could not be brought against the son only, for recovery of a debt due by the father, yet the son may be joined as a party defendant in a suit brought against the father, and, if the plaintiff succeeds in the suit against both the father and the son, a sale of joint family property which takes place in execution of such decree will bind the son also—though such decree cannot be executed against him personally—and he will be precluded from bringing a suit to contest the sale on the ground that the debt was incurred for an illegal or immoral purpose—a plea which, if well founded, he ought to have advanced and established in the original suit, in which case the decree would have been against the father only and the suit would have been dismissed as against the son." In *Chidambara Mudaliar* v. *Koothaperumal*[2], the learned judges observe : " It is now established by a uniform course of decisions that a debt incurred by the father which is not shown to be illegal or immoral is, even during the lifetime of the father, binding upon the son's interests in the family property and that any alienation, voluntary or involuntary, made to discharge the debt is binding upon the son." We think the trend of authority in this Presidency is in accordance with the view of the minority of the Full Bench in *Chandra Deo Singh* v. *Mata Prasad.*[3]

1. (1904) I. L. R. 27 M. 243. 2. (1904) I.L.R. 27 M. 326.
3. (1909) I.L.R. 31 A. 176.

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It was not suggested that the creditor could rely on the family necessity for the advance under Exhibit *IX* on the ground that it was for the purpose of discharging an antecedent debt, if it was shewn that the antecedent debt was an "illegal" or "immoral" debt. Evidence was adduced for the purpose of showing that the antecedent debt was immoral. We agree with the District Judge that no reliance can be placed on the evidence of the 1st defendant as to this, and the evidence of the other witnesses seems to be worth very little. We are not prepared to say that it has been shown that the amount advanced to the 1st defendant on the 1st mortgage was for an illegal or an immoral purpose.

APPEAL NO. 95 OF 1906.

The plaintiff's case in that a fresh advance of Rs. 800 was made at the time Exhibit *A* was executed. The father has allowed judgment to go by default and the son has not shown that this further advance was not made. His contention is that the purpose for which the advance was made—the marriage of the 1st defendant's daughter—is not binding on the family. The question whether the marriage expenses of a daughter are a justifiable necessity, so as to bind the family, was considered by Mr. Justice *Krishnaswami Aiyar*, in a learned and exhaustive judgment in S. A. No. 1305 of 1907—*Devalapalli Kameswara* v. *Palavarapu Veeracharlu*[1]. We feel no doubt that the law on this question is correctly laid down in that judgment and we are prepared to follow it. It is not necessary for us to discuss the decision in *Govindarajulu Narasimham* v. *Devarabhatta Venkatanarasayya*[2]. In that case the question arose with reference to a son in a Brahmin family. In the present case the question arises with reference to a daughter in a non-Brahmin family.

Appeal No. 115 of 1906 must be be dismissed with costs, and Appeal No. 95 of 1906 must be allowed with costs throughout. Time for redemption under the mortgage is extended to three months from this date.

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1. (1910) 20 M.L.J. 855.
2. (1903) I.L.R. 27 M. 206.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Krishnaswami Aiyar.

Murugappa Chetty & others .. Petitioners*

v.

Ranganayakulu Chetty & others .. Respondents.

Murugappa Chetty v. Ranganayakulu Chetty.

C. P. C., S. 115—*Material irregularity—Practice—Procedure when another remedy open—Garnishee proceedings in firm's name bad—Presidency Small Cause Courts Act, S.* 36 *and Rule* 223.

A firm of partners cannot be proceeded against in their firm name; nor can garnishee proceedings be instituted against certain individuals in their firm name. The institution of proceedings in the firm name implies absence of notice to the individuals specifically, which is a material irregularity.

The High Court does not usually interfere in revision where there is another remedy open to parties. It is only where a suit is contested that a re-hearing by the Full Court can be asked for in respect of an order passed by a judgment, but an application to set aside an *ex-parte* order in garnishee proceedings cannot be treated as a suit, and consequently no re-hearing being permissible, the High Court can interfere in the case.

Petition under S. 115 of Act V of 1908 and S. 15 of the Charter Act, praying the High Court to revise the order, dated 15th November 1909, of the Registrar of the Presidency Small Cause Court in E. P. No. 11437 of 1909.

Venkatasubba Row for petitioners.

T. S. Natesa Sastri for respondents.

The Court delivered the following

JUDGMENT:—I think the order of the Registrar of the Small Cause Court, Madras, in this case is wrong in directing that the petitioners should pay the debt which they owed to the judgment-debtor. The garnishee proceedings were instituted against the petitioners only as a firm. There seems to be no warrant for a firm of partners being proceeded against in their firm name, and if there is no warrant for proceeding against them as defendants in that form, it stands to reason that there is no warrant for instituting garnishee proceedings against certain individuals in their firm name. It must be taken, therefore, that no notices were issued to the individuals who were sought to be made liable and the absence of such a notice, is to my mind, a material irregularity which vitiated the proceedings of the Registrar.

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* C. R. P. No. 145 of 1910. 4th November, 1910.

Murugappa Chetty v. Ranganayakulu Chetty.

It is further contended for the respondents that another remedy was open to the petitioners and that I should not interfere in revision. The remedy suggested is re-hearing before the Full Court, and S. 36 of the Small Cause Courts Act is relied on. That only shows that the Registrar's order is to be dealt with as if it were an order by a judge. But S. 38 says that it is only where a suit is contested that a re-hearing by the full court can be asked for in respect of an order passed by a judgment. Here admittedly the suit was not contested, but the respondent's vakil suggests that under Rule 223, the garnishee proceedings are to treated as a suit if the persons who are sought to be made liable contested their liability. Assuming that the garnishee proceedings would be converted into a suit if the persons served with notice for fixing them with liability appeared and contested, in this case, admittedly, the garnishee order itself was made *ex parte*, and it is not pretended that an application to set aside an *ex parte* order is to be treated as a suit. I think, therefore, that Rule 223 is not, by the mere fact of contested garnishee proceedings being liable to be treated as a suit, any warrant for holding that an application could have been made to the full court for a re-hearing.

So if the remedy by way of re-hearing was not open to the petitioners, they were perfectly justified in coming to this court. I hold then, on the ground that there was a material irregularity on the part of the Registrar in making the garnishee order against the petitioners, that the order was bad and I set it aside. The petitioners will have their costs in this court; the costs below will be dealt with by the Registrar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Thaith Ottathil Kutte Ammu .. Appellant*

v.

Purushotam Doss Raggi Seth .. Respondent.

Negotiable instruments—Liability of persons other than the maker.

In the case of a negotiable instrument, the signature of one person in his own name cannot justify a decree against another person although the debt might have been borrowed for the benefit of the trading partnership of both.

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* A. No. 186 of 1907. 29th November, 1910.

[*Somasundaram* v. *Krishnamurthi* [1] and *Subba Narayana Vathiar* v. *Ramaswmi Iyer* [2] followed.]

Kutte Ammu *v.* Purushotam Doss.

Appeal presented from the decree of the District Court of North Malabar in O. S. No. 18 of 1906.

J. L. Rosario for appellant.

S. Varadachariar for the Advocate-General for respondents.

The Court delivered the following

JUDGMENT.—The suit is upon a pro-note which is executed by the 1st defendant in his name. The 2nd defendant is sought to be made liable on the ground that he was a partner with the 1st defendant and that the debt was borrowed for the purpose of the partnership. The District Judge has given a decree against both the defendants. But we are unable to agree with him as regards the liability of the 2nd defendant. It is a well known rule of law that in the case of a negotiable instrument, the signature of one person in his own name cannot justify a decree against another person although the debt might have been borrowed for the benefit of both or although both the persons might have been trading in partnership and the debt was borrowed for the purpose of the partnership. The decisions to which our attention has been drawn by Mr. Rosario—*Somasundaram* v. *Krishnamurthi* [1] and *Subba Narayana Vathiar* v. *Ramasami Iyer* [2]—are clear authorities in support of this position.

Mr. Varadachariar for the 1st and 2nd respondents does not dispute the correctness of this proposition. He argues that the signature at the foot of the pro-note is the firm name and that the 2nd defendant is also included as he is represented by the firm name. We do not think there is any warrant for this view. The plaint proceeds on the basis that the executant of the note was only the 1st defendant, and the 2nd defendant is sought to be made liable merely on the ground that he was a partner, and as such answerable for the debt. Mr. Varadachariar invites our attention to the description of the 1st defendant in the cause title. The 1st defendant is no doubt there referred to as trading under the name and style of Mukkakasbrath and Pallikutti, which is also the name of the 1st defendant. But there is no allegation in the body of the plaint that the two defendants are trading under this name as their firm, nor does the cause title say that

1. (1907) 17 M. L. J. 126. 2. (1906) I. L. R. 30 M. 88.

Kutte Ammu v. Purushotam Doss.

the 2nd defendant is trading under that name along with the 1st defendant. Mr. Varadachariar says that in the evidence of the witness there is a reference to the fact that the trade is carried on in the 1st defendant's name as the firm name. But we do not think we should be allowed to rely upon any of the statements which might casually have been made in the course of the evidence. We must disallow this contention on the ground that the plaint itself is not based upon any such view. Looking at the document itself (Exhibit *A*), it is perfectly plain that it speaks in the singular number, and that is, to our minds, an indication that it was not intended that the firm name should be subscribed to it. Mr. Varadachariar next contends that we should treat the plaint as also claiming relief against the 2nd defendant on the footing of the original debt. We are unable to do so. The cause of action is given as arising on the 5th May 1906 which is the date fixed for payment under the pro-note dated 5th May 1905. Again, the rate of interest which is claimed is what is specified in the pro-note. If it was the original debt which was sued for, *prima facie* it would be barred by time and the plaintiff would be bound to state how he takes the case out of the statute of limitation which he has not attempted to do. All these things are, to our minds, sufficient to show that the suit is one based purely on the pro-note. We must, therefore, overrule this second contention also. We modify the decree of the lower court by dismissing the suit against the 2nd defendant with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

William Dare .. Petitioner*

v.

Mrs. Bella Dona Igdaliah Dare .. Respondent

and

George Wheeler .. Co-respondent.

Divorce Act, S. 17—Jurisdiction of High Court to rescind decree nisi on reconciliation between parties.

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* Ref. Case No. 3 of 1910. 1st November, 1910.

William Dare v. Bella Dare.

The High Court has jurisdiction to rescind the decree of the District Judge in cases coming before it for confirmation under S. 17 of the Divorce Act, if the parties have become reconciled to each other, and not merely to decline to confirm the decree.

Case submitted under S. 17, Act IV of 1869, by the District Judge of South Malabar, in O. P. No. 123 of 1909.

C. Kunhiraman for petitioner.

P. Kundu Paniker for respondent.

The Court delivered the following

JUDGMENT: *Chief Justice*—In this case the petitioner (the husband) obtained in the District Court a decree against the respondent for dissolution of marriage under S. 14 of the Indian Divorce Act and for damages and costs against the co-respondent. On the decree coming before this court for confirmation under S. 17 of the Act he asked that the petition might be withdrawn and the decree of the District Court rescinded. Affidavits were put in by the petitioner and the respondent in which they stated that since the decree they had become reconciled and were living together as husband and wife. The question is can we do anything more than refuse to confirm the decree or can we rescind it?

The question now raised before us came before the Allahabad High Court in *Culley* v. *Culley*.[1] In that case, on the decree coming before the High Court for confirmation, the petitioner and the respondent put in a petition expressing their intention of living together as man and wife and asked that the decree should not be confirmed. (In the case before us the parties say they have actually resumed conjugal relations). The question whether the court would have jurisdiction to dismiss the petition or to rescind the decree does not seem to have been considered by the learned Chief Justice and the order made was that the court did not make absolute the decree of the District Judge. This was in accordance with the decision in *Lewis* v. *Lewis*[2] where the judge ordinarily doubted whether he had power to dismiss a petition for dissolution after a decree *nisi* except at the instance of the Queen's Proctor or a third person.

As regards the status of the parties, an order like the order in *Culley* v. *Culley*[1] would have the same effect as an order dismissing the petition or rescinding the decree since they would remain husband and wife. But an order which leaves a decree for

1. (1888) I.L.R. 10 All. 559. (1860) 30 L.J.P. and M. 199.

William Dare v. Bella Dare. Chief Justice.

dissolution outstanding in the case of parties who do not desire that the marriage should be dissolved, does not seem a convenient or desirable way of disposing of the case if we have jurisdiction to make an order which would get rid of the decree.

In *Troward* v. *Troward*, [1] *Butt* J., on the application by the petitioner, rescinded a decree *nisi* for dissolution when the parties had come together again. On the same facts, a similar order was made by *Sir Francis Jeune* in *Flower* v. *Flower*.[2]

In accordance with the more recent English practice, I think it is clear that when the decree *nisi* is made by the High Court under S. 16, this court would have power to rescind the decree on the ground that the petitioner and the respondent had come together since the making of the decree *nisi*. The question is, is there similar power when the decree is under S. 17 ?

It is, no doubt, not strictly accurate to speak of a decree under S. 17 as a decree *nisi*. Section 16 provides that the decree of the High Court " shall in the first instance be a decree *nisi*. " Section 18 speaks of a decree for dissolution of marriage. Under S. 16, the decree is made absolute by the same tribunal which pronounced the decree *nisi*. Under S. 17, the decree is confirmed by the tribunal which is the appellate tribunal for the purposes of the Divorce Act, though by S. 55 there is no appeal from a decree of a District Judge for dissolution of marriage. Section 16 empowers the High Court, on the application of any person, to reverse a decree *nisi* on the ground that it has been obtained by collusion or that material facts have not been brought before the court.

There is no express power given to the High Court by S. 17 to reverse or rescind a decree. The power of removal given to the High Court is a power to remove before the decree has been pronounced. Under S. 16 the right to intervene is during the progress of the suit in the court of the District Judge. The reason for this distinction is not clear. Under S. 16, if the parties fail within a reasonable time to move to have the decree *nisi* made absolute, the High Court may dismiss the suit. There is no similar provision in S. 17 and the practice of this court is to deal with cases for confirmation under S. 17 without an application by the petitioner.

1. (1883) 32 W.R. 864.

2. (1893) P. 290.

William Dare v. Bella Dare. — Chief Justice.

But I do not find anything in the Divorce Act which requires us to draw a distinction between the two sections with reference to the power of the court to rescind the decree made in the first instance when the parties have resumed the relations of husband and wife since the decree was passed and before it has been confirmed or made absolute.

It is difficult on principle to see why the wide discretion to make "such other order as to the court seems fit," given to the High Court when the court has directed further enquiry to be made or additional evidence to be taken under S. 17, should not be exercisable in cases where the court did not consider further enquiry or additional evidence necessary.

As regards S. 45 of the Divorce Act, I should be inclined to hold that that section only applied to matters of procedure, and the question before us being one of jurisdiction, that section cannot be relied on for the purpose of praying in aid the provisions of the Civil Procedure Code of 1908.

In the present case, I think we have power to make an order dismissing the petition and setting aside the decree, and I think that is the order we ought to make.

Krishnaswami Aiyar J. :—I concur with the learned Chief Justice in the conclusion arrived at by him. The District Court has pronounced a decree dissolving the marriage under S. 14 of the Divorce Act. The case has come up before us under S. 17 of the Act. The husband who was the petitioner has got reconciled to the wife and taken her back. He does not want to proceed with the petition for divorce. Notwithstanding the doubt expressed in *Lewis* v. *Lewis*[1], it would now be perfectly competent to withdraw the petition under English Law. See *Troward* v. *Troward*[2] ; *Flower* v. *Flower*[3] ; *Ousey* v. *Ousey*[4]. On such withdrawal the court would set aside the decree *nisi.* I take it to be clear that if the proceedings had been instituted on the Original Side of the High Court, the court under the like circumstances would make the same order. Section 7 of the Act which requires High Courts and District Courts to act and give relief on principles as nearly as may be conformable to the principles

1. (1860) 30 L. J. P and M. 199.
2. (1883) 32 W. R. 864.
3. (1893) P. 290.
4. (1875) 1 P. D. 56 at p. 65.

William Dare v. Bella Dare. — Krishnaswami Aiyar J.

and rules of the Divorce Act in England would enable a withdrawal after a decree *nisi* of the High Court and the setting aside of such decree.

The only question is, whether it makes any difference that the decree in this case has been passed by the District Court and the case has come to the High Court for confirmation. I think it does not. Section 45 of the Act says that subject to the provisions therein contained all proceedings under the Act shall be regulated by the Code of Civil Procedure. The competency of a plaintiff to withdraw his suit at any stage is affirmed by Order XXIII, Rule 1, of the Code of Civil Procedure. It would seem to follow that the pendency of the matter in the High Court for confirmation is no ground for refusing to permit the withdrawal. When the withdrawal of a suit or petition is allowed by the appellate court, the court has power to set aside the original decree and is indeed bound to do so. S. 17 of the Act empowers the High Court to confirm the decree for dissolution of marriage or to make such order as to the court seems fit after such further enquiry as it may have chosen to direct. I do not think that the power to make such other order as the court thinks fit is limited to cases where further enquiry has been ordered, notwithstanding the use of the word 'thereupon' after 'the enquiry in case an enquiry has been ordered.' The court having the power to make such other order as it thinks fit and being bound to act as nearly as may be in conformity with the rules and principles of the Divorce Court, the proper order that we should make is to set aside the decree of the District Court and permit the withdrawal of the petition for divorce.

Ayling J.:—I concur in the order proposed by the learned Chief Justice.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Munro and Mr. Justice Sankaran Nair.

S. Visweswara Sarma .. Petitioner* (*Plaintiff*)

v.

Dr. T. M. Nair & another .. Respondents (*Defendants*).

Visweswara Sarma *v.* T. M. Nair.

Court Fees Act, S. 30—*C.P.C., O.* 7, *r.* 10—*Plaint, return of—Practice, as to old stamp—Credit to be given to old stamp.*

When a plaint is returned by one court for presentation to another court, the latter court should give credit to the old stamp on the plaint.

Case stated under S. 69 of the Presidency Small Cause Courts Act, XV of 1882, and rule 428 of the Rules of Procedure of the Presidency Small Cause Court of Madras by the Chief Judge of that Court in Suit No. 3067 of 1910 on the file of that Court.

The question in this case was whether when a plaint was returned by the City Civil Court for presentation to the proper court the Presidency Small Cause Court to which it was presented should give credit to the old stamp on the plaint.

C. K. Mahadeva Aiyar for petitioner.

V. V. Srinivasa Aiyangar for respondents.

C. K. Mahadeva Aiyar.—When a plaint is returned for presentation to the proper court no new court fee is payable—*Prabhakar Bhat* v. *Vishwambar Pandit*[1]; read S. 19-A of the Presidency Small Cause Courts Act and S. 23 of the Provincial Small Cause Courts Act; also rule 11 of the Presidency Small Cause Courts Act corresponding to S. 21 of the old Civil Procedure Code, a case where credit is allowed to be given when the suit is stayed. S. 57 of the old C. P. C. and O. 7, r. 10 [*Krishnaswamy Aiyar* J.—Has the Local Government made any rules under S. 27 of the Court Fees Act so as to show whether such stamps are treated as damaged or spoilt stamps?] No. Sections 71, 75 and 77 of the Presidency S. C. C. Act; Ss. 3, 5 and 25 of the Court Fees Act.

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*Referred Case No. 8 of 1910. 20th March, 1911.

1. (1884) I. L. R. 8 B. 313. (F. B.)

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V. V. Srinivasa Aiyangar.—The Presidency Small Casue Courts Act is governed by S. 71 of the Act as regards Court Fees. Where the two courts concerned are governed by the same fiscal enactment it may be that it can be considered inequitable to levy a second fee in such cases. But here the City Civil Court and the Presidency Small Cause Court are governed by different fiscal laws. I refer to S. 14 of the City Civil Courts Act and Ss. 19-A and 40 of the Presidency S. C. C. Act. In these two sections express provision is made for crediting the fee in certain cases. This is not such a case. [*V. K. Aiyar* J.—S. 4 of the Court Fees Act governs the Presidency Small Cause Courts Act.] That is only as to the mode of levy. In *Prabhakar Bhat* v. *Vishwambhar Pundit* [1] the decision on this point is *obiter*. [*V. K. Aiyar* J.—That seems to be the reason for the decision in the case.] *In re Bai Amrit* [2], *Jagjivan* v. *Magdum Ali* [3] and Ss. 20 and 21 of old C. P. C. referred to. Where a person presents a plaint to a court without jurisdiction he himself is at fault and he is not to be entitled to credit for the stamp. But not so in other cases—*Assan* v. *Pathumma* [4]. [*V. K. Aiyar* J.—That does not help you. There it was assumed that the stamp would be good for at least one of the new plaints.] When once a stamp is cancelled it cannot be used again unless there is a section which allows the use of it

C. K. Mahadeva Aiyar in reply.—In all the cases the plaint is said to be returned and not rejected.

This case coming on for hearing in the first instance before Mr. Justice *Krishnaswami Aiyar* and Mr. Justice *Ayling*

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH *:—*Krishnasvami Aiyar, J.*—This is a reference by the learned Chief Judge of the Presidency Small Cause Court. The question stated is one of far-reaching importance. The Judge of the City Civil Court returned a plaint for presentation to the proper court under Order 7, Rule 10, of the Code of Civil Procedure. The plaint has been re-presented to the Presidency Small Cause Court under the authority of that

1. (1884) I.L.R. 8 B. 313 (F.B).
2. (1884) I.L.R. 8 B. 380.
3. (1883) I.L.R. 7 B 487.
4. (1899) I. L.R. 22 M. 494.

*13th December 1910.

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rule. The question is whether the plaintiff is entitled to credit for the court-fee levied in the City Civil Court. S. 9 of the Madras City Civil Court Act, 1899, directs the value to be ascertained for the purposes of court-fee in the manner provided by the Court-fees Act, S. 7, clause (v), if the suit is for land or a house or a garden. S. 6 of the Court-fees Act renders the 1st schedule applicable to a plaint filed in the City Civil Court. S. 25 of the Court-fees Act provides that all fees referred to in S. 3 or chargeable under the Act shall be collected by stamps. S. 26 directs that the stamps used to denote any fees chargeable under the Act shall be impressed or adhesive or partly impressed and partly adhesive as the Governor-General in Council may direct. By S. 27 the Local Government is empowered to make rules for regulating among other things the renewal of damaged or spoilt stamps. S. 30 provides that no document requiring a stamp *under this Act* shall be filed or acted upon in any proceeding in any court or office until the stamp has been cancelled. The rest of the section deals with the mode of cancellation.

In this case the stamp used for the plaint in the City Civil Court was cancelled in accordance with the provisions of S. 30 and the Instructions issued by the Government of India (see Appendix VI to Jagannada Iyer's Court-fees Act). Now, the plaint comes again into court with the cancelled stamp and an additional stamp to make up the deficiency in the court-fee required for the plaint in the Small Cause Court in pursuance of the Government Notification under S. 75 of the Presidency Small Cause Courts Act. (See p. 276 of Bakewell's Presidency Small Cause Courts Act). There is no doubt that the identical plaint returned by the City Civil Court is properly presented to the Presidency Small Cause Court under Order 7, Rule 10, of the Code of Civil Procedure. A plaint presented in the Small Cause Court is chargeable with a fee under S. 71 of the Presidency Small Cause Courts Act, not exceeding that which is specified in that section. Under S. 75 of the same Act the Local Government may from time to time by notification in the Official Gazette vary the amount of the fee under S. 71. The Government of Madras has fixed the fee under this section by a Notification dated the 23rd January 1883. These two sections

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of the Act together with the notification only determine the fee, but make no provision as regards the mode in which that fee is to be paid. By S. 77 it is enacted that Ss. 3, 5 and 15 of the Court-fees Act shall remain unaffected by anything contained in Chapter X, *i. e.*, for our present purpose, by Ss. 71 and 75 of the Presidency Small Cause Courts Act. The result of the saving is that by virtue of S. 3 the fees chargeable in the Presidency Small Cause Court shall be collected in manner thereinafter appearing in the Court-fees Act, and that by S. 25 the court-fee chargeable in the Presidency Small Cause Court, which is referred to in S. 3, though it is not leviable under the Court-fees Act, shall be collected by stamps. S. 26 appears to have no application to the nature of the stamps which may be used for court-fees in the Presidency Small Cause Court, as they are not chargeable under the Court-fees Act. S. 28, which is applicable to the Presidency Small Cause Court, because the court-fees referred to in S. 3 are payable in stamps under S. 25, declares that no document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped. Can it be said that a plaint which bears a cancelled stamp is properly stamped within the meaning of S. 28 of the Court-fees Act? There is no definition of the words "properly stamped" in the Act. If a stamp which has been properly cancelled in accordance with the requirements of S. 30 may be used again in payment of a court-fee chargeable, there is no provision limiting such user to the mere case of a plaint returned. In *Prabhakar Bhat* v. *Vishwambar Pundit*, [1] the question referred to the Full Bench was whether a plaint could be returned where in second appeal a suit was held to have been filed in the wrong court In the course of the judgment of the Full Bench it was incidentally observed "where a court-fee on the institution of a suit has been paid in a court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a court which can really give one." There is no reference in the judgment to the provisions of S. 30 of the Court-fees Act, as regards cancellation of the stamp or of S. 28 as to the requirement of a proper stamp. Stress was laid on the provision contained in

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S. 30 of the Court-fees Act in the decision in *Jagjivan Javherdas Seth* v. *Magdum Ally*[1], as precluding the presentation of a plaint returned with a cancelled stamp without new stamps being affixed to it. In the case of *In re Bai Amrit*[2], the same learned judges who decided the case of *Jagjivan Javherdas Seth* v. *Magdum Ali*[1], declined to accept the decision of the Full Bench in *PrabhakarBhat* v. *Vishwambhar Pundit*[3] as binding upon them. One of the judges, Mr. Justice *Pinhey*, points out at page 390, that the decision of the Full Bench was silent on one of the grounds on which the decision in *Jagjivan Javherdas Seth* v. *Magdum Ali*[1], was based, *viz.*, " the futility of returning a plaint after the court-fee stamps have been cancelled, because cancelled court-fee stamps can no more be used a second time than cancelled postage stamps can be so used."

The argument in favour of the opposite view can only be that the cancelled stamps must be treated as uncancelled because the court which returned the plaint for want of jurisdiction had no jurisdiction to cancel the stamp. But that is evidently not the effect of S. 30 of the Court-fees Act, which requires cancellation of the stamp before the plaint is filed or acted upon. The court must consider the allegations in the plaint and the relief asked for before determining the question of jurisdiction. On the foregoing considerations the result must be that the plaint returned to be presented to the proper court will have to be stamped anew without reference to the cancelled stamps. Section 29 of the Court-fees Act, which makes a special provision in the case of amendment of a document that it shall not necessitate the affixing of a fresh stamp, appears to strengthen the above view. A cancelled stamp does not also appear to fall under the head of damaged or spoiled stamps with reference to the renewal of which the Local Government has power to make rules. The rules made by the Local Government under S. 27, clause (*c*), which refer to plaints written on stamps and not filed in any court, do not extend to the case of a cancelled stamp returned.

But the matter does not appear to rest here. The learned Chief Judge points out that S. 21 of the Civil Procedure Code of 1882, S. 14 of the Madras City Civil Court Act, 1892, and Ss. 19-A

1. (1883) I. L. R. 7 B. 487. 2. (1884) I. L. R. 8 B. 380.
3. (1884) I. L. R. 8 B. 313.

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and 40 of the Presidency Small Cause Courts Act, 1882, make special provision for the deduction of the court-fee paid in one court from the fee payable in another to which a plaint returned by the first is re-presented or a suit is transferred from the first in the circumstances referred to in those sections. Where the transfer of the suit or the re-presentation of the plaint is to the High Court on the Original Side there may be a special need for a specific provision as regards the deduction of the fee already paid, as the system of charging court-fees is essentially different under the Rules of Practice applicable to the Original Side. But it is not easy to explain why a special provision for deduction was made in S. 21 of the old Code of Civil Procedure where a suit is stayed in one court under S. 20 and the plaint is returned and presented to another under S. 21. It must, however, be noted that Ss. 20 and 21 have not been reproduced in the Civil Procedure Code of 1908. On a full consideration of the various provisions of the several enactments to which our attention has been drawn, I feel constrained to agree with the learned Chief Judge of the Small Cause Court. But the practice not only in the Small Cause Court but throughout the Presidency has been, in such cases as the present, to accept the original stamp affixed to the plaint in one court as good so far as it goes in the second court to which the plaint is re-presented. As the question is one of great importance and the view we are at present inclined to take is against the established practice, we refer the question stated to the Full Bench.

Ayling, J.—I am not prepared to dissent from the view of the law expounded by my learned brother; but it cannot be denied that its adoption will not only alter the general practice both in the Presidency and Mofussil courts, but, what is of more importance, will inflict considerable hardship on many litigants who have in perfect good faith taken their case to the wrong court. I doubt very much whether this was the intention of the Legislature. I therefore agree in the proposed reference to a Full Bench.

The case came on before the Full Bench constituted as above.

C. K. Mahadeva Aiyar, for petitioner, submitted that the present case is not covered by any notification of the Governor-General under S. 35 and S.27 does not apply to this case. The

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argument wholly proceeds upon the words "*returning the plaint.*" There is no object in the Legislature using the term but for the purpose of saving court-fee; for limitation it does not matter whether the same plaint is presented or a fresh plaint, whether the plaint is rejected or is returned—see S. 14, Limitation Act. The section relied upon provides for a case as it arose, and moreover has application to the Original Side of the High Court where the system of court fee prevailing is distinct from that in the mofussil. He relied upon *Prabhak Barhat* v. *Vishwambar Pundit*[1] overruling *Jagjivan Seth* v. *Magdum Ali*[2] and submitted that *In re Bai Aurit*[3] was not inconsistent with the earlier F. B. ruling, being based upon the practice of the Original Side. Usage can be appealed to for the interpretation of Statutes where statutes are doubtful—*Magistrate of Dunbar* v. *Roxburghe.*[4]

V. V. Srinivasa Aiyangar, for respondent, relied upon S. 21, C. P. C. (Act XIV of 1882) and referred to Ss. 13, 14, 15 and 29, Courts-fees Act. He submitted that the payments under the Court-fees Act and the Small Cause Courts Act were not of the same nature. Therefore the payment under the one cannot exempt from payment under the other; nor go any way towards it. The Full Bench case in Bombay—*Prabhakar Bhat* v. *Vishwambar Pundit*[1]—has not taken note of the effect of the cancelling that is required. [*Sankaran Nair* J.—Cannot the court cancel the order regarding the cancelling of stamps?] The Act cannot be cancelled by any subsequent order. [*Sankaran Nair* J.—Are not the rules in the Court Fees Act really contemplated to apply only to presentation? Otherwise how can cases of amendment, &c., be met?] Counsel referred to S. 29 and submitted that in those cases the Court orders a re-presentation to itself. In the case of returning of plaint there is no order for re-presentation. Here is only a return of the plaint as being improperly filed in the court in which it is filed.

The Court expressed the following

OPINION:—*The Chief Justice*:—I do not think we ought to interfere with an established practice in this Presidency unless we are fully satisfied that the practice is contrary to law. In

1. (1884) I. L. R. 8 B. 313.
2. (1883) I. L. R. 7 B. 490.
3. (1884) I. L. R. 8 B. 380.
4. (1835) 6 E. R. 1469.

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this case, on the facts stated in the Order of Reference, I am not so satisfied.

The plaint presented to the Small Cause Court is the same plaint as that which was presented to the City Civil Court and returned by that court under Order VII, Rule 10, of the first schedule to the Code of Civil Procedure. The amount actually paid on the plaint is an amount which satisfies the requirements of Ss. 71 and 75 of the Presidency Small Cause Courts Act, 1882, and the notifications under the latter section. No doubt the stamp on the plaint when it was presented to the City Civil Court was cancelled by the City Civil Court in pursuance of S. 30 of the Court-fees Act, because the court purported to "act upon" it by returning it. But I do not find anything in the Court-fees Act which compels me to hold that the plaint when presented to the Small Cause Court was unstamped *quoad* the cancelled stamp. The analogy of the cancelled postage suggested by *In re Bai Amrit*[1] does not seem to me to be in point. If it were, it might be pointed out that the postal regulations do not require a new stamp when a letter is re-addressed and re-delivered. The provision in S. 28 of the Court-fees Act that no document which ought to bear a stamp under that Act shall be of any validity unless it is properly stamped, affords us no assistance on the question whether, on the facts stated, the plaint was properly stamped when presented to the Small Cause Court. The provision in the same section that when a document is amended in order to correct a mistake a fresh stamp is not necessary—no doubt on the "*expressio unius*" principle—lends some support to the conclusion that the document in question in the present case was not properly stamped. The same observation may apply to the last paragraph of S. 19-A and S. 40 (3) of the Presidency Small Cause Courts Act. But, as pointed out in the Order of Reference, "where the transfer of the suit or the re-presentation of the plaint is to the High Court on the Original Side there may be a special need for a specific provision as regards the deduction of the fee already paid as the system of charging court-fees is essentially different under the Rules of Practice applicable to the Original Side." Ss. 20 and 21 of the old Code of Civil Procedure, as the Order of Reference points out, have not been reproduced in the present Code.

The observation of the Full Bench of the Bombay High Court in *Prabhakar Bhat* v. *Vishwambar Pundit*,[2] "where a

1. (1884) I. L. R. 8 B. 387 at p. 390. 2. (1884) I. L. R. 8 B. 313.

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court-fee on the institution of a suit has been paid in a court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a court which can really give one," is no doubt *obiter*, but, in the absence of express statutory provision the other way, I am prepared to apply it to the facts of the present case. In so doing I am upholding what is admittedly the settled practice in this Presidency and what would seem to be, though I have no information as to this, the settled practice in Bombay.

I would answer the question in the affirmative.

Munro J. :—I agree that the question whether the Small Cause Court is bound to give credit for the fee levied by the City Civil Court should be answered in the affirmative. I think this result can be deduced from Order VII, Rule 10, of the Civil Procedure Code of 1908, which lays down that the plaint shall at any stage of the suit be returned to be presented to the court in which the suit should have been instituted. If the plaint, as returned, is not a document which the court to which it is to be presented is bound to receive as it stands—assuming the same scale of court-fees is in vogue in both courts—I am unable to find any sufficient reason for the enactment of the rule. The return of the plaint does not by itself save limitation. So far as limitation is concerned the plaintiff would be in the same position if he tore up the plaint which had been returned to him and drew up and presented a fresh one; for whether the original plaint is presented or a fresh one, the plaintiff, if he wishes to call in aid S. 14 of the Limitation Act, must show that he comes within its terms. I do not think that a court, when returning a plaint under this rule, can be said to be acting upon it within the meaning of S. 30 of the Court Fees Act. It is conceivable that the fact that the court had no jurisdiction to entertain the plaint might be noticed before anything was done to the stamps. In such a case the plaint could, and should, be returned without cancelling the stamps. A plaintiff who had acted *bona fide* should not be in a worse position because the court did not find out its want of jurisdiction before the stamps were cancelled, and, as the rule for the return of plaints makes no distinction between

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cases where the plaintiff has acted *bona fide* and cases where he has acted otherwise, the same principle is clearly meant to apply in all cases.

Sankaran Nair J.:—A plaint was presented to the City Civil Court on the 21st January 1910 written upon a stamped paper of the value of Rs. 75. The stamp was cancelled by an officer of the court on 22nd January 1910.

The Judge of the City Civil Court was of opinion that the suit should have been instituted in the Small Cause Court and returned it on the 22nd February for presentation to that court. The same plaint was presented to the Small Cause Court with the stamp of Rs. 75 which had been already cancelled and further adhesive stamps for Rs. 9-12-0 which were required to make up the fee of Rs. 84-12-0 chargeable on the plaint in the Small Cause Court under S. 71 of the Presidency Small Cause Courts Act. The learned Chief Judge of the Small Cause Court, Mr. Justice Ayling with some hesitation, and Mr. Justice Krishnasawmi Aiyar are of opinion that the 75 Rs. stamp having been rightly cancelled when the plaint was first presented to the City Civil Court has lost its force and the plaint when presented to the Small Cause Court must be taken to bear only a stamp of Rs. 9-12-0.

S. 71 of the Presidency Small Cause Courts Act provides that an *ad valorem* fee shall be paid on the plaint in every suit and that no plaint shall be received until such fee has been paid. S. 28 of the Court-fees Act also states that no document requiring a stamp under that Act shall be of any validity unless it is properly stamped. If therfore the plaint, when presented to the Small Cause Court, bears, in law, only a stamp of Rs. 9-12-0 the plaint cannot be received or acted upon.

The question referred to the Full Bench for decision is whether the stamp cancelled has lost its force in the circumstances above stated and whether the plaint must again be stamped with a stamp of equal value. I am clearly of opinion that the plaintiff need not affix the stamp again to his plaint.

There is no difference between this case and similar cases in the mofussil courts where plaints are returned by one court for presentation to the proper court. There was a doubt entertained for some time under the old Code of Civil Procedure

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whether a plaint should not be returned before it was filed ; or whether it might be returned at any stage of the suit. The Bombay and the Madras High Courts took the latter view which has been embodied in Order VII, Rule 10, of the present Code of Civil Procedure, that the plaint shall at any stage of the suit be returned to be presented to the court in which the suit should have been first instituted. The return of a plaint for presentation to a proper court is to enable the plaintiff to present that document without paying the stamp over again. It was on the ground that " where a court-fee on the institution of a suit has been paid in a court which cannot possibly afford the relief sought it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid or that he should not be allowed to ask without paying a second fee for an adjudication from a court which can really give one," that it was held by the Full Bench of the Bombay High Court that a plaint might be returned at any stage of a suit to enable the plaintiff to present the same plaint without paying over again that fee to the proper court—*Prabhakar Bhat* v. *Vishwambhar Pundit*[1]. Order VII, Rule 10, of the Code of Civil Procedure, 1908, now embodies that rule and it would be thus defeating the very object of the Legislature in directing the return of a plaint to levy the fee over again when it is again presented.

The decision of the Bombay High Court was passed in 1884 and the practice in the Bombay Presidency may be presumed to be in accordance with that decision. In this Presidency it has been the practice to accept the original stamp in the second court to which the plaint is presented. The Legislature has not interfered with that decision or the practice. It has obviously accepted this view.

S. 14 of the Madras City Civil Courts Act and Ss. 19-A and 40 of the Presidency Small Cause Courts Act provide that credit shall be given to the plaintiff in cases of return of plaints to be presented to the High Court for the court-fee paid in such court. This was apparently due to the doubt raised by the system of the court-fees levied on the Original Side of the High Court being different in principle from the Court-fees Act. Ss. 20 and 21 of the Civil Procedure Code of 1882, not reproduced in the present

1. (1884) I.L.R. 8 B. 313.

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code, enact a similar provision. But they deal with the re-institution of the suit, and this may have created some doubt. These provisions certainly indicate the tendency of legislation and, taken with the omission to deal with the cases under consideration, with the prevailing practice and the Full Bench decision of the Bombay High Court before the legislature, can lead only to one conclusion.

It is then said that a stamp which has been defaced and cancelled by proper authority has lost its force and cannot be used again. There is, it appears to me, a fallacy in this argument. It loses sight of the fact that a document does not cease any the less to be a properly stamped document by the cancellation of the stamp. It continues to be properly stamped. By cancellation the stamp cannot be used again, but when the same document, which was the plaint in one court, is rightly presented in another court as a plaint in another court, the stamp is not being used again. It is only the same document that is being used in another court; otherwise, it might with equal force be argued that a plaint with its stamp cancelled when filed as an exhibit in another case, must be stamped again.

I am further of opinion that the cancellation in such cases must be taken to be set aside by reason of the subsequent order returning the plaint. Section 30 of the Court-fees Act runs thus:—

"No document requiring a stamp under this Act shall be filed or acted upon in any proceeding in any court or office until the stamp has been cancelled.

"Such officer, as the court or the head of the office may from time to time appoint, shall, on receiving such document, forthwith effect such cancellation by punching out the figure-head so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed."

In the course of the argument I was inclined to think that under the 2nd clause of this section, the court-fee stamp on a plaint has to be cancelled on its presentation. This does not appear to be so. Under S. 48 of the Code of Civil Procedure of 1882, the plaint has to be presented to the court or to such officer as

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may be appointed to receive it. S. 57 provided that, if on the presentation of a plaint it appears that the court has no jurisdication to try the cause, the plaint shall be returned to be presented to the proper court. The first clause of S. 30 of the Court-fees Act only requires that the stamp shall be cancelled before the document is filed or acted upon. It does not require the cancellation on presentation. The 2nd clause only requires the officer appointed on that behalf, who will be a different person from the judge himself or who may be a different person from the one appointed to receive plaints, to cancel the stamps when—as I read the clause—he receives it for that purpose, preliminary to its being filed or acted upon. The obvious intention and what these sections lay down is that, when a plaint is received, and before it is acted upon or filed, the judge has to decide whether it has been presented to the proper court and according to his opinion return it for that purpose or otherwise give it to the proper officer for cancellation before it is acted upon or filed. He may act upon it without filing it by rejecting it for certain reasons, for instance if the plaintiff fails to supply within a given time the requisite stamp paper to meet the deficiency, if any. In these cases he may file a new suit but not present the same plaint. When the court at a later stage or the appellate court directs the return of a plaint, it is only doing what the court of first instance should have done bef re the cancellation of the stamp. The important alteration in the present Civil Procedure Code allowing the return of the plaint at any stage only strengthens the argument, as already pointed out. It was enacted to enable the courts to do at any stage of the suit what should properly be done on presentation of the plaint before it is acted on or filed. It does not affect the interpretation of S. 30 of the Court-fees Act. The final order returning the plaint, even if passed only in second appeal, therefore relates back to a stage of a suit before it is acted upon or filed, as a preliminary to which alone the stamp has to be cancelled under S. 30 of the Court-fees Act. The final decision directing the return is an order that the court should not have acted on or filed the plaint. It follows therefrom that the cancellation of the stamp was unnecessary under S. 30 of the Court-fees Act. The plaintiff is in such cases relegated by the order to the position he would occupy if the plaint had been returned before

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having been acted upon. A court which has no jurisdiction to entertain a plaint ought to return it immediately. It cannot act upon it, though it may be necessary to make an enquiry to decide the question of jurisdiction. This is not acting upon it but only deciding whether it should act upon it. A party is not to be prejudiced if possible by an act of court afterwards found improper; and cancellation is therefore of no greater effect than the other proceedings including decrees which may have been passed before the final order was passed to return the plaint.

I therefore answer the question whether the Small Cause Court is "bound to give credit for the fee levied by the City Civil Court" in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

H. Vydianatha Aiyar ... Appellant * (*Counter-Petitioner*)

v.

K. Subramanian Pattar .. Respondent (*Petitioner*).

Limitation Act, Art. 182—" *The date of the decree* "—*Portion of amount left unspecified and left to be determined—Cause of action when arises.*

The intention of the Legislature is to treat a decree as a whole, although only a part, and sometimes a very small part, may be the subject of an appeal, or an application for review or amendment. Different starting points for portions of a decree against the same defendant seem to be contemplated only in the case where the decree directs payment on different dates. Where a portion only of the amount decreed is left to be ascertained in future limitation for the execution of the whole decree runs from the date of ascertainment.

Where a decree directed payment of certain specified amounts and also the costs incurred in the lower appellate court which it said " will be ascertained and taxed by that courts:" *Held* that limitation for execution of the whole decree ran from the date of the ascertainment of the unspecified sum.

Obiter :—If the direction were that the costs of the lower appellate court should be paid when ascertained by the subordinate court, the result might be different.

Appeal from the order of the Subordinate Judge's Court of South Malabar at Palghat in A. S No. 805 of 1909 presented

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*A. A. A. O. No 38 of 1910. 7th April, 1911.

against the order of the Court of the District Munsif of Chowghat in M. P. No. 2022 of 1909 in O. S. No. 701 of 1901 and S. A. No 915 of 1903.

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In a case where there was a second appeal to the High Court, the High Court directed that the respondent should pay the costs of the lower appellate court as taxed by the lower appellate court. There were other and substantial reliefs granted in the suits within 3 years of the taxing by the lower appellate court but more than 3 years from the date of the High Court decree. Application was made to execute the decree.

The question was whether the application was barred.

C. V. Ananthakrishnaiyar for appellant.—The application is barred. There was nothing against executing the decree in so far as it was executable. He relied upon *Ratnachallam Aiyar* v. *Venkatarama Aiyar*[1]; C. M. A. 73 of 1903; *Prayaj Singh* v. *Rajah Singh*[2].

T. K. Govinda Aiyar for respondent :— The C. P. C. does not contemplate piece-meal execution. There can be only one execution. In this case, it could be only after ascertainment of the costs. *Ratnachalam Aiyar* v. *Venkatrama Aiyar*[1] is authority that in a case where the decree in the form in which it stands is not executable Art. 178 applies in the first instance. It could also be viewed as an amendment of the decree in pursuance of the judgment in which case also limitation would commence only from the date of amendment. As in the Full Bench case in *Krishnamachariar* v. *Mangammal*[3], there is only one decree and any interference with any portion of that decree involves the commencing of a fresh period of limitation. Two decrees are not contemplated by the C.P. C. as it stood before 1908. The application for taxing the costs may well be regarded also as a step-in-aid of execution.

The Court delivered the following

JUDGMENT.—The question in this case is whether the execution of the decree in S. A. 915 of 1903 of this court is barred by limitation. The decree which was dated the 30th July 1906 provided that the appellant in the second appeal (defendant) should pay the respondent (plaintiff) "Rs 64-11-4 for his costs

1. (1905) I. L. R. 29 M. 46 2. (1898) I. L. R. 25 C. 203
3. (1902) I. L. R. 26 M. 91 (F.B.)

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in this second appeal, Rs. 78-3-7 for his costs in the memorandum of objections and also his costs in the lower appellate court which will be ascertained and taxed by that court." The costs in the lower appellate court were ascertained by that court on the 1st December 1906. The aplication for the execution of the whole decree was presented on the 7th August 1909, *i. e.*, more than 3 years from the date of the High Court decree in S. A. No. 915 of 1903 but within 3 years after the date of the ascertainment of the costs of the lower appellate court by that court. The District Munsif held that the application for execution was barred except with regard to the costs of the lower appellate court. The Subordinate Judge modified his order and held that no portion of the decree was barred by limitation.

It is conceded that so far as it related to the costs of the lower appellate court, the execution was not barred as the decree with respect to that portion became complete only within 3 years of the date of the application. But it is contended by the appellant that the rest of the decree is barred as execution could be applied for with respect to it immediately after the date of the decree of this court in second appeal. After careful consideration we have come to the conclusion that the decision of the lower appellate court is right. Article 182 of the Limitation Act prescribes the rule of limitation with respect to execution of decrees. The starting point is mentioned in the third column. Where an appeal is preferred from a decree or a review of judgment or amendment of the decree is applied for limitation runs with respect to the execution of the whole decree only when the proceedings in appeal, review or amendment come to an end. This shows that the intention of the Legislature is to treat the decree as a whole although only a part, sometimes a very small part, may be the subject of an appeal, or an application for review of judgment or amendment of decree. Different starting points for portions of a decree against the same defendant seem to be contemplated only in the case where the decree directs payments to be made on certain dates, in which case limitation will run for the enforcement of each payment from the date when it is directed by the decree to be made. Although the language of clauses 2, 3 and 4 might possibly be capable of a different construction, it is most fully established by judicial decisions that

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there is only a single starting point where there has been an appeal, review or amendment although it might be open in some of the cases falling within their purview for the decree-holder to apply for the execution of a part of the decree before the proceedings in appeal, review or amendment have terminated—see *Gopal Chundar Munne* v. *Gosain Das Kalay*[1]; *Krishama chariar* v. *Mangammal*[2]; *Abdul Rahiman* v. *Moidin Sahib*[3] and *Gouri Sahai* v. *Ashpak Husain*[4]. We think that in the present case also the decree must be taken as a whole for deciding the question of limitation. If the direction were that the costs of the lower appellate court should be paid when ascertained by the subordinate court the case might be different We are of opinion that the decree must be interpreted as one for the payment of a certain sum of money composed of 3 items, and one of those items, namely the costs of the lower appellate court was not ascertained until the 1st December 1906. It was held in *Ratnachella Aiyar* v. *Venkatarama Aiyar*[5] that where a decree is for the payment of a sum of money to be thereafter ascertained, limitation would run only from the date of the ascertainment of the amount, a view which has been enunciated in several other cases (see also *Krishnan* v. *Nilakantan*[6]). We are of opinion that the same rule should apply where a portion only of the amount decreed is left to be ascertained in future. It has also been decided that an application for execution of a a portion of a decree or against some only of the judgment-debtors would give a fresh starting point for the execution of the whole decree—see *Subramanian Chettiar* v. *Alagappa Chettiar*[7] by agent *Palaniappa Chettiar* and *Nepal Chandra Sudhorkar* v. *Amrita Lal Sudhorkar*[8].

Mr. Anantakrishna Aiyar for the appellant relies on two cases in support of his contention. The first of them—*Prayag Singh* v. *Rajah Singh*[9]—does not really decide the question and need not be further considered. The other decision is a judgment of *Subrahmanya Aiyar* and *Boddam* JJ. in C. M. A No. 74 of 1903. The decree in that case provided for the payment of costs and mesne profits, the mesne profits being left to be ascertained subsequently in execution. The application for execution

1. (1898) I. L. R. 25 C. 594 (F.B.)
2. (1902) I. L.R. 26 M. 91 (F.B.)
3. (1896) I. L. R. 22 B. 500.
4. (1907) I.L. R. 29 A.. 623.
5. (1905) I. L. R. 29 M. 46.
6. (1884) I.L.R. 8 M. 137.
7. (1906) I. L. R. 30 M. 268.
8. (1899) I. L. R. 26 C. 888.
9. (1898) I. L. R. 25 C. 203.

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was presented more than three years after the decree but within that period after the ascertainment of mesne profits. The learned judges held that the application was barred with respect to the costs but not with regard to the mesne profits. The judgment with reference to execution for the costs is extremely brief and no reasons are given in support of it. With all deference to the learned judges we are unable to follow the decision. The policy of the Limitation Act in the case of execution decrees is, in our opinion, to lay down a simple rule and to treat the decree as a whole except when the decree itself directs that different portions of the relief granted are to be rendered by the defendant to the decree-holder at different times. Our conclusion is in accordance with the decision of the Privy Council in *Haji Ashfat* v. *Lala Gauri Sahai*[1].

We must therefore dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Kunyil Parkum Putthukkayi Kottayi Kanaran	..	Appellant* in A. No. 76 of 1908 (*9th Defendant.*)
v.		
Varanakot Illath Ganapathi Nambudri and others	..	Respondents in Do. (*Plaintiff and Defendants* 2 & 3).

C.P.C. (*Act VIII of* 1859), *S.* 246—*Scope of enquiry—Limitation Act, Art.* 11—*Judgment-debtor if a necessary party to inquiry under S.* 246—*Estoppel—Demisor and demisee.*

The judgment-debtor cannot be regarded as necessarily a party to an investigation under S. 246 of Act VIII of 1859; and in the absence of proof of service of notice on him, he is not bound to set aside an order in claim proceedings within one year from the date of the order.

The court, under S. 246 of Act VIII of 1859, could only make an order releasing the property from attachment or disallow the claim—a claim *objecting to the sale* of the property in execution. The rights of any claimant to some interest in the property, *e.g.*, to an equity of redemption in the possession of the judgment-debtor cannot form the subject of an inquiry under S. 246 of Act VIII of 1859.

Held also that the demisee was estopped in the case from contesting the title of the demisor and that no express admission of jenm right by the demisee otherwise than by the acceptance of the demise was necessary in the circumstances of the case to estop the demisee from denying the demisor's jenm right.

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*A. S. Nos. 76 and 102 of 1908. 6th February, 1911.

1. (1911) 13 C.L.J. 351.

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Appeals from the decree of the District Court of North Malabar in O. S. No. 14 of 1906.

The necessary facts appear from the judgment.

T. R Ramachandra Aiyar, for appellant, contended:—

(i) That the plaintiff's right was only a redeemable mortgage right. "Nirozhika" *otti* meant no otti, the only difference between that kind of tenure and ordinary otti being that the amount advanced in the former case was less than that advanced in the latter case. Kaividu otti, for instance, has been judicially declared in *Kundu* v. *Impichi*[1] to be no more than an ordinary otti, not irredeemable. The right of the ottidar is stated in *Kadakamvalli Sankaran Missad* v. *Mokkath Ussain Haji*[2]. For the nature and incidence of the various otti tenures see MOORE's *Malabar Law*, p. 251 *et seq.*

(ii) The defendant being the sub-mortgagee and having also acquired the jenmi's interest, the result is payment of the mortgage because the amount of the sub-mortgage is at least as high as the mortgage.

(iii) In a case like this there is no estoppel. All that the mortgagor is precluded from contending is that the mortgagee had not the title sufficient to maintain the mortgage and not from saying that he had not a higher right which is recited in the mortgage document—EVEREST & STROUD ON *Estoppel* p. 278; *Ford* v. *Agir*[3]; CASPERZ, p. 100; *In re Hringer estate*[4].

The effect of the order in claim proceedings was to extinguish the right of the plaintiff except to the extent it upheld it.

J. L. Rosario, for respondent, contended that the defendant was estopped from contending that the plaintiff had not the jenm, though after once delivering possession he would be entitled to rely upon whatever title he has. As for the order, the order that was made could not have been legitimately made by the court—*Ramanada* v. *Bithee*[5]; *Nettietom Perangnypron* v. *Tayanbany Parameshwaran*[6]. It must have been one either releasing or upholding the attachment—*Kelat Chunder* v. *Bhugbuttee*[7].

1. (1884) I. L. R. 7 M. 442.
2. (1907) I.L.R. 30 M. 388.
3. (1863) 2 H. & Colt, 279.
4. (1877) 6 Ch. D. 1.
5. (1869) 4 M. H. C. 263.
6. (1869) 4 M. H. C. 472.
7. (1870) 14 W. R. 144.

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The only parties to the order in claim proceedings are the claimant and the decree-holder—see S.278, *et seq*. The Rules of Practice provide only for notice to the decree-holder. The judgment debtor is not a party and is not bound. He cited *Sardhari Lal* v. *Ambilla Persad*[1]; *Guruva* v. *Subbarayudu*[2]; *Moidin Kutti* v. *Kunhi Kutti Ali*[3]; *Krishnaswami* v. *Somasundaram Chettiar*[4]; *Vadapalli Narasimham* v. *Dronamraju Sitaramamurthy*[5]; *Abdul Samad* v. *Corporation of Calcutta*[6]; *Sadaya Pillai* v. *Amritachari*[7]. As to the nature of the tenure, he submitted it was an irredeemable one.

T. R. Ramachandra Aiyar, in reply, contended, relying upon *Chidambara Pattar* v. *Ramasami Pattar*[8], that attachment could be upheld to the whole extent, or partially, and that the word "possession" was not confined to physical possession. As to parties, he contended that the judgment-debtor was a party—a proper party—and could be bound.

The Court delivered the following

JUDGMENT:—*Appeal* No. 102 *of* 1908.—The 3rd defendant has preferred this appeal against the decree of the District Court of North Malabar, decreeing redemption of a kanom demise of the year 1870, made in favor of one Kunhi Lakshmi Kettilamma, the mother of the 2nd and 3rd defendants, by Iswaran, the 12th defendant's predecessor in title. The 1st defendant is the brother of Kunhi Lakshmi. Exhibit *A* is the demise sued on and it is executed by Iswara Vadhyan as the jenmi of the properties. It does not appear that there was any counterpart or *kaichit* executed by the demisee, but admittedly the demise was accepted by Kunhi Lakshmi who would seem to have been in possession of it on *Putravakasam* tenure. The property therefore seems to belong to the children of Kunhi Lakshmi, who are entitled to hold them as *tavazhi* property with the incidents of such property under the *Marumakathayam Law*. There seems to be a dispute between the 2nd and 3rd defendants with respect to the question whether the 2nd defendant has any right to the property. But this dispute is immaterial for the disposal of this case. The plaintiff alleges

1. (1888) I.L.R. 15 C. 521.
2. (1890) I.L.R. 13 M. 366.
3. (1902) I.L.R. 25 M. 721.
4. (1907) I.L.R. 30 M. 335.
5. (1907) I.L.R. 31 M. 163.
6. (1905) I.L.R. 33 C. 287.
7. (1910) M. W. N. 741.
8. (1903) I.L.R. 27 M. 67.

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inter alia that the property is held under the demise by the 2nd and 3rd defendants and by defendants Nos. 4 and 10 under them. The 1st defendant did not put in an appearance. The 2nd and 3rd defendants, while admitting the demise, deny the plaintiff's right to redeem. They contend that the plaintiff had no *jenm* right over the property on the date of the demise, but only a kanom interest for an amount much smaller than the amount acknowledged by Exhibit *A* to have been received by Iswara Vadhyan from Kunhi Lakshmi, that the jenm right vested in the Kurungot Tarwad till 1878, when it was sold in court auction in execution of a decree against the tarwad and purchased on behalf of Kunhi Lakshmi by a benamidar (Exhibit *II*) who executed a conveyance later on in the same year to Kunhi Lakshmi (Exhibit *III*) and that Iswara Vadhyan's right to redeem was terminated in law on the date of the said auction sale, as Kunhi Lakshmi then became the owner of the equity of redemption and at the same time held a sub-mortgage from Iswara Vadhyan for a much larger amount than that due to him on his own mortgage. They further allege that in 1872, when the property was attached in execution of a decree against Iswara Vadhyan as his jenm, the Karnavan of Kurungot Tarwad put in a claim petition under S. 246 of Act VIII of 1859, asserting that the jenm right belonged to his tarwad and that Iswara Vadhyan had only an *otti* right, which was directed to be sold, and that no suit having been instituted by Iswara Vadhyan within one year after the order on the claim petition, Exhibit *I*, dated 23rd March 1872, the plaintiff as the assignee of Iswara Vadhyan's right cannot claim to redeem the demise as jenmi.

The principal questions raised in the lower court were those covered by issues Nos. 2 and 4 to 8. Of these, the second issue refers to the plaintiff's title to redeem either on jenm or any other title that he may have. The 6th and 7th issues raised the question whether in consequence of the order, Exhibit *I*, on the claim petition of 1872 referred to above, the plaintiff is debarred from setting up his jenm title, assuming that he was the jenmi before. The lower court held that the order, Exhibit *I*, not having been questioned by a regular suit within one year after it was passed, the plaintiff cannot now claim to redeem as jenmi. But it held that the plaintiff has an irredeemable *otti* right and is entitled as such to maintain this suit for

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redemption. The learned vakil for the appellant contends that the view of the lower court that the plaintiff is entitled to an irredeemable mortgage cannot be sustained and the question of the nature of the plaintiff's right over the property, assuming that he cannot set up a jenm claim, was argued before us at some length. Mr. Rosario, for the 1st respondent, attacks the District Judge's finding with respect to the conclusiveness of the order, Exhibit *I*, and contends that the plaintiff is not estopped from relying on his jenm right. He also urges that the demisee under Exhibit A, Kunhi Lakshmi, and her heirs must be held, by having accepted the demise and held possession under it, to be estopped from disputing the plaintiff's jenm title.

We propose first to deal with the former of these contentions.

[After discussing the evidence on the point their Lordships proceeded as follows:—ED.]

* * *

We must hold on the evidence and the probabilities of the case that notice of the claim was not issued to the judgment-debtor Iswara Vadhyan.

Mr. Ramachandra Aiyar contends, on behalf of the appellant, that the judgment-debtor must be taken to have been necessarily a party to, and to be bound by, an order made under S. 246 of Act VIII of 1859, and relies on the words of the section which says that "the court shall........proceed to investigate the same with the like powers *as if the claimant had been originally made a defendant in the suit* and also with such powers as regards the summoning of the original defendant as are contained in S. 220." It is urged that the claim must be regarded, on this language, as if it were a proceeding in the original suit, and that, as the judgment-debtor was a party to the original suit, he must be regarded as having been a party to the claim proceedings also. But this contention does not seem to be quite consistent with the latter part of the sentence, which expressly confers power on the court to summon the original defendant, a provision that would be hardly necessary if the judgment-debtor was to be necessarily treated as a party. The corresponding section in the later Acts X of 1877 and XIV of 1882, made a variation in the language used in S. 246 of Act VIII of 1859 and provided that " the court shall proceed to investigate the

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claim or objection with like power as regards the examination of the claimant or objector and in all other respects as if he were a party to the suit," and not "as if the claimant was a party to the original suit." The Bombay High Court in *Shivapa* v. *Dod Nagaya*,[1] was of opinion that the later Acts merely expressed in clearer language the meaning of S. 246 of the Code of 1859 (see page 118). According to that decision "the material fact for inquiry is whether the claimant held possession, and the fact of possession may be investigated in a proceeding between the decree-holder and the claimant only. The power given by the section to summon the original defendant also shews this" The Judicial Committee of the Privy Council in *Sardhari Lal* v. *Ambika Pershad*[2] observe: "It is not suggested that there can be any person against whom an order can be passed under S. 280 except the decree-holder himself." In *Netietom Perangaryprom* alias *Panisherry Damodhran Nambudry* v. *Tayanbany Parameshwaram Nambudry*[3], *Scotland* C. J., and *Bitleston* and *Collett* JJ. were of opinion that the judgment-debtor must be regarded as a party when a claim is upheld. But *Innes*, J. was inclined to take the contrary view. This decision was doubted in *Chengarakal* alias *Arakel Kunhi Kuttyali* v. *Vayaka Parambat Imbichi Ammal*[4] by *Morgan*, C. J and *Holloway* J. and in *Moidin Kutti* v. *Kunhikutti Ali*[5] by the *Chief Justice* and *Benson* J. In *Imbichi Koya* v. *Kakkunet Uppaki*[6] and *Mannu Lal* v. *Harsukh Das*[7] it was held that the judgment-debtor is not necessarily a party to the proceedings under S. 246 of the Code of 1859. In the latter case it was considered that it would be necessary to show that the judgment-debtor was summoned, and that the fact that he was a party in name would not be enough to bind him by the order made on the claim petition. Under the later Codes of 1877 and 1882 it has been held almost unanimously in a series of cases that it must be shewn that notice of claim was served on the judgment-debtor before he can be held to be bound by the order of the court (see *Moidan Kutti* v. *Kunkutti Ali*[8], *Krishnaswami Naidu* v. *Somasundram Chettiar*[9], *Vadapalli Narasimham* v. *Dronam Raju Seetharam Murthi*[10] and *Sadaya Pillai* v. *Amritha Chari*[11] where attention is drawn to the difference between the language of S. 246 of the Code of 1859 and the corresponding section of the later Codes). We are inclined to hold that the judgment-debtor cannot be regarded as necessarily a party to an investigation under S. 246 of Act VIII of 1859. We are confirmed in this opinion by the conclusion we have arrived at with respect to the meaning and scope of S. 246 of the Code of 1859.

The respondent contends that under S. 245 the Sudder Amin's Court was entitled to inquire only into the question whether Iswara Vadhyan or Kurungot Tarwad was the party

1. (1881) I. L. R. 11 B. 114
2. (1888) L. R. 15 I A. 123.
3. (1902) 4 M. H. C. R 472.
4. (1878) 6 M. H. C. R. 416.
5. (1902) I. L. R. 25 M. 721.
6. (1878) I. L. R. 1 M. 391.
7. (1881) I. L. R. 3 A. 233.
8. (1902) I. L. R. 25 M 721.
9. (1907) I.L.R. 30 M. 335.
10. (1907) I.R. 31 M. 163.
11. (1910) 1 M.W. N. 741.

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in possession of the property; that the question whether Iswara Vadhyan was only an ottidar or whether he had a valid jenm right was beyond the scope of the section, and that therefore he was not bound to establish his jenm right within one year after the date of the order, Exhibit J. The question raised by the claimant was whether a jenm deed obtained by Iswara Vadhyan in 1863 from the Karnavan of the tarwad was obtained under circumstances which would make it binding on the tarwad or not, the genuineness of the deed which was filed as Exhibit *A* in the claim proceedings, but is not produced in this suit, not being contested. For the purpose of deciding this question it is necessary to examine a little closely the provisions of S. 246. The claim which a person could prefer under it was one referring to or objecting to the sale of the attached property as not liable to be sold in execution of the decree. The investigation to be made by the court was whether property was actually or constructively in the possession of the judgment-debtor or of some other person (constructive possession being taken to include possession on one's behalf by a trustee); and the order to be passed was one releasing the property from attachment or allowing the claim referring or objecting to the sale of property. A comparison of the section with Ss. 278 to 282 of the later Codes of 1877 and 1882 throw much useful light on the construction of S. 246 of the Act of 1859. Section 278 enacts that "if any claim be preferred or objection made to the attachment of any property. . . . ". This allows a claim being made to the property attached and not merely a claim referring to the sale of attached property, and the ground of the claim or objection is that such property is not liable to *such* attachment, *i.e.*, "the particular attachment objected to" and not that the property in question is "not liable to be sold in execution of the decree" as in S. 246. This distinction is made clearer by S. 279 which says that "the claimant or objector must adduce evidence to show that at the date of the attachment he *had some interest in* or was possessed of the property attached." The investigation by the court thus includes the question whether the claimant, whether he has possession or not, had some interest in the property at the date of the attachment. The distinction is pursued by the enactment of S. 282 which lays down that "if the court is satisfied that the property is subject to a mortgage or lien in favor of some person not in possession and thinks fit to continue the attachment, it may do so subject to such mortgage." There is nothing in S. 246 of the Code of 1859 corresponding to this provision Section 283 enacts that "the party against whom an order is passed under S. 280, 281 or 282 may institute a suit to establish *the right which he claims* to the property in dispute . . . . " not, as in S. 246 "the right claimed under the section objecting to the sale of the attached property." Under S. 281, no doubt, the claim is to be disallowed if the judgment-debtor has a possessory interest in the property, but this must be taken in conjunction with Ss. 279 and 282, which show that the claim of a mortgagee or

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lien-holder not in possession must be maintained. If the judgment-debtor is not in legal or constructive possession, the property is to be released from attachment according to S. 246. The corresponding S. 280 adds the words "*wholly or to such extent as it thinks fit*" carrying out the opinion expressed in *Deonath Biswas* v. *Issury Gira*[1] that under S. 246 also part of the property attached could be released. No express provision is made in S. 280 or S. 281 with regard to investigation of any right of the judgment-debtor in the property not accompanied by possession, either directly or through a tenant or other person paying rent. It may be that the principle laid down in *Chidambara Pattar* v. *Ramasami Pattar*[2] will allow of such investigation being made, and the right of the judgment-debtor without possession, physical or through a tenant, being allowed to be sold; such a view would be in consonance with the provision in S. 282 that a claim of mortgage or lien without possession on the part of the claimant may be recognised by the court.

The above comparison leads clearly to the conclusion that the court under S. 246 could only make an order releasing the property from attachment or disallow the claim, which must be one objecting to the sale of the property in execution. We are not aware of any case holding that under S. 246 the rights of a claimant to some interest in property in the possession of the judgment-debtor could be investigated, or that the court could raise an attachment where the judgment-debtor had a possessory interest in the property. Mr. Rosario cited several cases in which the contrary view was maintained—*Khelat Chunder* v. *Bhugbiathy*[3], *Thebrajat Deraj Mahtab Chand* v. *Hardes Narain*[4] *Cheriarkel* v. *Vayaka Parumbath Imbichisunwa*[5] *Shivappa* v. *Doddle Nagaya*[5] *Dayac hand Nemchand* v. *Hemchand Dharamchand*[7] Mr. Ramachandra Aiyar argued that the Kurungot Tarwad must be treated as having been in possession of the equity of redemption, and that we must take it that the Sudder Amin found that it was in possession of it. But such a claim, if of an equity of redemption, is not, as already observed, within the purview of S. 246, as it would not be an objection to the sale of the property. Moreover, Exhibit *I* does not show that the claimant asserted that the tarwad was in possession of the equity of redemption. Iswara Vadhyan had purchased the jenm right. The land was in the actual possession of the Putravakasam holders, but their rights had been sold in court auction. There is no positive evidence except Exh. *A* that they had attorned to Iswara, but we must take it, as between the Tarwad and Iswara Vadhyan, that the Tarwad had no possession, especially as there was no purapad or rent payable to the jenmi. The sale of the jenm right was sufficient in the circumstances to vest in Iswara Vadhyan such legal possession

1. (1870) 14 W. R. 52.
2. (1903) I.L.R. 27 M. 67.
3. (1870) 14 W. R. 144.
4. (1871) 16 W. R. 119.
5. (1871) 6 M. H. C. R. 416.
6. (1881) I.L.R. 11 B 114.
7. (1880) I.L.R. 4 B 575.

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of the equity of redemption as it was capable of. It is unnecesary to refer to cases cited at the Bar relating to the investigation of claims under the sections in the later Codes which support the interpretation we place on S. 246. For the above mentioned reasons we hold that the order, Exhibit *I*, was not one which Iswara Vadhyan was bound to impeach by a suit within one year or twelve years after it was passed. We also agree with the contention of the learned vakil for the first respondent that defendants Nos. 2 and 3 are estopped from contesting in this suit the plaintiff's jenm right to the property. Iswara Vadhyan purchased the jenm right from the Karnavan of the Kurungot Tarwad on the 27th September 1863 (Exhibit *A* in the claim case). The *otti* rights of the *Tavazhi* of the 2nd and 3rd defendants had been sold in auction previously to the jenm sale and purchased by Iswara. Kunhi Lakshmi then in 1870 accepts from him the kanom demise, Exhibit *A*, in which the property is declared by him to be his jenm. It is impossible to believe that at the time of the demise when no one had impeached the validity of his jenm deed, Iswara Vadhyan, would have agreed to execute Exhibit *A*, if Kunhi Lakshmi-who was fully conversant with the facts, had not agreed to act knowledge him as the jenmi and agreed to hold the land under him on that footing. Kunhi Lakshmi, by her conduct, induced Iswara to execute Exhibit *A*, as she would otherwise have been bound to surrender the lands to him, as the auction purchaser of her Tavazhi rights. We cannot agree with the contention that any express admission of jenm right by the demisee otherwise than by the acceptance of the demise was necessary in the circumstances of the case to estop her from denying the plaintiff's jenm right.

In the view we take on the questions discussed it is unnecessary to consider the contention that the *otti* right that Iswara Vadhyan first purchased in auction was not irredeemable. The defendants did not in this suit allege that the jenm sale to Iswara was not binding on the Kurungot Tarwad but relied solely on Exhibit *I*.

In the result this appeal must be dismissed with costs. Time for payment of the mortgage money and the value of improvements is extended till the re-opening of the District Court after the summer recess.

Appeal No 76 of 1908 is by the 9th defendant for two plots of land. [Their Lordships after discussing the evidence relating to them reversed the decree of the lower court and modified the decree accordingly.—ED.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Sir Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswamy Aiyar and Mr. Justice Ayling.

Kunmetta Chinnarappa .. Petitioner*

v.

Kona Thimma Reddi, A Second Grade Pleader of Gooty .. Respondent

Kunmetta Chinnarappa *v.* Thimma Reddi.

Legal Practitioners Act, S. 13 (*f*)—*Reasonable cause—Rule* 27—"*Enters into any trade or business*"—*Usurious money-lending transactions.*

A pleader who entered into usurious and oppressive money-lending transactions, using the name of his minor son as a screen, did not give the notice required by Rule 27 of the Rules under the Legal Practitioners Act The transactions were numerous, continuous and systematic.

Held that there was reasonable cause for an order of suspension or dismissal within the meaning of S. 13 of the Legal Practitioners Act.

Case referred, under S. 14 of Act XVIII of 1879, by the District Judge of Cuddapah, in M.P. No. 245 of 1908, on the file of his Court.

S. Swaminathan for the petitioner.

T. Rangachariar on behalf of the Pleadership Board.

L. A. Govindaragava Aiyar for the 2nd Grade Pleader.

T. V. Seshagiri Aiyar on behalf of the Vakils' Association.

The Court delivered the following

JUDGMENT:—*The Chief Justice.*—In this case certain charges of misconduct were preferred under the Legal Practitioners Act, 1879, against one Kona Thimma Reddi, a Second Grade Pleader of Gooty.

The matter came before us on a report by the District Judge under S. 14 of the Act.

Before this court the pleader was called upon to answer the charges:—

(1) A charge of trading in the name of his minor son for his own benefit.

(2) A charge founded upon an order made by the Deputy Magistrate, Gooty, directing the pleader to furnish security under S. 107 of the Code of Criminal Procedure.

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* Ref. Case No. 12 of 1910. 13th November, 1910.

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As regards the 3rd charge the order to furnish security was set aside by the District Magistrate. In these circumstances I an not prepared to say that any case of misconduct has been made out against the pleader in respect of this charge.

As regards the 2nd charge, I am of opinion that the evidence dces not establish that the circumstances connected with the institution and conduct of the criminal cases were such as to furnish grounds for dealing with the certificate of the pleader.

With reference to the 1st charge. Rule 27 of the rules under the Legal Practitioners Act is as follows :—

"If any person, having been admitted as a pleader, accepts any appointment under Government, becomes any student of any school or college for the purpose of pursuing his studies or enters into any trade or other business, or accepts employment as a law agent other than a Pleader, Mukhtar or agent certified under Act XVII of 1879 and these rules, he shall give immediate notice thereof to the High Court who may thereupon suspend such pleader from practice or pass such orders as the said court may think fit." The pleader did not give notice to the High Court that he had entered into a trade or business. In order to avoid the necessity of further local enquiries with reference to this charge, Mr. Govindaragava Iyer, who appeared for the pleader, consented to furnish particulars of transactions which his client had entered into, and these particulars were duly furnished. The defence put forward on behalf of the pleader was two-fold:— (1) That the transactions were not carried on by him for his own benefit but for the benefit of his minor son and out of the moneys belonging to the son. (2) The transactions did not constitute the entering into a trade or business. The transactions consisted of loans of money in small amounts. The substance of one of the bonds taken by the pleader as security for an advance is set out in the plaint in a suit brought by him (O. S. No. 636 of 1908 on the file of the Gooty District Munsif's Court). It is as follows :— "The defendant having taken Rs. 24 from the plaintiff on the 27th May 1907, executed a bond for Rs. 24 in favour of the plaintiff in the village of Gooty stipulating to deliver on the Palgunasuddha, 15th of the year Plavanga (17th March 1908,) 8 maunds of cotton for Rs. 8, failing so to deliver, to pay the price at Rs. 2 per maund, to pay the balance of Rs. 16 with

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interest thereon on the aforesaid due date and failing to do so, to deliver cotton at the rate of 1 maund per rupee and in case of failure to do so to pay the price at Rs. 2 per maund."

It appears from the particulars furnished on behalf of the pleader that in the great majority of cases, his advances were secured by bonds containing terms similar to those set out above. I find it impossible to accept the statement that these transactions were entered into by the pleader on behalf of his minor son and out of his son's moneys. If the pleader, as he wants us to believe, was acting as his son's trustee or guardian, the transactions were altogether improper. They were certainly of a speculative character since the result might be dependent on the price of cotton several months after. The bonds, as it seems to me, were usurious and oppressive. I feel no doubt that the son's name was held as a screen. Even if the pleader conducted these transactions as guardian it might none the less amount to the entering into a trade or business within the meaning of the rule. As regards this part of the case, it is enough to say that, in my opinion, the defence that the transactions were not entered into by the pleader on his own behalf entirely fails.

As regards the contention that the transactions do not constitute a trade or business, it would seem from the particulars (according to the summary given by Mr. Rungachariar who appeared on behalf the Pleadership Examination Board) that in 1906, 14 transactions in the name of the Pleader's son and 2 in his own, took place; in 1907, 57 transactions in his son's name and 14 in his own, and in 1908, 14 transactions in his son's name and 25 in his own, and that in 1907 the total amount of cotton which the borrowers agreed to deliver in satisfaction of the advances made to them was over 1,000 maunds.

The money-lending transactions were numerous, continuous and systematic and I feel no doubt that the pleader entered into a trade or business within the meaning of the rule.

The breach of the rule, of course, consists in not giving notice to the High Court, and if the pleader had dealt candidly with the court and had not attempted to justify his conduct, I should have been disposed to take a lenient view of the case. But, I do not believe his statement that he carried on the transactions on behalf of his son, and the fact that he has put forward

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this statement, to my mind indicates that he was conscious of the impropriety of his conduct. I think we are entitled to take into consideration the nature of the money-lending transactions which, in my opinion, as I have already stated, were usurious and oppressive.

There is now no question as to our jurisdiction to deal with a case of this sort—see the order of the High Court dated 19th April, 1910, in the matter of the Second Grade Pleaders *Choragudi Venkatadri Panthulu Garu* and *Oruganu Venkata Subba Row Pantulu Garu*[1]—and I am of opinion that there is reasonable cause for an order of suspension or dismissal.

The order we make is that Kone Thimma Reddi, a Second Grade Pleader, be suspended from practice till the end of the year and that his certificate be not renewed until he satisfies this court that his outstanding money-lending transactions are closed and that he has ceased to carry on business as a money-lender.

Krishnaswami Aiyar J—I agree.

Ayling J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Balasubramania Nadar.	..	Appellant.
v.		(*2nd Defendant*).
Sivaguru Asari & another.	..	Respondents.

Balasubramania Nadar v. Sivaguru Asari and another.

Deed—Construction—Mortgage or charge?—Simple mortgage, essentials of—T. P. A., S. 61—*Consolidation of mortgages.*

A mortgage deed ran as follows:—"In default I shall on the security of the house site belonging to me * * * pay and make good the principal and interest."

Held: Per *Curiam*:—That the instrument created a mortgage. *Madho Misser* v. *Sidh Binaick*[2] disapproved.

Per *Chief Justice*,—S. 61 of the Transfer of Property Act implies, as is shown by the illustration, that if there are different mortgages in favour of one and the same person, not in respect of different properties but the same property, the mortgager cannot seek to redeem any one mortgage without redeeming the others also. The same principle will be equally applicable to a mortgagee having several mortgages over the same property seeking to obtain an order for sale on one mortgage.

*S. A. No. 1086 of 1907. 8th December 1909.

1. (1910) 20 M.L.J. 500. 2. (1887) I.L.R. 14 C. 687.

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Per *Krishnaswami Aiyar* J :—*Obiter.*—A charge may be created on the happening of a condition where the condition itself is first stipulated and the condition happens afterwards.

A covenant to pay is essential for a simple mortgage. It is not necessary that there should be a formal transfer of any interest in property in words : nor is it necessary to constitute a simple mortgage that the instrument should state that the mortgagee shall recover his money by sale.

Second appeal from the decree of the Subordinate Judge's Court of Madura (West) in A. S. No. 149 of 1906. presented against the decree of the court of the District Munsif of Tirumangalam in O. S. No. 600 of 1904.

Suit for redemption. In February 1873 there was a mortgage of a house by the plaintiff's vendor to the 1st defendant's predecessor in title (Exhibit I). In June of the same year there was a transaction (Exhibit II) between the same parties under which a further advance was made by the 1st defendant's predecessor in title. In 1889 there was a sub-mortgage by the 1st defendant's predecessor to the 2nd defendant's predecessor in title. In 1904, the plaintiff purchased the equity of redemption. With regard to Exhibit II the Munsif held that the instrument was a mortgage and decided in favour of the 2nd defendant. The lower appellate court took the view that it was neither a charge nor a mortgage and accordingly decided against the 2nd defendants' contention that he was entitled to be redeemed in the plaintiff's suit.

S. Srinivasa Aiyangar for appellant :—Default in payment is not a contingency. Even if it is, there is nothing against the creation of a charge on a contingency.—*Madho Misser* v. *Sidh Binaick Upadhyaya*[1] is opposed to *Cooling* v. *Saravana.* It is in effect the same as creating mortgage of future property which has been upheld in *Palaniappa* v. *Lakshmanan*[3]; see also *Janardan* v. *Ananth*[4]; *Montagu* v. *Earl of Sandwich*[5] *Balshet* v. *Dhondo Ram*[6]. This is a case of mortgage not of charge. The difference between a mortgage and charge is that a mortgage can only be by act of parties, there must be a debt, and property must be specific. Again, a simple mortgage involves a convenant to pay, while a charge does not. If it is a mortgage clearly the claim is not barred. Even if the suit is barred, defence on that basis is not barred.—*Subrahmanya Aiyar* v. *Poovan*[7]. *Orr* v. *Sundara Pandia*[8]; *Krishna Menon* v. *Keshavan*[9] *Lukshmi Das,* v. *Rup Lal*[10]; *Ranganath Sakharam* v. *Govind*

1. (1887) I. L. R. 14 C. 687.
2. (1888) I. L. R. 12 M. 69
3. (1893) I. L. R. 16 M. 429.
4. (1908) I. L. R. 32 B. 386.
5. (1886) 32 Ch. D. at 543.
6. (1901) I.L.R. 26 B. 33 at 39.
7. (1902) I. L. R. 27 M. 28.
8. (1893) I. L. R. 17 M. 255.
9. (1897) I. L. R. 20 M. 305.
10. (1906) I. L. R. 30 M. 178.

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Narasimh [1]. Again, the defendant is entitled to consolidation—*Dorasami* v. *Venkatashesha Aiyangar* [2]; *Parthasarathy* v. *Thandavaraya* [3]; *Nathu Krishnamacharyar* v. *Annangara Chariar* [4] and *In re Marshfield* [5].

M. Narayanaswami Aiyar for respondent cited *Harjas Rai* v. *Naurang* [6]; as adopting the ruling in *Madho Misser* v. *Sidh Binaick Upadhyaya* [7] as to difference between charge and mortgage he cited *Gobinda Chandra Pal* v. *Dwaraka Nath Pal* [8]; *Royzuddi Sheik* v. *Kali Nath Mookerjee* [9]; cited *Khudo Baksh* v. *Alim-un nissa* [10]; *Sheo Shankar* v. *Parma Mahton* [11] to negative the right of consolidation. He argued that there would be no right to consolidate when the mortage or charge is barred.

S. Srinivasa Aiyangar in reply further cited *Sir Raja Papamma Rao* v. *Sri Viraprritepa Ramachandra Razu* [12]; *Motiram* v. *Vithi* [13]; and *Datto Dudheshwar* v. *Vithu* [14] to show that the document in question created a charge.

The Court delivered the following

JUDGMENT:—*The Chief Justice.*—The facts necessary for determining the question which has been argued in this appeal may be put quite shortly thus: In February 1873 there was a mortgage of a house by the Plaintiff's vendor to the 1st defendant's predecessor in title (Exhibit *I*). In June of the same year there was a transaction (Exhibit *II*) between the same parties under which a further advance was made by the 1st defendant's predecessor in title. In 1889 there was a sub-mortgage by the 1st defendant's predecessor to the 2nd defendant's predecessor in title. In 1904, the plaintiff purchased the equity of redemption. With regard to Exhibit *II* the Munsif held that the instrument was a mortgage and decided in favour of the 2nd defendant. The lower appellate court took the view that it was neither a charge nor a mortgage and accordingly decided against the 2nd defendant's contention that he was entitled to be redeemed in the plaintiff's suit.

1. (1904) I. L. R. 28 B. 639.
2. (1901) I.L.R. 25 M. 108.
3. (1907) 17 M.L.J. 515.
4. (1907) I. L. R. 30 M. 353.
5. (1887) 34 Ch. D. 721.
6. (1906) 3 A. L. J. 220.
7. (1887) I. L. R. 14 C. 687.
8. (1908) I.L.R. 35 C. 837.
9. (1906) I. L. R. 33 C. 985.
10. (1904) I.L.R. 27 a 313.
11. (1904) I. L. R. 26 A. 559.
12. (1896) I. L.R 19 M. 249.
13. (1898) I. L. R. 13 B. 90.
14. (1895) I. L. R. 20 B. 408.

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Before passing to the question of the legal effect of Exhibit *II*, I propose to say one or two words with regard to the general question which was raised and that is to say, as to the power or right of the 2nd defendant to insist upon his being redeemed, and for the purpose of dealing with this question, I assume that Exhibit *II* amounts to a mortgage and I also assume that the law of limitation places no obstacle in the way of the 2nd defendant.

Now S. 61 of the Transfer of Property Act says that a mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him or by any person through whom he claims, or property other than that comprised in the mortgage which he seeks to redeem. That section does not say so, in so many words, but I think the inference is clear, that where the property is the same the subsequent mortgagee is entitled to insist on being redeemed.

The point is discussed in all the text books and it is pointed out that one view is taken in Bombay and Madras and another view in Allahabad. It seems to me that the law upon this point, so far as this Presidency is concerned, is well settled. I do not think it necessary for me to discuss all the authorities which have been cited in the course of the argument and I content myself with referring to a passage in a judgment of this court in the case of *Doraisamy* v. *Venkataseshayya.*[1] The passage is as follows and it is found at p. 115:—" Section 61 of the Transfer of Property Act, which is the same as S. 17 of the Conveyancing and Law of Property Act, 1881 (44 and 45 Vict, Cap, X 41), " no doubt abolishes the doctrine of consolidation of mortgages" over different properties which doctrine was recognized by the courts in India, before the Act was passed— *Vithal Mahadeo* v. *Dand Mahamed Hensen*[2]. But that very section implies— as is shown by the illustration, that if there are different mortgages in favour of one and the same person, not in respect of different properties, but the same property, the mortgagor cannot seek to redeem any one mortgage without redeeming the additonal mortgages also. The same principle will be equally applicable to a mortgagee having several mortgages over the same property, seeking to obtain an order for sale on one mortgage

1. (1901) I.L.R. 25 M. 108. 2. (1869) 6 B.H.C.R. (A. C.) 90.

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only. That seems to be a correct exposition of the law with regard to this question so far as this presidency is concerned.

Now, passing to the legal effect of Ex. *II* is it a charge or a mortgage or is it neither? The lower appellate court relied upon a decision in *Madho Misser* v. *Sidh Binaick Upadhya*[1]. In that case the argument was that the instrument was a mortgage and if it was not a mortgage it was a charge. The court held that it was not a charge and the reason they gave for so holding was this :—" This document seems to us not to create a charge at the time of its execution, but to operate only as a charge upon the land in question upon the non-payment of the principal." That is the ground of decision given by the Calcutta judgment. I think a distinction may be drawn between the language of the instrument in the *Madho Misser* v. *Sidh Binaick Upadhyaya*[1] and the language of the instrument before us. In the Calcutta case the instrument runs thus :—" * * If I do not pay the money according to the stipulation, then I declare in writing that I shall lose my right to 1 bigha and 7 cotas of Guzasta land situated in mouzah Kuthar. If I do not pay money according to the promise then the aforesaid Misser shall take possession of the land." In the document before us the words are " In default I shall on the security of the house site belonging to me * * * * pay and make good * * * the principal and interest."

Moreover I feel some doubt as to whether I should be prepared to follow the decision of the Calcutta High Court based as it was upon the ground that the instrument did not create a charge at the time of its execution, but that it only operated so as to bring the charge into existence on non-payment of the principal money, that is on default. The contingency which the learned Judges had in view was the contingency of the mortgagor not fulfilling his covenant to pay.

I should doubt, if on that ground alone, the instrument could be properly held not to create a charge within the meaning of S. 100 of the Transfer of property Act.

As regards the question of limitation it was argued that in the view that the instrument merely created a charge although the

1. (1887) I.L.R. 14 C. 687.

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2nd defendant could not have recovered on it, his remedy being time-barred, he might rely on it for the purpose of showing that his mortgage rights were not extinguished by the operation of the Law of Limitation. In support of that argument we were referred to the case of *Soobramania Aiyar* v. *Poovan*[1] and *Lakshmi Doss* v. *Roop Lal*[2]; to an English decision—*In re Marshfield*[3].

Again with regard to this question it is not necessary for me to express any final opinion because in my view the instrument is a mortgage. It seems to me it satisfies the requirements of S. 58, Sub-section (*b*), of the Transfer of Property Act. In support of the contention raised on behalf of the respondent that it was not a mortgage, we were referred to two Calcutta cases—*Royguddi Sheik* v. *Kali Nath Mookhejhee*[4] and *Gobinda Chandra Pal* v. *Dwakanath Pal*[5] I do not think that we get much assistance from either of these decisions. It was argued on behalf of the respondent that the document could not be construed as a mortgage because it did not in express terms, confer a power to sell. No authority was cited in support of this proposition. On the other hand Mr. Srinivasa Aiyangar was able in his reply to call our attention to a decision of the Privy Council in *Sri Raja Papamma Rao* v. *Sri Viraprataps H. V. Ramachandra Razu*[6]. It is true the words of the instrument there in question were not the same as the words here. The words in the Privy Council case no doubt come much nearer to a power of sale than the words in the instrument before us. But in the Privy Council case a power of sale was inferred from the words which did not give the power in express language.

Mr. Srinivasa Aiyangar was also able to call our attention to a Bombay case—*Motiram* v. *Vittal*[7]—in which the language of the document was the same as in the case before us. In that case it was held that the instrument amounted to a mortgage.

I think the court of first instance is right and that the instrument amounts to a mortgage. An issue will have to go back to the lower appellate court. I leave my learned brother to deal wth this.

1. (1902) I.L.R 27 M. 28.
2. (1906) I.L.R, 30 M. 178.
3. (1887) L. R. 34 Ch. D. 721.
4. (1906) I. L. R. 33 C. 985.
5. (1908) I. L. R. 35 C. 837.
6. (1896) I.L.R. 19 M. 249.
7. (1888) I. L. R. 13 B. 96.

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Krishnaswami Aiyar J.

Krishnaswami Aiyar J.—I wish to add a few words. I am unable to agree with the decision of the Calcutta High Court in *Madho Misser* v. *Sidh Binaik Upadhyaya.*[1] Although it is possible to distinguish the facts of that case from those of the present it must be admitted that the Calcutta case proceeds upon the principle that it is impossible to create a charge on a condition and the charge will not be effective on the happening of that condition. The Allahabad High Court also in *Harjas Roi* v. *Naurang* [2] appears to take the the same view. The facts of that case are also distinguishable. But although the facts are so distinguishable, the principle laid down in that case does not commend itself to me. Sections 5 and 21 of the Transfer of Property Act seem to me to recognise the principle of a valid charge being created on the happening of a condition. The decision of this court in *Cooling* v. *Saravana* [3] is based upon it. I see nothing opposed to any principle of law that there should be a charge created on the happening of a condition where the condition itself is first stipulated and the condition happens afterwards. That being my view I dissent from the conclusion arrived at by the Subordinate Judge.

Now the next question to be dealt with is whether the instrument in the case creates a mortgage or a charge. The distinction between mortgage and charge is rather fine sometimes. Of course, there is no difficulty in distinguishing a mortgage by conditional sale from a charge. But the difficulty arises where a distinction has to be drawn between a simple mortgage and a charge. A charge is said be created by act of parties or by operation of law.

In so as far as it is created by operation of law, that is a circumstance which distinguishes a charge from a mortgage which is created by act of parties. But there are cases where a charge is created by the act of parties and the question is, what is the distinction between a charge and a mortgage, where the mortgage is a simple mortgage and the charge is created by the act of parties. I have been in considerable doubt during the course of the argument as to whether we have succeeded in getting hold of any principle by means of which we could distinguish a mortgage from a charge. But having heard the

1. (1887) I. L. R. 14 C. 687. 2. (1906) 3 A. L. J. 220.
3. (1888) I. L. R. 12 M. 69.

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matter fully discussed by Mr. Srinivasa Aiyangar, I have been able to make up my mind and I wish to express the conclusion at which I have arrived. I think a covenant to pay is an essential element of a simple mortgage. It has been held that it is not necessary that there should be a formal transfer of any interest in property in words. And I think the authority of the Privy Council decision in *Sri Rajah Papamma Rao* v. *Sri Vira Pratap H. V. Ramachendra Razu* [1] goes so far as this. Then it is also not necessary to constitute a simple mortage that the instrument should state that the mortgagee shall recover his money by sale of the mortgaged property. The decision in *Datto Dudheswar* v. *Vithu* [2] carries the matter a little further than the Privy Council case and I venture to think that it carries it as far as it is necessary to go for the purpose of this case. Therefore following the authority of *Datto Dudheswar* v. *Vthu* [2] I hold that the transaction in this case is a mortgage.

Now the question remains as to what we shall do in this case. The Subordinate Judge in paragraph 8 of his judgment refers to the question as to the priority of plaintiff's sale over Exhibit *II*. The plaintiff's sale deed is registered and Exhibit *II* is unregistered. It has been pointed out by Mr. Srinivasa Aiyangar that his sub-mortgage which is registered is dated 1886 and anterior in point of time to the plaintiff's sale deed and that he would still be in a position to claim priority over the plaintiff's sale deed. Well, that is a question for the Subordinate Judge to decide. We should probably have considered it ourselves and decided it here but for the fact that Mr. Srinivasa Aiyangar raises also another question as to whether plaintiff's sale was not with notice of Exhibit *II*. No doubt, this question was not raised before; but having regard to the fact that the plaintiff only claimed in the appellate court priority in respect of his instrument being registered and the second defendant's document Exhibit *II*, being unregistered we ought not to deny the second defendant an opportunity of proving that the plaintiff had notice of Exhibit *II*.

The issue that we shall remit to the Subordinate Judge to try will be whether the plaintiff's purchase is free from the

1. (1896) I.L.R. 19 M. 249. 2. (1895) I.L.R. 20 B. 408.

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mortgage under Exhibit *II* as against the 2nd defendant by reason of the sale being registered and Exhibit *II* being unregistered. The 2nd defendant will be at liberty to raise in his plea of notice to the plaintiff at the time of his purchase of Exhibit *II*, and the Subordinate Judge will take further evidence on the issue and return his finding in 8 weeks from this date when there will be 10 days for objections.

[The appellant having died no further action was taken in the case.—ED.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Sree Raja Bommadevara Venkata Narasimha Naidu Bahadur, Zemindar Garu, of North Vallur Estate .. Appellant* in both.

v.

Sajja Sathayya .. Respondent in S. A. No. 1125 of 1909.

and

Ravi Subbayya .. Respondent in S. A. No. 1126 of 1909.

Madras Acts—1 Rent Recovery Act, S. 7—Distraint for larger amount than what is actually due—Illegality—No distinction between sale and distraint.

A distraint for a larger amount of rent than what is actually due is wholly void and cannot be held valid even to the extent of the rent actually due. [*Venkatakrishna Pillai v. Muthialu Reddi* [1]; *Periakarappa Pillai* v. *The Manager of the Lessees of Shivagunga Zemindari* [2]; *Ramachandra* v. *Naragarasawmi* [3]; not followed; *Varna Deva Desikar v. Murugesa Moodelli* [4]; followed; *Shunmooga Moodelly* v. *Palmattikuppu Chetti* [5]; *Bashyakarlu Naidu* v. *Gurudappa neni Subbanna* [6]; *Munisawmi Naidu* v. *Perumal Reddi* [7]; referred to.]

A distraint and a sale stand on the same footing in this respect.

Second appeals from the decrees of the District Court of Kistna in A. S. Nos. 479 and 750 of 1907 presented against the

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* S. A. Nos. 1125 and 1126 of 1909. 24th January, 1911.

1. (1910) 20 M.L.J. 821.
2. (1907) I.L.R. 31 M. 22.
3. (1887) I.L.R. 10 M. 229.
4. (1905) I.L.R. 29 M. 75.
5. (1901) I.L.R. 25 M. 613.
6. (1903) I.L.R. 27 M. 4.
7. (1900) I.L.R. 23 M. 613.

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decision of the Court of the Sub-Collector of Bezwada Division in S. S. Nos. 565 and 566 of 1907.

The landlord in this case (the defendant) distrained for arrears of rent after tendering a patta which he considered was proper. The tenant brought a suit to set aside the distraint and then it was found that the landlord had claimed too much rent. The rate claimed in the plaint was Rs. 5-0-0 whereas the correct rate was only Rs. 4-8-0. The distraint was accordingly set aside. Hence the appeal.

P. Nagabhushanam, for appellant, contended on the authority of the rulings in *Ramachandra* v. *Narayanaswami* [1], *Venkatakrishna Pillai* v. *Muthialu Reddy* [2], *Periakaruppa Pillai* v. *The Manager of the Lessees of the Sivaganga Zemindari* [3], *Bhupatirasu* v. *Ramasami* [4] that the distraint was good to the extent of the amount properly leviable on the tenant.

T. Prakasam, for respondent, argued *contra* relying upon the rulings in *Vama Deva Desikar* v. *Murugesa Mudally* [5], *Bashyakarlu Naidu* v. *Gurudappaneni Subbanna* [6], *Pichuvayengar* v. *Oliver* [7], *Munusami Naidu* v. *Perumal Reddi* [8], *Shunmuga Mudally* v. *Palnattiha Kuppu Chetty* [9] and submitted that on principle it should be so as under S. 7 of the Rent Recovery Act no proceedings taken would be valid unless a proper patta was tendered. The distraint can well be upheld where the patta tendered is proper but the amount claimed is higher than warranted by the patta or, as in *Ramachandra* v. *Narayanaswami* [10], the claim in respect of the arrears is barred.

The Court delivered the following

JUDGMENT:—The appellant is the Zemindar of Vallur and the respondents are his tenants. The respondents refused the patta tendered by the appellant for Fasli 1316 and the appellant distrained the respondents' property for arrears of rent for that Fasli. The respondents sued to set aside the distraint. Both the lower courts have found that the tendered patta was improper in that it provided for rent at the rate of Rs. 5 per

1. (1887) I. L. R. 10 M. 229.
2. (1910) 20 M. L. J. 821.
3. (1907) I. L. R. 31 M. 22.
4. (1899) I. L. R. 23 M. 268.
5. (1905) I. L. R, 29 M. 75.
6. (1903) I. L. R. 27 M. 4.
7. (1902) I. L. R. 26 M. 260.
8. (1900) I.L.R. 23 M. 616.
9. (1901) I. L. R. 25 M. 613.
10. (1887) I.L.R. 10 M. 229.

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acre instead of Rs. 4-8-0 the proper rate; and have accordingly given the respondents the decree sued for.

It is now argued on behalf of the appellant that in spite of the tendered patta being improper, the distraint should nevertheless be held valid to the extent of the rent actually due and that the decrees of the lower courts setting it aside altogether are wrong. This contention, which was considered and rejected by the District Judge, is the only one now put forward in support of the appeal.

The question has to be disposed of with reference to the provisions of Act VIII of 1865 as retrospective effect cannot be given to S. 53 of the Act I of 1908. Section 7 of Act VIII of 1865 enacts that no suit shall be brought and no legal proceedings taken to enforce the terms of a tenancy unless patta and muchilika have been exchanged or agreed to be dispensed with, or unless a proper patta has been tendered. There has been no exchange or agreement to dispense with patta and muchilika in the present case and the only patta tendered has been found to be improper. The provisions of this section would therefore appear to be conclusive against the appellant. The appellant, however, relies on the rulings reported in *Karnam Venkatakrishna Pillai* v. *A. Muthiyalu Reddi*[1], *Periakaruppa Pillai* v. *The Manager of the Lessees of the Sivaganga Zemindari*[2] and *Ramachandra* v. *Narayanaswami*[3]. On the other hand *Muniswami Naidu* v. *Perumal Reddi*[4], *Bashyakarlu Naidu* v. *Gurudappaneni Subanna*[5] and *Vama Deva Desikar* v. *Murugesa Mudaly*[6] are quoted by the respondent. In considering the first named cases, it is to be noted that the learned judges in *Karnam Venkatakrishna Pillai* v. *A. Muthiyalu Reddi*[1] do not profess to discuss the point but merely remark "it has been held by this court in recent cases that the attachment is good for the amount actually due." The only recent case to which we are referred is *Periakaruppa Pillai* v. *The Manager of the Lessees of the Sivaganga Zemindari*[2]. But here also, although there is some discussion of adverse rulings, their Lordships' decision appears to be chiefly based on the ground that the question was concluded by the express authority of a still earlier case—*Ramachendra* v.

1. (1910) 20 M. L. J. 821.
2. (1907) I. L. R. 31 M. 22.
3. (1887) I. L. R. 10 M. 229.
4. (1900) I. L. R. 23 M. 616.
5. (1903) I. L. R. 27 M. 4.
6. (1905) I. L. R. 29 M. 75.

Narasimha Naidu v. Sathayya.

Narayanaswami[3]. Turning again to this, the earliest of the cases relied on by the appellant, it will be found that the effect of S. 7 of the Rent Recovery Act is not considered at all in connection with the conclusion arrived at. The legality of the distraint in that case was questioned not on the ground that the requirements of S. 7 as to the tender of a proper pattah had not been complied with but on the ground that the distraint had been effected for arrears of two faslis, the claim for one of which was time-barred under S. 2 of the same Act.

This is a totally different point. S. 7 is not even alluded to in the judgment in that case and there is nothing to indicate that its provisions were infringed.

On the other hand *Vama Deva Desikar* v. *Murugesa Mudaly*[1] appears to us to be a distinct authority for the contrary view which is also in general accord with the principles enunciated by the Full Bench in *Shunmuga Mudaly* v. *Palnatti Kuppu Chetty*[2] and *Bashyakarlu Nadu* v. *Gurudappaneni Subbanna*[3]. We may also refer to the remarks of *Sheppard* J. in another Full Bench case—*Munisami Naidu* v. *Perumal Reddi*[4]—to the effect that any landlord who elects to distrain in preference to suing for acceptance of patta " takes his chance of some flaw being discovered in the patta". *Pichuviengar* v. *Oliver*[5] is another case which is mentioned in *Peria Karuppa Pillai* v. *The Manager of the Lessees of the Sivaganga Zemindari*[6] but distinguished on the ground that it relates to a *sale* and not to a distraint. But a tenant is certainly aggrieved even by a mere distraint of his property. He can only procure its release by payment of the amount demanded, *i. e.*, more than what is really due, and although he may be entitled to recover damages by a summary suit he should not be driven to such a troublesome remedy.

In these circumstances we feel justified in following the last noted series of decisions which appear to us to be in accordance with the true meaning of S. 7. We therefore agree with the District Judge in holding the distraint to be altogether illegal and we dismiss these second appeals with costs.

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1. (1887) I.L.R. 10 M. 229.
2. (1903) I. L. R. 29 M. 75.
3. (1901) I. L. R. 25 M. p. 613.
4. (1903) I. L. R. 27 M. 4.
5. (1900) I. L. R. 23 M. 616.
5. (1902) I. L. R. 26 M. 260.
7. (1907) I. L. R. 31 M. 22.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Krishnaswami Aiyar and Mr. Justice Abdur Rahim.

Peria Perumal Muthirian & others .. Appellants*

v.

Pichan *alias* Karupan Muthirian & others.. Respondents.

Perumal *v.* Karupan.

C.P.C., (*Act XIV of* 1882), *S.* 368—*Ejectment suit—Effect of abatement against one defendant as regards others—Wrong order for withdrawal of suit with leave—Effect on second suit.*

In an ejectment suit against several trespassers where one of the defendants dies and the plaintiff fails to bring his legal representative on record, he can still proceed against the other defendants in the suit. [*Joy Gobind Saha* v. *Manma Nath Banerji*[1] and *Upendra Kumar Chakravarthi* v. *Sham Lal Mandul*[2] followed.]

Obiter:—The result will be different in a suit for taking the accounts and winding up of the affairs of partnership. [*Rajchunder* v. *Ganga Das Sen*[3] referred to.]

A court has jurisdiction to grant leave to institute a fresh suit whether the defendants consent to it or not. Where a court wrongly purports to give leave to withdraw a suit with leave to file a fresh suit as with the consent of the defendant while the defendant himself was dead and there was no one brought on the record as legal representative. *Held*:—That no objection could be taken to the second suit on the ground that the order granting leave was made on a misconception of facts or that the leave was inoperative, the prior order not having been set aside in due course.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 187 of 1908, presented against the decree of the Court of the District Munsif of Srirangam in O. S. No. 421 of 1904.

Suit to recover possession of a certain land. There was a previous suit by the same plaintiff against the same parties and the ancestor of others which was permitted to be withdrawn with liberty to sue. The order purported to be with consent of the defendants. At the date of the order the 2nd defendant was dead and his legal representatives had not been brought on the record. The question was whether the order was not void as against all the defendants or at least the representatives of the 2nd defendant to the previous suit. Both the courts below took the view that

* S. A. No. 844 of 1909. 19th September, 1910.

1. (1906) I.L.R. 33 C. 580. 2. (1907) I.L.R. 34 C. 1020.

3. (1904) I.L.R. 31 C. 487.

the previous order was void and of no effect and also that the present suit was barred. Hence the appeal.

Perumal v. Karupan.

S. Krishnamachariar for appellant.

T. Natesa Aiyar for respondent.

S. Krishnamachariar contended that the suit did not abate so far as the other defendants were concerned and cited *Joy Gobind Saha* v. *Manmatha Nath Banerji*[1]; *Upendra Kumar* v. *Sham Lal Mandal*[2]; *Bai Full* v. *Ardesar*[3]; and distinguished. *Har Kunwar* v. *Amba Prasad*[4] and *Rajhunder Sen* v. *Ganga Das Seal*.[5] Leave to bring a fresh suit is not bad because one of the defendants had died at the time. At any rate the order giving leave ought to have been set aside. Not having been set aside, it is binding.

T. Natesa Aiyar relied upon *Dharam Jit Narayan Singh* v. *Chandeswar Prasad*[6] for the position that where it is not possible, as in this case, to discriminate the interest of each party, the whole suit must abate. The order on withdrawal petition being after the death of one party was of no effect so far at least as he was concerned, but, if the first contention of his was right, against all.

S. Krishnamachariar was not called upon to reply.

The Court delivered the following

JUDGMENT :—The second defendant in the first suit having died and his legal representatives not having been brought on the record within the time allowed by law, the first question is whether the suit, which was one in ejectment, abated only as against him or against the other defendants as well The language of S. 368 of the Code of Civil Procedure of 1882 is no doubt general, but that section has been the subject of many decisions, and we think the view taken of it in *Joy Gobind Saha* v. *Manmatha Nath Banerji* and *Upendra Kumar Chakravarth* v. *Sham Lal Mandal*[2] is correct. No doubt, in a case like the one in *Raj Chunder Sen* v. *Ganga Das Seal* and *Ramgate Dhur* v. *Raj Chunder Sen*[5] where the suit was for taking accounts and the winding up of the affairs of a partnership, the right of action could not be said to survive against the remaining defendants

1. (1906) I. L. R. 33 C. 680.
2. (1907) I.L.R. 34 C. 1020.
3. (1901) I. L. R. 26 B. 203.
4. (1900) I. L. R. 22 A. 430.
5. (1904) I. L. R. 31 C. 487.
6. (1907) 5 C.L.J. 393=11 C. W. N. 504.

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partners alone, since the relief, in a suit of that nature, can only be granted when all the partners and their legal representatives are before the court. A suit to recover possession of land from a number of trespassers stands, however, on a different footing. The plaintiff could proceed against one or more of them as he chose. We are, therefore, of opinion that the right to sue survived against the surviving defendants so far as their interests are concerned.

Now so far as the present suit as against the representatives of the 2nd defendant is concerned, the position is this. The first suit in which the 2nd defendant's representatives were not brought on record was allowed to be withdrawn with leave to institute a fresh suit. The order purports to be made with the consent of the defendants, but as a fact the 2nd defendant on the date of the order was dead, and his legal representatives had not been brought on the record and there could, therefore, be no consent on the part of his legal representatives. But that order granting leave to institute a fresh suit was not called in question by review or by revision. The question then is, was the order of no effect in law or was it one which would be operative unless set aside?

This matter is not free from some difficulty, but on the whole we are inclined to the view that the respondents ought to have got the order set aside, and, not having done so, no objection can be taken now to the suit on the ground that the order granting leave was made on a misconception of facts or that the leave was inoperative. The court has jurisdiction to grant leave to institute a fresh suit whether the defendants consented to it or not, and apparently the court thought that it was a proper case in which leave ought to be granted. Under these circumstances we do not think that the leave can be treated as *non est.*

The appeal is allowed and we reverse the decrees of both the courts and remand the suit to the court of first instance for disposal according to law. Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. Unni v Pathutti.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Thachakavil Unni Koya .. Appellant*

v.

Arapayil Pathutti Ummah .. Respondent.

C.P.C., S. (IV of 1882) 273—*Attachment of decree—Effect of attachment —Decree allowed to be barred by attaching creditor—Collusion—Damages.*

Attachment of a decree prevents the execution by the decree-holder thereof until and unless any of the events mentioned in S. 273, C. P. C., happens; [*Pathumma* v. *Idivi* [1] *Adhar* v. *Lal Mohan* [2] not followed. *Sami* v. *Krishna* [3]; distinguished; and consequently, the attaching creditor who attaches the decree, if he prevents the execution of the decree and allows it in collusion with the judgment-debtor to be barred is liable in damages to the decree-holder whose decree was attached and allowed to be barred.]

The only person who could execute a decree under attachment is the attaching creditor.

Any application by the decree-holder of a decree under attachment, for execution would be infructuous and an infructuous application will not save limitation. [*M. Husani* v. *Jani* [4]; *Gurupadappa* v. *Virabadrappa* [5]; and *Puma Chandra* v. *Radha* [6]; referred to.]

Appeal under S. 15 of the Letters Patent against the order and judgment of Mr. Justice Sankaran Nair in C. R. P. No. 687 of 1908.

The facts are stated in sufficient detail in the judgment.

K. P. M. Menon, for appellant, submitted that by reason of S. 273, C. P. C., the holder of the decree attached could not apply for execution, and the attaching decree-holder owed a duty to his judgment-debtor to exercise due care in the preservation of his property. The cases relied upon by *Sankaran Nair* J.—*Sami Pillai* v. *Krishnasawmy Chetty* [3], *Aoher Chendra Dass* v. *Lal Mohan Dass* [7]—he submitted, were not relevant to the present issue, and the case *Pathumma* v. *Iduri Beari* [1] was wrong. The learned judges themselves did not want it to be reported. The words used in S. 273 are "stay execution." In their ordinary sense they mean that the party execution by whom is stayed it is stayed

*L. P. A. No. 1 of 1910. 26th January, 1911.

1. (1892) 13 M.L.J. 265.
2. (1892) I.L.R. 24 C. 668.
3. (1897) I.L.R. 21 M. 417.
4. (1905) I.L.R. 27 A. 619.
5. (1882) I.L.R. 7 B. 459.
6. (1906) I.L.R. 33 C. 867.
7. (1892) I. L. R. 24 C. 778.
8. (1903) 13 M. L. J. 265.

Unni v. Pathutti.

cannot apply for execution. The law does not allow idle, infructuous, or impossible applications, and such applications cannot save limitation—*Chattar* v. *Nawal Singh*[1]; *Munawar* v. *Jani Bijai—Shankar*[2]; *Langtu Pande* v. *Baijnath Saran Pande*[3]. *Govindappa Basappa* v. *Virabhadrappa Irsangappa*[4]; *Rungiah Goundan* v. *Nanjappa Row*[5]; *Purna Chandra Mandal* v. *Ratha Nath Dass*[6]; *Munawar Hussain* v. *Jam Bigai Shauka*[7]; *Gopilandhu* v. *Domburu*[8]; *Umesh Chandra Das* v. *Shib Narain Mandal*[9].]

C. Madhavan Nair, for the respondent, conceded that if an application is idle, infructuous or unnecessary it cannot save limitation but he contended that the section prohibited only appropriation of profits by the judgment-debtor and did not stand in the way of going through the earlies stages of execution—see the observations of *Maclean* C.J. in *Adher Chendra Dass* v. *Lal Mohan Dasse*[10]. Staying execution does not precude applying for execution. He also cited *Debi Maharani* v. *Collector of Etawah*[11]; and Mitra on *Limitation* p. 1146, which show that in the analogous case of the attachment of a debt, the debtor can sue for the debt and the only thing that he cannot do is to receive the debt. He also submitted that the debtor could have applied for the appointment of a receiver. Being guilty of contributory negligence plaintiff could not get.

The Court delivered the following

JUDGMENT:—The suit was instituted for recovery of damages on the ground that the defendant who attached in execution of his decree against the plaintiff a decree for money which the plaintiff held against a third person allowed the decree by his negligence or by collusion with the judgment-debtor of the plaintiff to lapse by efflux of time. The defendant has realised the amount of his decree from the properties of the plaintiff. The Subordinate Judge gave a decree to the plaintiff finding the facts in his favour. *Sankaran Nair* J. in revision has set aside the judgment of the Subordinate judge on the ground that

1. (1889) I. L. R. 12 A. 64.
2. (1905) 2 A. L. J. 376.
3. (1906) I. L. R. 28 A. 387.
4. (1882) I. L. R. 7 B. 459 at 464
5. (1903) 13 M. L. J. 412.
6. (1906) I. L. R. 33 C. 867.
7. (1905) I. L. R. 27 A. 619.
8. (1888) I. L. R. 11 M. 336.
9. (1904) I. L. R. 31 C. 1011.
10. (1892) I. L. R. 24 C. 778.
11. (1894) I. L. R. 17 A. 198.

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the plaintiff, the holder of the attached decree, could have executed the decree in spite of the attachment, and in support of this proposition the learned judge relies on the cases *Pathumma* v. *Idivi Beari* [1], *Sami Pillai* v. *Krishnaswamy Chetty*[2] and *Aoher Chandra Dass* v. *Lal Mohan Dass*[3]. It is contended on behalf of the plaintiff who appeals against his judgment that S. 273 of the Civil Procedure Code (Act XIV of 1882), expressly lays down that when a decree is attached execution of it shall be stayed by the court which passed the decree unless and until the court which issued the notice of attachment cancels the notice or the judgment creditor at whose instance the attachment was made applies for execution of the decree so attached.

We think this contention is well founded. It is urged on behalf of the respondent that the words "stay the execution" in S. 273 must be understood to mean only the taking of the proceeds of the execution and that the section does not preclude the holder of the attached decree from taking all the necessary steps for its execution short of actually receiving the amount. We think that such a construction would be entirely artificial. As regards the authorities it would appear that so far as the case of *Pathumma* v. *Idivi Beari*[1] is concerned the learned Judges who decided the case did not wish that their decision should be used as a precedent for the general proposition which is now relied upon on behalf of the respondent. In *Adhar Chandra Dass* v. *Lal Mohan Dass*[3] there is no doubt a general dictum of *Maclean* C. J. that the attachment of a decree does not prevent the holder of that decree from executing it, but *Banerji* J. does not go so far and he limits his judgment to another ground. *Maclean* C.J., if we may say so with respect, does not attempt to show how the words of S. 273 are compatible with his construction but proceeds on what appears to us to be general grounds of expediency. The case reported in *Sami Pillai* v. *Krishnaswamy Chetty*[2] has no relevancy to the present question. If the holder of the attached decree could not execute it then any application made by him for that purpose would have been infructuous in the sense that it would not be competent for the court to grant it, and it would further follow that

1. (1903) 13 M. L. J. 265. 2. (1897) I. L. R. 21 M. 417.
3. (1892) I. L. R. 24 C. 778.

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such an application, if made, would have been useless to save limitation. [*See Munavar Hussain* v. *Jani Bigai Shankar*[1], *Puma Chandra Mandal* v. *Ratha Nath Dass*[2] and *Gurupadappa Basappa* v. *Virabhadrappa Irsangappa*[3]. We are therefore of opinion that the defendant, the attaching judgment-creditor, was the only person who could have executed the attached decree.

The judgment of *Sankaran Nair* J. must be reversed and that of the Subordinate Judge restored. Each party will bear the costs of this appeal and before *Sankaran Nair* J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

K. Seshadri Iyengar & others	.. Appellant*
v.	(*Defendants*).
Ranga Pattar	.. Respondent.
	(*Plaintiffs*).

Religious endowment — Trustee's power over archaka — Hereditary archaka—Ad interim suspension—Notice not necessary—Suspension whether and when incidental to power of dismissal—Courts, when will interfere with ad interim suspension for want of notice.

No notice is required for an *ad interim* suspension pending inquiry into a complaint against a servant entitled to hold office during good behaviour or for life *Seshadri* v. *Nataraja*[4] distinguished. The position of an archaka, though his tenure of office be hereditary, is essentially that of a servant. His position in relation to the trustee is not similar to the position of the trustee to the Temple Committee.

It may not be that in every case where the right to dismiss exists, the right of suspension is necessarily incidental to it. Such might possibly not be the case where the right depends on the construction of statutes or of the rules of a corporation or of a club. But these analogies are not applicable to the case of servants subject to the discipline of a trustee.

Even if it were that notice before an *ad interim* suspension is essential, a court will not set aside the order of suspension where, after enquiry by the court, it has been found proper and justifiable in the circumstances *The King* v. *The Mayor and Council of London* referred to. It may be otherwise where the propriety of the order itself is not reviewable by the court, in which case the order will be set aside for want of notice.

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*S. A. No. 722 of 1909. 7th April 1911.

1. (1905) I. L. R. 27 A. 619. 2. (1906) I.L. R. 33 C. 867.
3. (1882) I.L.R. 7 B. 459, p. 464. 4. (1897) I.L.R. 21 M. 179.
5. (1787) 100 E.R. 96.

Seshadri Iyengar. v. Ranga Pattar.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 154 of 1908, presented against the decree of the court of the District Munsif of Srirangam in O. S. No 35 of 1907.

The facts appear in sufficient detail in the judgment.

T. Rangachariar for appellant.

T. R. Ramachandra Aiyar and *R. Rangaswami Aiyangar* for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff in this suit was an archakar in the great Vishnu temple of Srirangam. He instituted the suit against the managers of the temple for the cancellation of an order of suspension passed against him by the managers and to recover damages alleged to have been sustained by him and the value of perquisites which he would have earned if the suspension had not taken place. The only question for decision in this second appeal is whether the suspension which is found to have been otherwise justifiable in the circumstances was illegal on the ground that no notice was given to the plaintiff to show cause against it before the order was passed. The District Judge held it to be illegal on the authority of certain observations contained in *Seshadri Aiyangar* v. *Nataraja Aiyar*[1]. It may be stated that at the enquiry held after the suspension, the plaintiff was found by the managers to be guilty of the offence complained of against him and he was suspended from office for a term by way of punishment. These offences were that he committed theft and concealed the property belonging to the idol while engaged in the performance of his duties as archakar. We are of opinion that the decision of the District Judge is not correct and that the order of suspension cannot be held to be invalid on the mere ground of absence of notice. According to the view taken by this court, a hereditary archakar like the plaintiff could be dismissed by the trustee only for good reasons which are liable to examination by a court of justice.—see *Krishnasawmi Thathachari* v. *G. Rangachari*[2] and with regard to the dismissal of a trustee, *Seshadri Aiyangar* v. *Nataraja Aiyar*[1]

1. (1897) I. L. R. 21 M. 179. 2. (1867) 4 M. H. C. 63.

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where the earlier cases are cited and examined. A different rule has no doubt been recently laid down in the Bombay High Court in *Bhavani Shankar* v. *Timmamma* [1] by *Jenkins* C. J., and *Batty*. J where those learned judges held that the *bona fide* dismissal of a moktesar by a devastanam committee could not be reviewed by civil court. As the correctness of the decision in *Krishnasawmi Thathachari* v. *G. Rangachari*[2] has not been impugned before us, we accept it as sound for the purposes of this case. The plaintiff is entitled to hold the office during his lifetime and on his death his heirs are entitled to succeed him. The order of suspension we have to deal with is one not passed as a punishment on the plaintiff for an offence of which he was found guilty but an *ad interim* order preventing him from performing to his office pending the investigation of the charges of misconduct made against him The suspension complained of in *Seshadri Aiyangar* v. *Nataraja Aiyar*[3] was also a similar order. That case was, however, in other respects very different from the present one. The temple committee who passed the order in that case, was a statutory body whose powers had to be determined by the interpretation of the provisions of Act XX of 1863. The question was whether the right of superintentence vested in them by that Act included the right to suspend a trustee, There is certainly authority for the position that a statutory power of dismissal which, according to the decisions, a temple committee possesses, does not necessarily include the right to suspend as a punitive measure—see American Cyclopædia of Law and Procedure, article "Officers," Vol. 29, p. 1405 and *Barton* v. *Taylor*[4]. The decision of the majority of the judges in that case proceeded largely on the ground that the result of suspension might be to create a temporary vacancy in the office of trustee without possession in any one in whom the management of the temple could vest for the time being. The trustee was no servant of the committee which possessed only the power of supervision over him, conferred on it by statute. The position of an archakar on the other hand, though he may have a hereditary tenure in the office, is, in our opinion, essentially that of a servant. The trustee is the representative of the temple and the archakar

1. (1906) I. L. R. 30 B. 508.
2. (1867) 4 M.H.C. 63.
3. (1897) I.L.R. 21 M. 179.
4. (1886) I. L. R. 11 A. C. 197.

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must be subject to his disciplinary authority. It cannot be said that his position in relation to the trustee is similar to the position of the trustee in relation to the committee. We may observe that *Collins* C. J., in holding that the power of suspension is the same as the power of dismissal did not apparently have regard to the difference which in our opinion is important between punitive suspension and suspension pending inquiry which is incidental to the exercise by the trustee of his right to inquire into a charge of misconduct against the archakar and to dismiss him in a case where serious misconduct is proved. *Seshadri Aiyangar* v. *Nataraja Aiyar*[1] cannot therefore be taken to govern this case. What then is the rule applicable to the case of a hereditary servant in a case like the present ? In our opinion, the sounder view is that no notice is required for an *ad interim* suspension pending inquiry into a complaint against a servant entitled to hold office during good behaviour or for life. The nature of the offence may be such that instant suspension from the functions of the office would be necessary in the interests of the institution and to hold that the officer could not be suspended without notice and without explanation received from him might be seriously detrimental to the interests of the temple.

In the present case, for instance, the charge against the plaintiff was that he was actually found removing coins strewed over the deity and concealing other property which was within the precincts of the shrine. Would it be reasonable to hold that a person regarding whom there were good grounds of suspicion of such conduct should be permitted to continue to officiate within the shrine giving him chances of repeating his offence until a formal enquiry into his conduct could be completed ? We are of opinion that such a view would seriously jeopardise the interests of the institution. The suspension must be regarded as incidental to the right possessed by the trustee of enquiring into and punishing the archakar for any offence committed by him and may be fairly taken to come within the purview of his disciplinary jurisdiction over the servants of the temple. We have little doubt that temple trustees generally exercise this right without question. In the American Cyclopædia of Law and Procedure, Vol. 29, p. 1485, it is observed : " But where

1. (1897) I. L. R. 21 M. 179.

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the power of removal is limited to cause, the power to suspend made use of as a disciplinary power pending charges is regarded as included within the power of removal. The power to suspend may be exercised without notice to the person suspended, and the suspension, when made in the exercise of a legal power to suspend, is irreviewable by the courts and takes effect from the time that the order of suspension is issued and served"—see also Dillon on "Municipal Corporations," Vol. I, p. 332, S. 247. We do not mean to lay down that in every case where the right to dismiss exists, the right of suspension must necessarily be incidental to it. Such might possibly not be the case where the right depends upon the construction of a statute as for example when the right of Government to deal with a Municipal Councillor for misconduct was in question—*Vijiaraghavachari* v. *The Secretary of State*[1]. The right may not exist also where the question depends upon the construction of the rules of a Corporation or a quasi-corporation like a Club. But in the case of servants subject to the discipline of a trustee we think these analogies should not be applied.

We are also of opinion that even if the right view should be that notice before suspension is essential in such a case, the court should not set aside the order where after enquiry it has been found that it was proper and justifiable in the circumstances. This view is supported by the decision in *The King* v. *The Mayor & Council of London*[2] where the Court of King's Bench in England refused to grant a mandamus against the Common Council of London to restore a clerk entitled to a life-tenure in his office on the ground of want of notice before suspension. See also Halsbury's Laws of England, Vol. 8, p. 330 (para. 743). Where an order against an officer by his superior or by a corporate body is not liable to be reviewed by the courts it will no doubt be set aside on the ground of want of notice on a principle similar to that applicable to the decision of an arbitrator. But when the person affected by such an order has the right to appeal to the courts against it and to have the propriety of the order examined by it and the court has found the order justified, it will be useless to set aside the order as it could be passed again immediately after giving notice. The courts will not order a

1. (1884) I. L. R. 7 M. 466. 2. (1787) 100 E. R. 96.

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restoration where they can see there is good ground for removal and that the order to restore would be without practical and useful effect—Dillon on "Municipal Corporations" S. 254. Such a case would be similar to an order passed irregularly by an inferior court which the superior court finds to be a proper order notwithstanding the irregularity. In *Vijiaraghavachary* v. *The Secretary of State for India* [1] it was held that the dismissal of a Municipal Councillor for misconduct would not be set aside by the court merely on the ground of want of notice, if the misconduct itself is proved before it—see I.L.R. 7 M. at p. 473.

Mr. Ramachandrier contends that his client is entitled to the profits of his office during the time that he was under suspension without notice. This proposition is, in our opinion, quite untenable as the suspension was found to be proper at the subsquent inquiry. The correct rule in such cases is, we think, that laid down at p. 1406 of Vol. 29, American Cyclopædia and in Dillon on "Municipal Corporations", S. 247, although if the order is set aside as improper he might be entitled to recover the profits. In the result we reverse the decision of the lower appellate Court and restore that of the District Munsif with costs both here and in the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Pattanur Velangeri Edathil Rairu Nambiar & others .. Appellants*

v.

Kiloth Thazhath Vittil Narayanan Nambiar & others .. Respondents.

Endowment—Private temple—Properties of—Ownership in—Revocation of trust—Competency of members of family to bind future generations.

Properties set apart for the purposes of a temple by a *tarwad*, even though the temple is a private temple as contradistinguished from a public temple, cannot be called tarwad properties; and the karnavan cannot dispose of those properties as if they were tarwad properties. The properties are trust properties and must continue to be regarded as trust properties until at any rate all the beneficiaries concerned, *i.e.*, all the members of the

* S. A. 1144 of 1909. 30th March 1911.

1. (1884) I. L. R. 7 M. 466.

Rairu Nambiar v. Narayanan Nambiar.

tarwad, put an end to the temple or to the endownment, assuming they can do so. *Rupa Jagshet* v. *Krishnaji Govind*[1].

Quære :—Whether the members for the time being can put an end to the trust so as to affect future generations.

Second appeal from the decree of the District Court of North Malabar in A. S. Nos. 500 and 529 of 1907 presented against the decree of the Court of the District Munsif of Cannanore in O. S. No. 632 of 1909.

The facts are given in the judgment.

M. Kunjunni Nair for appellants.

J. L. Rosario for respondents.

M. Kunjunni Nair :—The property, not withstanding the endowment is *tarwad* property. The temple is tarwad property, and the endowment also, therefore, is.—A. S. No. 64 of 1861.

J. L. Rosario—submitted that it is trust property which nothing short of the consensus of all the members of all the tarwads can revoke, and is not on the same footing as ordinary tarwads.—S. A. 1077 of 1892 ; *Rupa Jagshet* v. *Krishnaji Govind*[1].

The Court delivered the following

JUDGMENT :—In this case the plaintiffs and defendants Nos. 2 to 5 belonged to two houses, Pattanur Edam and Kiloth, and instituted the suit to recover certain lands from the 1st defendant and defendants Nos. 3 to 18.

The two houses above mentioned and another house called Nayarkandi were divided branches of a *tarwad* Pattanur Velangeri Edam. The Nayarkandi branch became extinct, according to the plaintiff, in 1898. The contesting defendants claimed the lands under a *kanom* from the Nayarkandi tarwad in 1893 and a sale which followed it in 1898, their case being that the properties belonged exclusively to their vendors. The plaintiffs' case, as stated in the plaint, was that the lands claimed in the suit belonged to five temples whose names are given in paragraph No. 3 in the plaint. The temples themselves, it is stated, belonged to the Velangeri Edam tarwad. The plaint alleges that these lands being indivisible, it was agreed, at the partition of the original tarwad into three branches

1. (1884) I. L. R. 9 B. 169.

Rairu Nambiar v. Narayanan Nambiar.

mentioned above, that they should be managed by the senior-most member of all the three branches, and that he should conduct the affairs of the temple out of the income of the said properties. The District Munsif passed a decree in the plaintiffs' favour for a portion of the properties claimed. On appeal the District Judge dismissed the suit. He found that the plaintiffs had not succeeded in proving that the plaint property was set apart for the temples. The learned pleader for the appellants has not been able to raise any legal objection to this finding, and we are bound to accept it. On this finding we are of opinion the second appeal must fail.

Mr. Kunjunni Nair contends that, notwithstanding the finding, his clients are entitled to recover the lands as the joint property of all the three branch tarwads, urging that, on the extinction of the Nayarkandi branch, the two other tarwads became entitled to them by survivorship. We are clearly of opinion that the case as set forth in the plaint is that the properties belong to the temples and not to the three tarwads beneficially. It is urged that there is no distinction between temple property and tarwad property as the temples themselves belonged to the tarwad. The temples are claimed as private temples in which the public have no interest, but we cannot accept the contention, even in the case of private temples claimed as belonging to a tarwad, that the properties admittedly set apart for the temples can be regarded as tarwad properties. Assuming that the public have no right in the temples, it cannot be doubted that the properties must continue to be regarded as trust property until at any rate all the beneficiaries concerned, that is all the members of the three families to which the temples are said to belong, put an end to the temples or to the endowment assuming that they could do so. (See the judgment of this court in S. A. No. 1077 of 1892 and *Rupa Jagshet* v. *Krishnaji Govind*.[1]

We are unable to agree with the ruling of the Sudder Court relied on by Mr. Kunjunni Nair in A. No 64 of 1861, where the learned judges who decided that case would seem to have held that a *karnavan* was entitled to dispose of property belonging to a tarwad temple in the same manner as he could deal with property belonging to the tarwad itself. That ruling was not followed

1. (1884) I. L. R. 9 B. 169.

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by this court in S. A. No. 1077 of 1892 referred to above. The Subordinate Judge from whose decision S. A. No. 1077 was preferred, had refused to follow the Sudder Court ruling and this court adopted his view, though the ruling in A.S. No 64 of 1861 was not expressly dissented from. It may be open to doubt whether, when a temple has been founded by a tarwad for the benefit of the family, the members for the time being can put an end to the trust, so as to affect those who may be subsequently born in the family, but it is unnecessary in this case to express an opinion on that point.

It is not alleged in this case that the allotment of the lands to the temples was ever revoked by the members of the three tarwads. We cannot, therefore, accept the argument that the allegation in the plaint that the lands belonged to the temple was tantamount to an assertion that they were the joint property of the three tarwards. And we must refuse to go into the question whether plaintiffs could sustain a claim to the lands as the joint property of the three tarwads and not the property of the devaswoms.

We must, therefore, dismiss the second appeal with the costs of the 1st respondent. The appellate court, in its judgment, gave the contending defendants all his costs in the Munsif's court. The omission in the appellate decree to include the half of the commissioner's fee paid by him must be rectified.

[See *Appu Pathar* v. *Kurumba Umma* reported below Ed.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir T. Muthusawmi Aiyar, and Mr. Justice Best.

Appu Pattar & another .. Appellants*
(*2nd & 3rd defts.*)

v.

Sri Kurumba Bhagavati Devaswom
Uttama Panampalli Kurumba Umma
& others .. Respondents
(*Plaintiffs* 1 *to* 8).

Trust—Public and private—Family temple—Alienation of temple property, whether allowable.

Property belonging to a private temple of a family is trust property and cannot be alienated.

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* S. A. 1077 of 1892. 18th September, 1893.

Appu Pattar v. Kurumba Umma.

Where a temple was originally a private temple there must be clear and strong proof of subsequent dedication to the public, to sustain a plea that the temple is a public temple.

The members of a family may unanimously put an end to a private endowment such as a temple of the family.

Second appeal from the decree of the Subordinate Judge's Court of South Malabar at Calicut in A. S. No. 966 of 1890, reversing the decree of the Court of the Distict Munsif of Nedungadi in O. S. No. 292 of 1882.

C. Sankaran Nair for appellants.

K. P. Sankara Menon for respondents.

This was a suit to set aside the sale in O. S. No. 454 of 1880 on the file of the District Munsif of Temelprom and also to declare that it was not binding either on plaintiffs' family or on their Srikurumba Bhagavati Devaswom.

One, Achyuta Menon, the late *karnavan* of the plaintiffs' tarwad, executed a mortgage deed for Rs. 1,000 to the first defendant. On Achyuta Menon's death the 4th defendant succeeded to the karnavan's office. 1st defendant brought suit O. S. No. 454 of 1880 against the 4th defendant for recovery of the amount due on the bond and obtained a decree both against the property mortgaged and the 4th defendant personally. The 1st defendant took out execution against the mortgaged property. The 5th defendant and two other members intervened with a claim objecting that the property was Devaswom property and not liable to be sold. The claim was allowed by a summary order of the court dated 22nd May 1882. The 1st defendant did not contest the order by a regular suit but proceeded to attach the lands now in suit. The 5th and 6th defendants presented a claim against the sale, but it was rejected. The lands were sold in October 1883 and 1st defendant became the purchaser, subject to incumbrances, amounting to Rupees 7,000. The 5th and 6th defendants thereupon brought a suit to set aside the sale impleading all the other members of the tarwad. It was withdrawn by them with permission to bring a fresh suit for the same relief coupled with a prayer for possession. They, however, brought no such suit. The present suit was brought by the plaintiffs for almost the same relief. The 1st plaintiff has just attained majority. The other plaintiffs are minors represented by her.

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The 1st defendant, denying the plaint, contended that the debt in the suit aforesaid was contracted for plaintiffs' and 4th to 10th defendants' family purposes; that the said sum was spent for the erection of the family house; that the sale in the said case was resisted by other defendants except the 4th; and as their endeavours proved ineffectual, that the 4th defendant instigated the plaintiff to institute the present suit; and that as he had already transferred the said decree to 2nd and 3rd defendants he had been unnecessarily made a party in the case.

The 2nd and 3rd defendants denied the plaint and averred that a suit to set aside the sale would not lie; that the property was not owned by the said Devaswom and that it belonged to plaintiffs' tarwad; that the debt in dispute was contracted for tarwad purposes; that the suit was barred by the statute of limitation; that the said decree was binding on the plaintiffs' family; and that the present suit was only an experimental one.

The other defendants were *ex parte*.

The following issues were framed:—

1. Whether the decree in O. S. No. 454 of 1880 was passed against the 4th defendant as karnavan?

2. Whether the property sold was the jenm of the Devaswom as alleged in the plaint and therefore liable to be sold for 4th defendant's or his tarwad's debt?

3. Whether decree in O. S. No. 454 of 1880 was binding on the plaintiffs and whether it was the result of collusion between the 1st and 4th defendants?

4. Whether the debt, which was the subject of suit No. 454 was contracted for the purposes of the tarwad?

5. Whether the suit was one for declaration and whether plaintiff was bound to ask for consequential relief?

6. Whether the suit was barred by limitation?

The Sub-Judge dismissed the suit.

On appeal to the High Court his decree was set aside on the ground that the suit was within the jurisdiction of the District Munsif and the plaint was ordered to be returned through the District Court as the proper court of appeal. It was refiled in the Tamalprom Munsif's Court. Thence it was transferred to

the Nedungadpaud Munsif for disposal. He heard it on the merits and dismissed it with costs.

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The Munsif's findings were that the judgment debt in O. S. No. 454 of 1880, in satisfaction of which the plaint property was sold, was a proper debt binding on the tarwad; that the 4th defendant, the judgment-debtor, was sued in his representative capacity and that the Sri Kurumba Devaswom was the private Dewaswom of the plaintiff's tarwad and its properties were liable to be sold for its legitimate debt.

The Subordinate Judge found that the suit was not barred as it was brought within 12 years from the date of sale; that the plaintiffs were not parties to the decree for which the sale was made, and that the 2nd to 7th plaintiffs were minors against whom there could be no bar of limitation. He accordingly reversed the Munsif's decree and declared that the sale of the plaint properties for the decree in O. S. No. 454 of 1880 was null and void.

This second appeal coming on for hearing in the first instance on the 2nd March 1893 before *Sir T. Muthusawmi Aiyer* and *Parker* JJ. the Court made the following

ORDER:—The Subordinate Judge finds that the temple in question, though it might have originally belonged to the *tarwad*, has since, in the course of time, attained a quasi-public character. It is contended by appellants' pleader that the facts found do not warrant the conclusion arrived at. This contention appears to us to be well-founded. In the plaint there is a distinct averment that the temple belonged to the tarwad. It is also in evidence that for the maintenance of a member of the tarwad, the income derived from the Devaswom property was taken into account, and in that suit 1st plaintiff was a party.

The Subordinate Judge refers to the fact that during the temple festival a horse is exhibited at the expense of the Palghat Rajah, and that the Cochin Rajah makes certain offerings to the idol in the temple. It must also be remembered that the family was originally that of a 'Naduvali' or Provincial Chief. These facts referred to by the Subordinate Judge are not in themselves conclusive. There must be clear and strong proof of subsequent dedication to the public if the institution originally belonged to the family.

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If there was nothing more in the evidence, we should consider it necessary to direct further inquiry, but on referring to the plaint we find a distinct averment that the temple belonged to the family.

No issue was taken as to whether it was a public or private temple. We cannot, therefore, accept a finding at variance with the case disclosed by the plaint.

It would, however, be necessary to adjudicate upon this question only if the appellants' second contention be upheld. It is urged by him that all the family from the year 1875 have united to put an end to the endowment. No specific issue was raised on this point. It does not appear either from Exhibit I or Exhibit IV that all the members of the tarwad were parties. These is also evidence that a member of the tarwad resisted an attachment in 1883 on the ground that the property attached belonged to the Devaswom. In the absence of a specific issue directing the attention of the parties to the matter in controversy, we do not consider it fair to rest our judgment on the evidence casually cited in the case with reference to the other issues.

We must therefore ask the Subordinate Judge to try the following issue and return a finding:—" Whether the plaintiffs' family has united to put an end to the endowment?"

No question of limitation would arise if it was trust property and if the family had not put an end to the endowment. Further evidence may be taken.

The finding is to be returned in one month from the date of reopening of the court after the recess and seven days will be allowed for filing objections after the finding has been posted up in this court.

In compliance with the above order, the Subordinate Judge submitted finding to the following effect : that the family has not united to put an end to the endowment.

This second appeal coming on for final hearing, on return to the order of this Court, dated 2nd March 1893, the Court delivered the following

JUDGMENT :—The finding is that the family has not put an end to the endowment.

We accept this finding and dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

Maharaja of Bobbili .. Appellant*

v.

Raja Kaminayini Bangaru and others .. Respondents.

Maharaja of Bobbili *v.* Raja Kaminayini Bangaru.

Hindu Law—Impartible Zemindari—Debts how far binding on successor —Hanuman Prasad's case—Onus of proof—Enquiry by lender.

An unsecured debt of the Zemindar of an impartible Zemindari, not incurred for family necessity, is recoverable from the estate in the hands of the next heir taking by survivorship. [*Nachiappa* v. *Chinnasami*[1] declared no longer law, *Raja of Kalahasti* v. *Achigadu*[2]; *Zemindar of Karvetnagar* v. *Trustees of Tirumalai Tirupati &c. Devasthanams*[3] followed.]

There is nothing in principle to confine the observations of the Judicial Committee in *Hanuman Prasad's* case[4] as to the sufficiency of a *bona fide* and reasonable enquiry to the case of alienations only. They apply with equal force to simple money debts as well.

No doubt, ordinarily something more than the mere representation of the borrower is necessary to constitute reasonable enquiry on the part of the lender, especially when the borrower's interests are likely to be opposed to those of the reversioner or the infant heir or other person whose manager he or she may happen to be.

But the representations of the borrower are not merely evidence but may, in particular circumstances, be sufficient to shift the onus from the lender to the person impeaching the debt or alienation. [*Sarat Chandra Banerjee* v. *Bhupendra Nath Basu*[5] referred to.]

Where a brother of the last male owner and the last male owner's widow were in joint possession of a Zemindari under a compromise, the same being liable to be divested on adoption by the widow: *Held*, that the brother and the widow represented the estate completely and a debt contracted or alienation made by the brother must be dealt with on the footing of an alienation by the widow.

Hanuman Prasad's case[4] explained.

Appeal from the decree of the District Court of Nellore in O.S. No. 25 of 1904.

P. R. Sundara Aiyar for appellant.

The Advocate-General (*P.S. Sivaswami Aiyar*) for respondents.

P. R. Sundara Aiyar contended (i) that the suit debts incurred by the uncle of the present incumbent were binding on him. whether they were for paying off the debt of the previous incum-

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* A. No. 150 of 1907. 26th October, 1910.

1. (1906) I.L.R. 29 M. 453.
2. (1907) I.L.R. 30 M. 454.
3. (1909) I.L.R. 32 M. 429.
4. (1856) 6 M. I. A. 393.
5. (1898) I.L.R. 25 C. 103.

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bent or the peishcush, it did not matter which exactly—*Kotta Ramasami* v. *Bangaru*[1]. (ii) On the principle on which *Sriramulu* v. *Kristamma*[2] proceeds, so long as the adoption did not take place, the powers of the then heir are unfettered and the adopted son can take only what remains—Mayne, S. 198; *Raghunadha* v. *Brojo Kishoro*[3]. That it is not necessary that a charge ought to be created before the debt can bind, has been laid down in *Reyelle Jogayya* v. *Venkataratnama.*[4] Charge and bond do not stand on different footing—*Kotta Ramasami* v. *Bangaru.*[1] (iii) The event by which the previous incumbent divested himself of the zemindari being the result of his own consent, the adopted son who takes as a result of the arrangement ought to pay his debts.

The Advocate-General, for the respondent, contended (i) that in cases of bonds mere inquiry will not do; actual application to binding purposes ought to be shown; (ii) that recitals in documents are not in themselves sufficient evidence of inquiry—*Hanuman Pershad's case*[5] and S. 38, T.P.A. The creditor must connect the debt with the debt of the previous Zemindar from whom the adopted son takes—*Maheshwar Baksh* v. *Ratan Singh*[6]. Reference was made to *Indar Chander* v. *Radha Kishore*[7]; *Nagendra* v. *Amar Chandra*[8]. The estate taken by the intermediate incumbent pending adoption, he submitted, was only a life estate.

C. V. Anantakrishna Aiyar for *P. R. Sundara Aiyar* cited *Sarat Chandra Banerjee* v. *Bhupendra Nath Basu*[9] as to the value of recitals and *Narayanasami Naidu* v. *Rangam*[10] as to *de facto* possessor's debts being binding on actual owners.

The Court delivered the following.

JUDGMENT:—The late Zemindar of Chundi, which was an impartible estate descendible according to the rule of primogeniture, died in 1892. On his death disputes arose between his brother the 1st defendant and his widow the 2nd defendant as to the succession. There was litigation between the parties. A compromise was entered into and embodied in Exhibit *A*, dated the 13th April 1901. Under it both were to enjoy the

1. (1878) I.L.R. 3 M. 145.
2. (1902) I.L.R. 26 M. 143.
3. (1873) I.L.R 1 M. 69 (P.C.)
4. (1910) 20 M. L. J. 412.
5. (1856) 6 M. I. A. 393.
6. (1896) I.L.R. 23 C. 766. (P.C.)
7. (1892) I.L.R. 19 C. 507 (P.C.)
8. (1903) 7 C.W.N. 725.
9. (1898) I.L.R. 25 C. 103 at 108.
10. (1907) 17 M.L.J. 484.

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zemindari in common and, in case a son was born to the 1st defendant, the 2nd defendant was to adopt him. A son was born to the 1st defendant in February 1903 and adopted by the 2nd defendant on the 27th of June 1903. The adopted son is the 3rd defendant, represented by the Court of Wards. The plaintiff sued to recover a sum of Rs. 7,000, with interest thereon under the promissory note, Exhibit *C* 2, dated the 16th September, 1901, executed by defendants Nos. 1 and 2 on the liability of the Chundi estate in the hands of the 3rd defendant. The 3rd defendant admitted a part of the claim. The District judge passed a decree in respect of it and dismissed the suit as regards the zemindari as against the 3rd defendant. The present appeal by the plaintiff relates to the amount disallowed. The District Judge based his dicision on the authority of the judgment in *Nachiappa Chettiar* v. *Chinnasami Naicker* [1] which held that in the case of an impartible zemindari, the unsecured debt of the zemindar not incurred for family necessity was not recoverable from the estate in the hands of the next heir taking by survivorship. The principle of the decision must be held to be no longer good law. See *Raja of Kalahasti* v. *Achigadu* [2] and *Zamindar of Karvetnagar* v. *Trustees of Tirumalai, Tirupathi, etc., Devasthanams* [3]. The ground of the District Judge's judgment being erroneous, it becomes necessary to consider the 3rd issue which raises the question whether a debt contracted by the 1st and 2nd defendants not secured upon the estate is nevertheless binding upon it. The District Judge has given no finding but he has recorded the evidence. We think it unnecessary to send the case back as both sides have agreed that we may deal with the issue.

Before, however, going into the evidence, it is necessary to deal with the legal contentions that were raised in connection with this issue. The first point to be noticed is whether the debt not having been secured upon the estate by the 1st and 2nd defendants, the estate in the hands of the 3rd defendant, who has, on adoption, divested them of the zemindari, under the Hindu Law, can be made liable. The learned Advocate-General, who appeared for the 3rd defendant, admitted that *Reyalle Jogayya* v.

1. (1906) I.L.R. 29 M. 453. 2. (1907) I.L.R. 30 M. 454.
3. (1909) I.L.R. 32 M. 429.

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Venkatarathnamma[1] was against him and did not seriously dispute its authority. Although the execution of a promissory note by the 1st and 2nd defendants might suggest *prima facie* that the creditor looked to their personal credit, it would be competent to him to show that the estate was intended to be bound as well in the circumstances of the case. In the case of the present loan, the estate was heavily involved and the very fact of the 1st and 2nd defendants being both required to execute the promissory note shows, that, if the loan was made after the due enquiry as to the purpose being of a character binding upon the estate, there can be no difficulty in coming to the conclusion that the creditor looked to the estate for repayment and not merely to the personal credit of the 1st and 2nd defendants. Mr. Sundara Aiyer for the appellant has argued that apart from the evidence of the actual application of the loan, he is entitled to a decree binding upon the estate because the loan was made after reasonable enquiry as to the purpose. The Advocate General, however, raised a question that the decision in *Hanuman Pershad Panday* v. *Mussummut Baboo Munraj Koonweree*[2], as to the sufficiency of a reasonable enquiry to validate a claim against the estate in the hands of a manager should not be extended to loans unsecured upon the estate. His argument was that it is only where the widow or other limited owner of an estate or the manager of a joint family or guardian of an infant heir alienates the estate in some form that *bona fide* enquiry and the satisfaction of the creditor as to reasonable necessity have been held sufficient to justify the alienation. But we see no ground to limit the decision in that case in this manner. There is nothing in principle to confine the observation of their Lordships as to the sufficiency of a *bona fide* and reasonable enquiry to the case of alienation.

In the case of *Kotta Ramasawmy Chetty* v. *Bangaru Seshamma Nayanivaru*[3], both Mr. Justice *Kernan* and Mr. Justice *Muthuswami Iyer* were of opinion that the *dicta* of the Privy Council applied with equal force to a simple loan as well as alienation. Mr. Justice *Kernan* observed of *Hanuman Pershad Panday* v. *Musammut Babool Munraj Koonweree*[2]: "The case dealt with was one of an express charge and so it was in very many other cases.

1. (1910) 20 M.L.J. 412. 2. (1856) 6 M.I.A. 393.
3. (1878) I.L.R. 3 M. 145.

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The principle, however, to be applied, whether in respect of an express charge, in writing, or by deposit, or of a loan of money to or other debt created by, a manager without such express charge, is the same." After referring to the sufficiency of due and proper enquiry the learned Judge proceeds to add: "The same principle applies to a simple loan or debt. In each case the manager acts as agent of the family and his acts are subject to the same consideration and question. In point of principle and law, the simple loan and the express charge require the same foundation to bind the family and the estate" (pages 148 & 149). Mr. Justice *Muthusawmi Aiyar* observed at page 161, with reference to a debt not secured upon the estate by the *de facto* poligar but sought to be recovered from the rightful successor: "It is true that though there was no real necessity for the debt, the plaintiffs should not fail if their claim were within the equity recognised by *Hanuman Pershad Panday* v. *Mussummut Baboot Munraj Koonweree*[1]." This being the law, the only question that we have to consider in the case is, whether, as contended by the learned vakil for the appellant, there was a reasonable and *bona fide* enquiry by the *lender* as to the purpose of the loan. The learned Advocate-General contended that the enquiry contemplated by the Privy Council is one independent of the representations of the borrower, in that such representations, even if evidence, are not in themselves sufficient to discharge the burden which rests upon the creditor of showing a reasonable enquiry as to the binding nature of the purpose for which the loan is contracted. In *Hanuman Pershad Panday* v. *Mussummut Babool Munraj Koonweree*[1], the Privy Council said at pages 419 and 420 of the report: "The representations by the manager accompanying the loan are part of the *res gestæ* and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir: and as their Lordships are informed that such *prima facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required." The foregoing extract from the judgment of their Lordships makes it abundantly clear that the representations of

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1. (1856) 6 M.I.A. 393.

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of the borrower are not merely evidence but may, in particular circumstances, be sufficient to shift the onus from the lender to the person impeaching the debt or alienation. The above principle has been accepted by the courts in India. In *Sarat Chandar Banerjee* v. *Bupendra Nath Basu*[1], Chief Justice *Maclean* applied the rule above enunciated to the case of a loan to an executor not governed by the Succession Act. We wish, however, to guard ourselves from being supposed to lay down the rule that the representations by the borrower are generally sufficient. In many cases the interests of the borrower are likely to be opposed to those of the reversioner or the infant heir or other person whose manager he or she may happen to be, and in such cases reasonable enquiry should not be limited to the representations of the borrower, and S. 38 of the Transfer of Property Act seems to require, in addition to good faith, reasonable care in ascertaining the existence of circumstances alleged by the transferor of immoveable property. This section, if deemed to enact a rule as to reasonable enquiry, in excess of what is required by the Priviy Council in *Hanooman Pershad's case*[2], cannot override the Hindu Law as settled by the Privy Council. See S. 2, Clause (*d*). But it may well be taken to indicate that ordinarily something more than the mere representation of the borrower is necessary to constitute reasonable enquiry on the part of the lender.

Taking the law to be as above indicated, we have to see how the facts stand in this case. It is perfectly clear that at the time of the suit loan, there was a debt due of a lakh and a half recoverable from the estate. The Advocate-General did not practically dispute this. Exhibit *A*, *G* 2, which is a draft mortgage-deed dated 8th of October, 1901, is sufficient evidence of the liability. By the letter Exhibit *D* dated 10th September, 1901, the 1st defendant asked for a loan of a lakh and a half. There can be no doubt that this loan was applied for to meet the liability which was enforceable against the estate. In the same letter the 1st defendant applied for an immediate loan of Rs. 7,000 on account of urgency to meet a decree debt and other debts out of the debts amounting to a lakh and a half that were recoverable from him. Before the date of the loan the defendant's

1. (1898) I.L.R. 25 C 103.

2. (1856) 6 M. I. A. 393.

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agent had been sent to the plaintiff to represent the urgency. The 2nd defendant, examined as the plaintiff's witness No. 3, says that the loan of a lakh and a half was absolutely necessary and that the amount of the suit pro-note was also comprised in the said loan. The witness also adds : " As I told him (Narasimmayya) that money was urgently needed, he spoke to Maharaja of Bobbili at Madras on my behalf about the urgency and caused money to be advanced." The 2nd witness for the plaintiff, his second manager, says: " From my enquiries I came to know that defendants Nos. 1 and 2 had a necessity to borrow and I was satisfied with the necessity for borrowing money."

It is true he is now unable to give any details of the debts. But we are on the whole satisfied, in the circumstances of this case, that even apart from the representations of the borrower, there was enquiry under S. 38 of the Transfer of Property Act by the lender which was reasonably sufficient to justify the loan so as to make it recoverable from the estate. It is unnecessary to consider the contention of Mr. Sundara Aiyar that, as the 1st defendant was, at the time of the loan, the full owner of the estate, the amount is recoverable from the estate in the hands of his successor apart from any necessity or reasonable enquiry as to the purpose of the loan. It is difficult to treat the 1st defendant's estate, which was liable to be divested on adoption by the 2nd defendant and which has, as a matter of fact, been so divested, as an absolute estate for purposes of validating loans or alienations by the holder of the estate. (See the judgment in Second Appeal No 92 of 1908). It is, however, unnecessary to express any opinion on this point But we cannot agree with the learned Advocate-General's argument that the estate of the 1st defendant should be treated on the same footing as that of the holder of a life estate. If that were the true view, an alienation for whatever purpose would be inoperative beyond the date on which the estate was divested. This is not in accordance with the tenor of the observations of the Privy Council in *Raghunatha* v. *Sri Brozo Kishore.*[1] (See also Mayne's *Hindu Law*, S. 198.) The analogy of the 1st defendant's estate is rather to that of a limited owner like a widow than that of a life owner. There is a vested reversion or remainder

1. (1878) I.L.R. 1 M. 69 (P.C.)

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where there is the life estate. But both in the case of the widow and the case of a person in the position of the 1st defendant, the holder for the time being represents the estate completely. If a debt or alienation by a widow for purposes would bind the reversion, it stands to reason that a debt contracted or alienation made by the 1st defendant must be dealt with on the same footing. We, therefore, allow the appeal with costs here and in the court below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Acha Ranganaikammall .. Plaintiff*

v.

Acha Ramanuja Aiyangar and others .. Defendants.

Ranganaikammal *v.* Ramanuja Aiyangar.

Hindu Law—Marriage—Marriage expenses—Right and duty to give girl of deceased Hindu in marriage—Mother's Right to be paid for expenses—Contract Act not exhaustive—S 69*—Interest—Pecuniary interest.*

The mother of a Hindu girl whose father is dead being the proper guardian of the person of the girl is entitled to select a bridegroom for her and to give her in marriage; and in order to entitle her to do so it is not necessary for the mother to show that her father-in-law wrongly and improperly refused to perform the marriage.

The mother is entitled to be paid the reasonable expenses of the marriage of her daughter by the husband's coparceners. The liability is one that arises under the Hindu Law and not under the Contract Act. The Contract Act is not exhaustive, and S. 69 of the Act applies to cases of payment to a third person and not to a case where a person is bound under the law to make a payment directly to the person who has incurred the expense. The interest referred to in S. 69 is pecuniary interest.

The texts relating to the duty of the father's co-parceners to give away a deceaed Hindu's daughter in marriage deal only with the religious rite of making the gift or *danam* of the bride; they are only directory and not obligatory even from a religious point of view; they create no legal right or obligation; they do not prescribe any special rules with respect to selecting a bridegroom or of disposing of a girl in marriage (as opposed to the ceremonial act of giving); and, consequently, the right to select a bridegroom vests in the guardian of the girl as part of the general rights of guardianship.

Case stated under S. 69 of Act XV of 1882 by the Chief Judge of the Small Cause Court in Suit No 401 of 1909.

The facts are sufficiently given in the Judgment.

T. R. Venkatarama Sastri for the plaintiff.—The only text‡ governing the matter is :—

पिता पिता महो भ्राता सकुल्यो जननी तथा ।
कन्याप्रदः पूर्वनाशे प्रकृतिस्थः परः परः ॥†

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*Referred Case No, 4 of 1910. 19th April 1911

†Yagnavalkya. Ch. II. Ss. 63.

‡ See the text quoted in the footnote at p. 601.

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There is no text as to guardianship in Hindu Law except that contained in the verse dealing with who* can give a girl in marriage. That text says after reciting various persons, that in the absence of each prior person the next succeeding person can give. Mother is the natural guardian—*Namasivayam* v. *Annammai*[1]. [*Sundara Aiyar* J.—Cannot the absence of any rule as to guardianship be owing to ancient Hindu Law having contemplated only a joint Hindu family?] Might be. The mother's right to give her daughter in marriage was recognised from the earliest times—Strange's *Hindu Law*, Edn. 1830, p. 71; *Kristo Kissor Neoghy* v. *Kader Moye Dossei*[2]; *Bhikno Koer* v. *Chamela Koer*[3]; *Jumoona Dassya* v. *Bamasoondari*[4]; *Shridhar* v. *Hiralal Vithal*[5]; *Harendra Nath* v. *Brinda Rani*[6]; Trevelyan's *Hindu Family Law*, pp. 219 and 220. It seems that so far as the mother is concerned that text is not strictly in force. [*S. Aiyar* J.—The context in which the text appears shows that it concerns itself with the mode of performing marriages and not the right to give in marriage]. Mayne's *Hindu Law*, 7th Edn., S. 211, at p. 273, says that first the father and then the mother has the right of guardianship. The text has been understood to lay down only a duty and not necessarily laying down an order—*Khushalchand* v. *Bhaimani*[7]; *Venkatacharyulu* v. *Rangacharyulu*[8]; *Mulchand Kuber* v. *Bhudra*[9]. The object of the text is given in *Vaikuntam Ammangar* v. *Kallapiran Aiyangar*[10] as the celebration of the marriage. Vide also *Vaikhuntam Ammangar* v. *Kallapiran Aiyangar*[11].

[* Cf. the following text from Mahabarata Adi Parva. Ch. 242, Kumbhakonam Edn. of 1906. Sloka 3

कन्यायास्तु पिता भ्राता माता मातुल एव वा ।
पितुः पिता पितुर्भ्राता दाने तु प्रभुतां गतः ॥

The meaning is : "In the case of a girl, the father, the brother, the mother, the maternal uncle, the paternal grandfather, the paternal uncle are the persons who are entitled to dispose (her) of in marriage."—ED.]

1. (1869) 4 M. H. C. R. at p. 343.
2. (1878) 2 C. L. R. 583.
3. (1897) 2 C. W. N. 191.
4. (1876) 1 C. 289 (P.C.)
5. (1887) I. L. R. 12 B. 480.
6. (1898) 2 C. W. N. 21.
7. (1886) I. L. R. 11 B. 247.
8. (1890) I. L. R. 14 M. 316, 324.
9. (1897) I. L. R. 22 B. 812.
10. (1900) I. L. R. 23 M. 512.
11. (1902) I. L. R. 26 M. 497.

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T. Ethiraja Mudaliar for the defendant.—Although the mother may be the natural guardian she has no right to give her daughter in marriage in preference to the male relations. [*S. Aiyar* J.—Is not the right of giving in marriage one of the incidents of natural guardianship?] In this particular case, the family being undivided the male relations of the husband must have the preferential right. The rule that the mother has the natural guardianship means that she has the right to custody. Other rights vest in the uncle etc,—Mayne. p. 273. [*S. Aiyar* J.—That relates to the uncle's right to hold the minor's property.] *Ram Bunsee Koonwaree* v. *Soobh Koonwaree*[1]. This decision and the next understand the text as dealing with the right of disposition in marriage apart from rights of guardianship—*Nanabhai Ganpathrao* v. *Janardhan Vasudeo*[2]. I refer to the observation at p. 142 in *Brindaban Chandra Kurmokar* v. *Chundra Kurmokar*[3] and to *Venkatacharyulu* v. *Rungacharyulu*[4] at p. 324. The observations in *Vaikuntam Ammangar* v. *Kallapiran*[5] at pp. 515 and 517 are in my favour. On the applicability of S. 69 of the Contract Act, see *Subramania Aiyar* v. *Rungappa Reddi*[6], on "interest" meaning only pecuniary interest.

T. R. Venkatarama Sastri, in reply, referred to the passage in Macgnagten's *Precedents*, Vol. II, p. 204, as the passage cited in *Ram Bunsee* v. *Soobh Koonwaree*[1]. S. A. 566 of 1899, 'lawful,' means proper. *Tulsha* v. *Gopal Rai*[7]. Pollock in his notes to S. 69 of the Contract Act says that in India interest need not be confined to pecuniary interest alone.

The Court delivered the following

JUDGMENT.—This is a reference by the Presidency Small Cause Court in a suit instituted by the mother of a minor Hindu girl against the undivided coparceners of her father to recover the expenses of the girl's marriage defrayed by the mother.

The question referred to this court is: "Is the widow of a deceased member of an undivided Hindu family entitled to perform the marriage of a daughter of the deceased, when the father of the deceased and the other male members of the family

1. (1867) 7 W. R. 321
2. (1886) I. L. R. 12 B. 110.
3. (1885) I. L. R. 12 C. 140, 142.
4. (1890) I. L. R. 14 M. 316, 324.
5. (1902) I.L.R. 26 M. 497.
6. (1909) I. L. R. 33 M. 232.
7. (1884) I.L.R. 6 A. 632.

have not wrongly or improperly refused to perform such marriage, and to recover the reasonable expenses of such marriage out of the joint family property?" The letter of reference sets out the facts as follows :— Ranganaikammal v. Ramanuja Aiyangar.

" The plaintiff is the widow of one Sudarsana Aiyangar deceased, who was the son of the first defendant and brother of the other defendants and undivided from them. Plaintiff had a daughter Lakshmi by the deceased, aged 10, who was asked in marriage for one Sundar Ramanuja Aiyangar. The marriage was agreed upon by all the parties and the Nischithartham or betrothal ceremony was performed by the 1st defendant at his own expense and a day was fixed for the marriage. Before the marriage day arrived the father of the bridegroom wrote to the 1st defendant demanding that certain properties should be given by him to the boy. The 1st defendant did not wish to comply with this demand and proposed to give the girl to another bridegroom to whom plaintiff objected on the ground that he was a widower of 34 years of age.

Thereupon the plaintiff herself entered into negotiations with the family of Sundara Ramanuja Aiyangar, the bridegroom first proposed, and carried out the marriage of her daughter with him without calling upon the defendants to perform it, and without proper notice to them of her intention. The plaintiff seeks in this suit to recover the expenses incurred by her in performing this marriage. The learned judge found that the defendants did not improperly or wrongfully refuse to perform the marriage of the plaintiff's daughter and held that the plaintiff was not therefore entitled to perform the marriage herself and to demand the costs of so doing from the defendants; and he accordingly dismissed the suit with costs."

The learned 1st and 2nd Judges of the Small Cause Court were of opinion that the plaintiff is not entitled to recover the expenses from the defendants; while the 3rd Judge is of a contrary opinion; the ground on which the former opinion is based is that the 1st defendant, the father of the deceased had a preferable right to select a bridegroom for the girl and dispose of her in marriage and as he did not wrongly or improperly refuse to perform the marriage the widow acted wrongly in performing it herself.

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The first question we have to decide is whether the plaintiff was entitled to perform the marriage of her daughter in the circumstances set out in the letter of reference. The rules of Hindu Law on which the answer to this question must depend are by no means clear. Ordinarily it would be regarded as the function of the guardian of a minor girl whoever that person might be, to arrange for her marriage and to select the bridegroom. The Hindu Law, however, contains very little authority on the question of guardianship—Mayne's *Hindu Law*, S. 211. There are some texts relating to the persons who are to give a girl in marriage which have often been referred to in deciding who is entitled to select a bridegroom and which have to be considered in this case. We shall first refer to the state of the authorities on the question of guardianship. The texts of Hindu Law refer only to the property and not to the person of the minor. According to Manu, it is the duty of the Sovereign to protect the property of minors. See chapter VIII, S. 27. The same rule is laid down by Vishnu-Sankha and Likhita, Baudhyayana and Katyayana. See Colebrook's Digest, Volume II (1874 Edn.), pp. 575-76. According to those texts, none of the relations of the minor has a right to be the guardian, but the king is to appoint a proper person to protect the minor's property. Jagannatha says: "But it should be here remarked that the property of a minor should be entrusted to the heirs and the rest appointed with his concurrence, or if the infant be absolutely incapable of discretion, with the consent of a near unimpeachable friend, such as his mother and the rest." And again, commenting on the text of Katyayana enjoining undivided kinsman of an infant son not to divide the common estate until the minor attain majority, he says: "In practice, the mother is the guardian of the minor and all his property * * If the widow be old and incapable of governing her own conduct there is no harm in permitting the estate to be guarded by kinsmen selected by her, for it is only directed that a widow and the rest shall guard the property by any possible means." Thus it is observable that the mother's right of guardianship was recognised very early. Mr. Macnaughten in his *Principles of Hindu Law*, page 103, observes: "A father is recognised as the legal guardian of his children where he exists, and where the father is dead, the mother may assume the guardianship. But where the duties of mana-

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ger and guardian are united, she is in the exercise of the former capacity, necessarily subject to the control of her husband's relations and with respect to the minor's person likewise there are some acts to which she is incompetent such as the performance of the several initiatory rites, the management of which rests with the paternal kindred. In default of her an elder brother of the minor is competent to assume the guardianship of him. In default of such brother the paternal relations generally are entitled to hold the office of guardian, and failing such relations, the office devolves on the maternal kinsmen, according to the degree of proximity. But the appointment of guardian universally rests with the ruling power." Sir Thomas Strange, in his book on *Hindu Law* published in 1830, Vol. I., p. 71, says that the king is to an extent beyond what is recognised by us in our Courts of Chancery, the universal superintendent of those who cannot take care of themselves. In this capacity, it rests with him, that is with the judicial power exercising for him this branch of his prerogative, to select for the office the fittest among the infant's relations, preferring always the paternal male kindred to a maternal ancestor or female. It is stated that, in practice the mother is the guardian, but as a Hindu widow is herself liable to the same sort of tutelage, it is more correct to regard her as a proper person capable of being consulted on the appointment of one, and if of competent understanding, the concurrence of the minor himself is not to be disregarded—all which only shews how much the choice is a matter of sound discretion." Mr. Mayne says—see S. 211 : "The father and next to him the mother is his natural guardian. In default of her, or if she is unfit to exercise that trust, his nearest male kinsman should be appointed." Mr. Trevelyan also observes : "The Hindu Law does not seem to prescribe any positive rules with respect to the rights of guardianship, but by practice and custom the rights of certain relations of a Hindu minor have now almost acquired the force of law. For instance the rights of the father, and of the mother after the death of the father, have been so long and universally acknowledged as to be now indispensable" (p. 64). In *Moodookrishna Naick* v. *Tandavaraya Naick* [1] the Sudder Court held that the mother may act as

1. Madras Decisions of 1852.

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guardian at partition. On these authorities it may be taken as clearly established that the mother is entitled to the guardianship of a minor boy or girl after the father and that the paternal kindred are postponed to her. Where the family is undivided the surviving coparceners of the father would, no doubt, be entitled to hold possession of the family estate until partition but this does not affect her right of guardianship in other respects—see *Namasivayam Pillai* v. *Ammani Ammal*[1]; *K. Venkatasubbiah* v. *J. Narasappa*[2]. The right to give a girl in marriage should ordinarily be regarded as part of the general right of guardianship unless it be expressly vested by law in a different person (see *Shirdar* v. *Hira Lal Vitha Lal*[3]) and the mothers' right to select a bridegroom would be prior to that of any of the paternal *dayadis* of the deceased father.

We have therefore next to examine the texts* relating to the marriage of a girl. These are collected in the *Vyavastha Chandrika* of Shyama Charan Sirkar, Vol. II, pp. 445 to 447. The principal text is that of Yagnavalkya, Slokas 63 and 64: "A father, paternal grandfather, brother, *sakulya*, the mother likewise are the givers of a girl in marriage. The right to do so devolves on them successively so that, on the failure of the first, the next in order is entitled to perform the ceremony if of sound mind." The expression translated "on failure" is "nasay" which means lit-rally "on the death" but it is explained that the same rule applies to absence in a distant place. The verse occurs in a context relating to the ceremonies to be performed at the marriage. The text goes on to say: "If they do not give her in marriage they become guilty of destroying the embryo at every menstruation of the damsel. The prescription of spiritual penalty often indicates in the Hindu Law that the obligation is not a legally binding one. Vignaneswara observes: "This, however, must be understood in the case of a bridegroom endowed with the qualities as mentioned being procurable." The word translated into "procurable" by Shyama Charan Sircar is "*sambhav*" which literally means "on the happening." This shews that the obligation is * * seek out a bridegroom but only to make the gift of the bride to a bride

* See the verse p. 601.

1. (1869) 4 M. H. C. R. 342. 2. (1866) 3 M. H. C. R. 116.

3. (1887) I. L. R. 12 B. 480 at p. 484.

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groom when he is available. If the relations mentioned in the text neglect their duty the girl is after the lapse of a certain time entitled to give herself in marriage to a bridegroom. Having regard to the language and the context, certainly it is doubtful whether on its proper construction the text does not relate merely to the ceremonial act of giving so as to make the religious rite most efficacious although it is true that it has been assumed in several reported cases and in the writings of some modern authors on Hindu Law, to include the right of disposing of the girl by selecting a bridegroom for her. Kamalakara, in his *Nirnaya Sindhu*, in commenting on the text says that "when the father is dead, if the brother of the girl be *asamskirtha*, that is "uninitiated," the mother should make the gift," which indicates that in the author's view ceremonial competency is what the text deals with. It will be noticed that the author prefers the mother to the other *sapindas* of the girl's father. Narada and Vishnu have also got texts similar to Yagnavalkya though Narada places the maternal grandfather and the maternal uncle before the *sakuylas* and the mother, and Vishnu also places the maternal grandfather before the mother. The language of all these texts is, moreover, that of an obligation laid on the relations mentioned and not of a right conferred on them. This was the view taken in *Venkatacharyulu* v. *Rungacharyulu*[1]. Where the obligation is one enforceable in law, it would no doubt follow that the person under obligation has also a corresponding right to perform the act which he is bound to do, but it can hardly be held that any of the persons mentioned in the texts can be legally compelled to give the girl in marriage or be cast in damages for failure to do so—see *Namasivaya Pillai* v. *Ammani Ammal*[2]. The consequence attached to the failure according to the Hindu Law, is, as already observed, that the person failing will be guilty of a heinous sin—a pronouncement which would indicate that the obligation is only a moral and not a legal one. It has also been held that the provision as to the proper person to be the giver of the girl is only directory in its character (see *Kusalchand and Lalchand* v. *Bai Manu*[3] and *Venkatacharyulu* v. *Rungacharlu*[1]) both of which cases relate to the invalidity of the marriage in consequence of

1. (1890) I.L.R. 14 M. 316. 2. (1869) 4 M.H.C.R. p. 339 at p. 344.
3. (1886) I.L.R. 11 B. 247.

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the gift having been made by the mother without the consent of the father. A contrary interpretation of the texts by holding them to be obligatory with reference to the proper person to make a gift of the bride would work serious inconvenience in practice. In practice, as a matter of fact, the mother is the person who exercises the right of choice of a bridegroom when the father is dead. That such is the case when the family is divided or when she is not living with the undivided *dayadis* of her husband there can be no doubt although the texts of Yagnavalkya and other Smriti writers do not make any distinction between a divided and an undivided family. We are inclined to hold that the texts really deal only with the religious rite of making the gift or *danam* of the bride; (see 4 M. H. C. R., p. 344); that they are only directory and not obligatory even from a religious point of view; that they create no legal right or obligation; that they do not prescribe any special rules with respect to selecting a bridegroom or of disposing of a girl in marriage (as opposed to the ceremonial act of giving), and that the right to select a bridegroom must therefore be taken to vest in the guardian of the girl as part of the general rights of guardianship. In *Maharanee Rambansi Kunwari* v. *Maharanee Subba Kunwari*[1], where the question was whether the step-mother was entitled to the custody of her step-daughter with a view to giving her in marriage in preference to the paternal grand-mother of the girl, *Lock* and *Macpherson* JJ. no doubt observe: "We are inclined to think that the texts already referred to lay down a special rule with respect to the right to dispose of a girl in marriage, different from the right of guardianship." The learned Judges, however, abstained from deciding the point as they held that "the paternal grandmother had the preferable right of guardianship as she was more nearly related to the girl than her step-mother." The *dictum* in the above case was adopted by *Farran* J. in *Nanabhai Ganpatrai* v. *Janardhan Vasudev* [2] but the learned Judge was dealing with the right of the father of a girl as against the mother and the question arose before him, moreover, in an application by the father for *ad interim* injunction restraining his wife from performing the daughter's marriage, pending the suit for a declaration of his right of guardianship. It is further not clear from his judgment that he did not intend to decide the question

1. (1867) 7 W. R. 321.

2. (1886) I.L.R. 12 B. 110.

on the ground of the father's superior right of guardianship, for he observed : "I am unable in the absence of authority, on a rule of this kind, to hold, that the plaintiff has forfeited his parental right to give his daughter in marriage, or that the defendants are justified in marrying her without her father's consent and against his wish—that important question must be decided when the case comes on for hearing." For the reasons already mentioned we doubt the correctness of the *dictum* of the Calcutta High Court in *Maharanee Rambansi Kunwari* v. *Mehemnu Subba Kummari*[1].

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But assuming that the above mentioned texts propound a special rule with respect to the right to give a girl in marriage, we agree with the view expressed in 4 M.H.C.R. at p. 343, 349 that they are obsolete so far, at any rate, as the mother's right is concerned. In that case the divided brother of a deceased Hindu sued the widow for a declaration of his independent legal right to give in marriage her infant daughter to a person of his own choice without her intervention. It was enough for the purpose of the case to decide that he had no such unqualified right, and the court consisting of *Scotland* C. J. and *Innes* J. abstained from deciding more. But their observations show that in their opinion the mother's right to select a bridegroom is superior to the brother's. They observe : "The strictly legal position and rights of the defendant (*i.e.*, the mother) as the guardian of her daughters and the possessor of her husband's property presents still stronger grounds of objection in opposition to the plaintiff's claim. It was conceded in argument that the law has always recognised a mother's right to be the guardian of her minor son or daughter upon the death of her husband in preference to his kinsmen. Such a recognition is very inconsistent with the disposal of her daughter in marriage by her husband's brother or other relations without reference to her and tends forcibly to support the view we have expressed with respect to the state of dependency imposed on women. Thus the recognition of her position as guardian militates against the law ever having given the exclusive right confended for. But now that the texts declaring such a state of dependency have become, as did the Roman law relating to the *Jatela Muliebris* obsolete and a

1. (1887) 7 W. R. 321.

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woman acts independently as guardian and such acts are perfectly legal, it would amount to almost an absurd contradiction to hold that although competent and capable to be guardian a mother has no right to be consulted in the choice of a husband for her daughter." In *Krishto Kissor Nughy* v. *Kadar Moye Dossi* [1] and *Shirdhar* v. *Hiralal* [2] the right of both parents to bestow a girl in marriage was regarded as being stronger than, and of a different character from that of other persons. In *Tulshe* v. *Gopal Rai* [3] it was held that the mother is the " most natural and proper person" to arrange for the marriage of a girl and in *Kaulesra* v. *Jorai Kasanndham* [4] even an outcasted mother was held not to have forfeited her right of guardianship.

We are, therefore, of opinion that the plaintiff as the proper personal guardian of her minor daughter was entitled to select a bridegroom for her and to give her in marriage and that in order to entitle her to do so it is not necessary for her to show that the father of the deceased wrongly and improperly refused to perform the marriage. In the present case, on the facts stated in the letter of reference, her act must, in any event, be regarded as proper, as the choice of the bridegroom had been approved by the 1st defendant. This view is in accordance with the decision of this court in S. A. 566 1889 where *Collins* C.J. and *Parker* J., held that the mother could not be held to be acting in fraud of the rights of the father when the latter had approved of the bridegroom, and the only difference between him and his wife was regarding the amount of money that should be received as bride-price.

We now proceed to deal with the second question, namely, " whether the mother is entitled to recover the reasonable expenses of such marriage out of the joint family property. " The decision of this question has been made by the learned Judges of the Small Cause Court to rest on the applicability or otherwise of S. 69 of the Indian Contract Act. That section lays down that " a person who is interested in the payment of money which another is bound by law to pay and who therefore pays it is entitled to be reimbursed by the other." It is undoubted law that

1. (1878) L. R. 2 C. 583.
2. (1887) I. L. R. 12 B. 480.
3. (1884) I. L. R. 6 A. 632.
4. (1905) I. L. R. 28 A. 233.

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when a Hindu co-parcener dies leaving an unmarried daughter, his survivors are bound, out of the joint family property, to defray the expenses of the marriage. This does not at at all involve the conclusion that they are entitled to select a bridegroom for her though they are of course bound to pay only the reasonable expenses of the marriage according to the circumstances of the family and not any amount which might have been actually spent for it. In *Vaikuntam Ammangar* v. *Kallapiran Aiyangar*[1] a decree was passed in favor of the mother of a minor girl for the expenses of her marriage, it being held that when the mother had lawfully performed the marriage of her daughter and had in consequences incurred expense she was entitled to recover it from her husband's undivided brother. The judgment is not expressly based on S. 69 of the Contract Act though it was referred to in the argument. In *Vaikuntam Ammangar* v *Kallaphiran Aiyangar*[2] in which the parties were the same as in *Vaikuntam Ammangar* v. *Kallaphiran Aiyangar*[1] the decison is based on S. 69. In our opinion it is doubtful whether that section is applicable to such a case, as it apparently contemplates cases where one person is bound by law to pay money and another is interested in the payment of it. It apparently has relation to payment to a third person and it is difficult to apply it to a a case where the person is bound under the law to make a payment directly to the person who has incurred the expense. Moreover as observed in *Subramania Aiyar* v. *Rungappa*[3], to which one of us was a party, the interest referred to in the section is apparently a pecuniary interest. See also Pollock & Mulla on "*Contracts*," p. 287. It is immaterial, however, in our opinion whether S. 69 of the Indian Contract Act is applicable or not. Under the Hindu Law the defendants are bound to provide the expenses of the plaintiff's daughter's marriage out of the joint family property in their hands, and if, as we hold, the plaintiff was entitled to perform the marriage, she has, under the law, a right of action against them to recover the expenses of marriage. There is no reason for holding that the provisions of the Contract Act are exhaustive of all cases in which a person under the English Law would be taken to have a right of action against another as for money paid to his use. It

1. (1900) I.L.R. 23 M. 512. 2. (1902) I. L. R. 26 M. 497.
3. (1909) I.L.R. 33 M. 232.

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has been held that the Contract Act is not an exhaustive code as the preamble to the Act itself shews—see *The Irawady Flotilla Co.* v. *Bagawan Doss*[1]; *Narayanasawmi Redi* v. *Usu Reddi*[2]; *Govardhana Gokul Doss Tejpal* v. *The Bank of Bombay*[3] and *Chandra Sakharkar* v. *Nagion Chandra* . In *Bradshaw* v. *Beard*[5], where the brother of a lady who had separated from her husband on account of a quarrel performed her burial without communicating with the husband it was held that he was entitled to recover the costs of the burial from the husband as money paid to his use. *Willes* J. observed: "Where the deceased has a husband, the performance of that last act of piety and charity devolves upon him. The law makes that a legal duty which the law and nature of society make a moral duty; and upon his default the law obliges him to recoup the reasonable expenses of the person who performs it for him. I am not, therefore, surprised to find that there are two authorities in this court—*Jenkins* v. *Tucker*[6] and *Ambrose* v. *Kerrison*[7]—to support this view, and I feel no alarm that this doctrine may induce a stranger to thrust himself between husband and wife for the mere purpose of preventing the husband from performing that duty himself. Generally speaking, parties are not allowed to claim in respect of monies expended for others without request. If the plaintiff here had been shown to have been guilty of any fraud in concealing from the husband the fact of his wife's death and so preventing him from performing the last duty to her remains, the case would have presented a very different aspect, but I see no reason for imputing any such misconduct to the plaintiff. Therefore, I think the plaintiff is entitled to recover the reasonable expenses incurred by him in the performance of that duty which the defendant ought to have discharged but has failed to discharge"—see also *Dalal Kunwari* v. *Ambica Pratap Singh*[8]; *Vrijbukanan Das* v. *Baiarvah*[9]; Keener on *Quasi Contracts* pp. 341 to 344. The present case is much stronger than that reported in *Bradshaw* v. *Beard*[5] as in this case, according to our view, the law gave the plaintiff the right to perform the marriage and threw on the defendants the obligation to pay for it. We hold, therefore, the plaintiff is entitled to recover the expenses

1. (1891) I.L.R. 18 C. 620 (P.C.)
2. (1901) I.L.R. 25 M. 548.
3. (1890) I.L.R. 15 B. 48.
4. (1906) 4 C.L.J. 555.
5. (1862) 12 Com. Bench. Rep., New Series, p. 344.
6. H.B.L. 91.
7. (1850-51) 10 C. B. 776.
8. (1903) I.L.R. 25 A. 266;
9. (1907) I. L. R. 32 B. 26.

of the marriage out of the joint family property of the defendants. We answer both parts of the question referred in the affirmative.

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The Small Cause Court will provide for the costs of this reference.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

K. Damodara Menon .. Petitioner*

v.

Patinhara Malasseeri Ikkaliamma's son Kelappa Menon & others .. Respondents.

Damodara Menon v. Kelappa Menon.

C. P. C., S. 141—"Procedure," meaning—Reference under O. 46, r. 1 in an application under S. 83, T. P. A., incompetent.

S. 141, C. P. C., does not give a party to a proceeding, which is not a suit, a right of appeal. It refers only to the mode of trial and the procedure incidental thereto: and it does not include a reference under O. 46, r. 1, which is incompetent in proceedings which are not suits.

O. 46, r. 1, C. P. C., does not authorize a court to invoke the jurisdiction of another court any more than it authorizes a party to do so by way of appeal.

Consequently, a court cannot make a reference under O. 46, r. 1, in an application under S. 83, Transfer of Property Act.

Cases stated under Order 46, Rule 1, Civil Procedure Code, by the District Munsif of Palghat in M. P. No. 74 of 1909 (O. P. No. 66 of 1909).

Parties not represented.

The Court delivered the following

JUDGMENT:—This is a reference made by the District Munsif of Palghat under Order 46, Rule 1, of the Code of Civil Procedure. The question referred is whether when mortgage money is deposited under S. 83 of the Transfer of Property Act

*Referred Case No. 5 of 1909. 28th April 1911.

Damodara Menon v. Kelappa Menon.

for the benefit of the mortgagee, and the mortgagee is a Malabar *tarward* or *tavazhi* governed by the *Marumakkathayamu Law*, consisting of a mother and her minor daughters who are all made counter-petitioners to the petition put in under S. 83, the minors being represented by their mother as guardian *ad litem*, the money may be paid out to the mother alone as manager without taking security from her under Order 32, rule 6, of the Code of Civil Procedure to protect the interests of her minor daughters? The Munsif is of opinion that although the proceeding before him is not a suit or appeal, he is entitled to make this reference by virtue of the provisions of S. 141 of the Code of Civil Procedure which lays down that "the procedure provided in this code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction." In our opinion this reference is incompetent. It has been held in numerous cases that S. 141 will not give a party to a proceeding, not a suit, a right of appeal. See *Thomas Souza* v. *Gulam Moidin Beari*[1] and *Parasuram Ayyar* v. *Seshia*[2]. The corresponding provision in S. 38 of Act XXIII of 1861 expressed in similar language was interpreted by *Jackson* and *Mitter* JJ. to extend to other proceedings only "the mode of trial and the procedure incidental thereto" laid down in the Civil Procedure Code and not a right of appeal. See *Huree Nath Koondoo* v. *Madhoo Soodun Saha*[3] followed in *Ningappa* v. *Gangawa*[4]. We are of opinion that the section does not authorize a court to invoke the jurisdiction of another court, any more than it authorises a party to do so by way of appeal. Such right must be expressly conferred by statute. See *Minakshi* v. *Subramanya*[5]. We therefore decline to answer the question. The record will be returned to the Munsif who will dispose of the case according to law.

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1. (1902) I.L.R. 26 M. 438.
2. (1903) I.L.R. 27 M. 504.
3. 19 W.R. 122.
4. (1885) I.L.R. 10 B. 433.
5. (1887) I.L.R. 11 M. 26 (P.C.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Muthurakkoo Thevan & others .. Appellants* (*Defendants.*)
v.
Robert Gordon Orr & others .. Respondents (*Plaintiffs.*)

Limitation—Adverse possession—Landlord and tenant—Essentials.

There is no presumption that a tenant who encroaches on his landlord's lands intends to hold possession purely for the benefit of the landlord, and in the case of an encroachment by the tenant on the adjoining lands of the landlord, the tenant acquires a title by adverse possession encroached land as a tenant irrespective of the knowlege of the landlord of such encroachment. The true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. [*Guru Doss Roy* v. *Issur Chunder Bose*[1] approved; *Ishan Chandra Milter* v. *Raja Rama Ranjan Chakerbutti*[2] ref. to; *Maidin Saiba* v. *Nagapa*[3]; *Krishna Govinda Jawadar* v. *Banku Behari Saha*[4]; *Wali Ahmed Chowdry* v. *Totameah Chowdry*[5], *Prohlad Teor* v. *Kedarnath Bose*[6] doubted.]

Muthurak koo Thevan *v.* R. G. Orr.

Second appeal from the decree of the Additional Subordinate Judge's Court, Madura, in A. S. No. 446 of 1908 presented against the decree of the Court of the District Munsif of Shivagunga in O. S. No. 223 of 1907.

R. Rangasami Aiyangar for appellants:—On the facts I am entitled to a decree.

T. Rangachariar for respondent:—To make out adverse possession the tenant is bound to show that the landlord had notice of the encroachment—*Prohlad Teor* v. *Kedarnath*[6]; *Wali Ahmed* v. *Tota Meah*[4]; *Krishna Govinda Jawardar* v. *Banku Behari Saha*[3]. No doubt *Stephen* and *Mookerjee* JJ. think in *Ishan Chandar* v. *Rama Ranjan*[2] that such notice is to be proved only when the tenant sets up a higher title than that of tenant. The principle of the decisions seems to be that the tenant is in a position of confidence and

* S. A. 861 of 1909. 12th April, 1911.

1. (1874) 22 W. R. 246.
2. (1905) 2 C. L. J. 125.
3. (1882) I.L.R. 7 B. 96.
4. (1909) 13 C. W. N. 698.
5. (1903) I.L.R. 31 C. 397.
6. (1897) I.L.R. 25 C. 302.

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ought not to be permitted to abuse his trust by encroaching on the landlord's neighbouring land. When such encroachment has not been brought to the notice of the landlord the law presumes that the tenant's possession is not wrongful. The last cited case is in conflict with this principle.

R. Rangasami Aiyangar cited, in addition to *Ambika Churn* v. *Mukta Kishori*[1], Woodfall's *Landlord and Tenant*, p. 782 (16th Edn.)

This second appeal coming on for hearing in the first instance on 24th October 1910, the Court (*Benson* and *Krishnaswami Aiyer* JJ.) delivered the following

JUDGMENT:—The courts below were wrong in holding that the defendants were not entitled to adduce evidence on the 2nd issue. If the defendants held the excess lands for more than the statutory period, they will be entitled to claim the same rights in them as in the lands admittedly held under the cowle. We must ask the present District Judge to return a finding on the 2nd issue* after taking the evidence that the parties may adduce.

The finding should be submitted within six weeks from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of Madura submitted finding to the effect that the defendants did acquire prescriptive right in respect of excess land claimed.

This second appeal coming on for final hearing the Court delivered the following

JUDGMENT—The District Judge has found that the defendants have acquired a prescriptive right of tenancy to the excess lands claimed by the plaintiffs. We accept the finding. Mr. Rungachariar contends that as the Judge has not found that the plaintiffs or their predecessors in interest were aware more than 12 years before this suit of the encroachment made by their tenants the defendants cannot be taken to have acquired a prescriptive right. His argument is that a

* The 2nd issue was : "Whether the defendants have acquired any prescriptive right in respect of excess lands claimed."

1. (1905) 2 C.L.J. 125.

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tenant who encroaches upon his lessor's land adjoining the land leased to him must prove that he set up to the knowledge of his lessor more than 12 years prior to the suit in ejectment a right to hold the land encroached on as a tenant. We are unable to uphold this argument. Unquestionably the ordinary rule of law is that possession held by a person in his own right is adverse to the true owner, whether the owner is aware of such possession being taken or not, and if the adverse possession be continued for the statutory period, it will confer a prescriptive title on the trespasser. This rule is qualified by the principle that if the trespasser while in possession claims a right less than the absolute ownership in the land he will acquire by prescription only the inferior title set up by him. The title acquired will be determined by the *animus possidenti* of the trespasser. It is also well established that when possession is proved by a person it will be presumed to be held in his own right. This presumption, no doubt, is not applicable in cases where a special relationship exists between the parties such as tenants in common or members of an undivided family. The court will, in such cases, presume that possession is held on behalf of all the co-owners or the members of the family and it will lie on the possessor to prove that he held exclusive possession to the knowledge of those whose rights he seeks to affect by his possession. What then is the proper presumption where a tenant takes possession of lands not included in his holding, taking advantage of his character as tenant? We are clearly of opinion that the view enunciated by *Markby* J. in *Guroo Doss Roy* v. *Issur Chunder Bose*[1] is correct. That learned judge observes: "We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the enoroachment for his own benefit." This is also the view enunciated in the later case of *Ishan Chandra Mitter* v. *Raja Rama Ranjan Chakerbutty*[2]; see also *Maidin Saiba* v. *Nagapa*[3]. Our attention has been drawn to some cases in which

1. (1874) 22 W. R. 246.
2. (1905) 2 C. L. J. 125.
3. (1882) I.L.R. 7 B. 96.

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it has been stated that the tenant is bound to prove that he set up a right of tenancy over the encroached lands to the knowledge of his landlord—*Wali Ahmed Chowdry* v. *Totah Meah Chowdhry*[1]; *Krishna Govinda Jawadar* v. *Banka Behari Saha*[2]. See also *Prohlad Deor* v. *Kedarnath Bose*[3] where *Maclean* C.J. was of opinion that the rule laid down by *Markby* J. was stated in too broad terms. In *Wali Ahmed Chowdhry* v. *Totah Meah Chowdhry*, the encroachment was on waste land and the acts of enjoyment might be held not to amount to effective possession. These decisions might be perfectly right on the particular facts on which they were passed, but if they intend to lay down that a tenant-trespasser is, as a matter of law, bound to prove that his trespass was known to his landlord, we must say that we prefer the rule laid down by *Markby* J. We can see no basis for a presumption that a tenant when he encroaches on his landlord's lands intends to hold possession purely for the benefit of the landlord. We are, therefore, of opinion that on the finding arrived at by the District Judge the plaintiffs must fail. We may add that it is almost impossible to believe that during the period of about 30 years that the defendants were cultivating the lands prior to 1904, their landlords were ignorant of the fact. The result of the finding is that the decrees of the lower courts must be reversed and the suit dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro.

Manji and others .. Petitioners*

v.

Paramayya Hebbara .. Respondent.

Manji v. Paramayya Hebbara.

Oaths Act, Ss. 12, 11, 10—Refusal to take oath—Effect of.

The agreement to take the oath must be such that the court is in a position to administer it forthwith. If, however, the form and place have not been settled or agreed upon and the court cannot administer it, a refusal to take the oath, will not entail on the party refusing a decision adverse to him on the ground of such refusal. [*Aiyakannu Nadar* v. *Muthia Nadar*[4] distinguished.]

Petition, under S. 115 of Act V of 1908, praying the High Court to revise the decree of the Temporary Sub-Judge's Court

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C.R.P. 197 of 1910. 20th January 1911.

1. (1903) I. L. R. 31 C. 397.
2. (1909) 13 C. W. N. 698.
3. (1897) I. L. R. 25 C. 302.
4. (1907) 17 M. L. J. 99.

of South Canara in A. No. 18 of 1908, presented from the decree of the District Munsif of Kundapur in O. S. No. 60 of 1907.

Manji v. Paramayya Hebbara.

Plaintiff in the case sued for rent due from the defendant his tenant. Defendant pleaded discharge. In the course of plaintiff's cross-examination, plaintiff was asked if he was willing to abide by the oath of the defendant. He said he was, but no question was put to him as to the form of the oath. The defendant was prepared to take oath in any form required by plaintiff but plaintiff refused to state the form of the oath, but on the other hand would not be bound by the oath of the defendant. The District Munsif dismissed the suit on this ground relying on *Aiyakkannu* v. *Muthia Nadar*[1] but, on appeal, the Sub-Judge reversed his decision on the ground that so long as the form was not settled upon, there was no concluded agreement and therefore the penalty laid down in the case cited did not apply. He was also of opinion that the only result contemplated by the Oaths Act was that evidence taken in accordance with the agreement was conclusive, and in the absence of such evidence, the court could not found an adverse decision on the plaintiff resiling from his agreement.

K. Ramanath Shenoi, for petitioner, contended that there was an agreement within the meaning of the ruling in *Aiyakkannu* v. *Muthia Nadar*[1] and the court ought to have dismissed the suit.

B. Sitarama Rao, for respondent, submitted that the question whether there was a binding agreement or not was a question of fact or law at best and error on that point could not be a ground for revision. He also submitted that Ss. 8, 9 and 10 of the Oaths Act made it clear that the parties must have agreed as to the form of the oath which is always the very essence of the oath so as to enable the court to immediately proceed to administer the oath. In *Ayakannu Nadar* v. *Muthia Nadar*[1] the form of the oath had been settled upon. See also *Velayuda Gounden* v. *Narayanasami Gounden*[2]. The ruling in *Ayakannu Nadar* v. *Muthia Nadar*[1] does not hurt the respondent as, according to that decision, the effect of an agreement to be bound by

1. (1906) 17 M. L. J. 99. 2. (1907) 17 M. L. J. 536.

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oath is to dispense with other evidence. In this case the burden of proof being on the defendant, in the absence of evidence on his side, the decision ought to be against him. He submitted also that the decision in *Ayakannu Nadar* v. *Muthia Nadar*[1] was not warranted by the Act or by any of the rulings relied upon, as they were all cases in which oaths had been taken in accordance with the agreement and to which S. 11 of the Act would in terms apply. In *Moyan* v. *Pattukutti*[2] Mr. Justice *Miller* differs from the ruling in *Ayakannu Nadar* v. *Muthia Nadar*[1].

The Court delivered the following

JUDGMENT :—I doubt if any question of jurisdiction arises in this case, but, assuming such a question arises, I think the Sub-Judge is right on the question regarding the oath. Though the plaintiff agreed generally to abide by the oath of the defendants and the defendants agreed to take an oath in any form or in any place, still the form and place were never actually agreed upon. It is clear from S. 10 of the Oaths Act that the agreement as to the oath must be such that the court is in a position to administer it forthwith. If, however, the form and place have not been settled, the court cannot administer it. *Ayakannu Nadar* v. *Muthia Nadar*[1] is distinguished on the ground that there the form of the oath had been agreed upon.

The petition is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Munro.

Sanka Krishna Murthi, minor, by guardian *ad litem* Sriram Lakshmikantham .. Appellant* (*Defendant*)

v.

The Bank of Burmah, Limited .. Respondents (*Plaintiffs*).

Krishna Murthi v. The Bank of Burmah, Ld.

Minor—Hindu Law—Trading partnership—Liability on bills drawn by guardian's agent—Extent.

A minor member of a joint Hindu trading family is liable on bills drawn by the manager whether it be for purposes connected with the

* O. S. A. 49 of 1909. 24th April, 1911.

1. (1906) 17 M. L. J. 99.

2. (1907) I.L.R. 31 M. 1.

business or unconnected with it and in fraud of the family ; but his liability is limited to a share in the business.

The rule is different in the case of a minor who is the sole owner of the business. There the creditors have no direct recourse against the minor or his estate but as the guardian is liable to indemnity for the liabilities properly incurred out of the assets of the minor embarked in the business, creditors have been held entitled to proceed directly against such assets; but where a guardian has no right to indemnity against the assets in the business, as where he has acted improperly, his creditors also will not have the right.

A guardian of a minor—sole proprietor in a partnernip—cannot in any view be justified in giving any larger powers to the agent than are reasonably necessary, and a guardian will be acting improperly in giving her agent power to draw bills in favour of himself or his firm; and if, as the result of giving such power, the guardian finds himself involved in liability for the fraud of the agent she has no right of indemnity against the assets of the minor in the business nor are her creditors entitled to claim any relief against the minor or his assets.

Appeal from the judgment and decree of the Honourable Mr. Justice Sankaran Nair in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 348 of 1906.

V. V. Srinivasa Aiyangar and *C. P. Ramaswami Aiyar* for appellant.

Nugent Grant and *C. Madhavan Nair* instructed by *Greatorex*, for respondents.

V. V. Srinivasa Aiyangar.—The minor is made liable cn the pro-note executed by the guardian. My contention is the minor is not liable, for under the Negotiable Instruments Act only a person competent to contract or his duly authorised agent is empowered to make a note. *Vide* Ss. 4, 26, 27 of Negotiable Instruments Act; *Subba Narayana Vathiar* v. *Ramasawmi Ayyar*[1]; *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*[2]. Any act of the guardian which does not purport to be for the benefit of the minor or his estate will not bind the minor. In this case the debt was incurred by the managing member of the joint family business. The minor was a member. *Sankaran Nair* J. held that the minor was liable as member of the firm. There is no family business here. Again a guardian cannot bind the ward by a bare promise to pay unless a charge is created. A guardian has no greater power to bind the ward personally than a

1. (1906) I. L. R. 30 M. 93. 2. (1904) I. L. R. 28 M. 205.

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guardian in England. The cause of action here is based on a bare promise to pay—*Waghela Rasay* v. *Sheikh Masludin*[1]; *Maharana Shri Ranmal Singji* v. *Vadilal Vakhatchand*[2]; *Indurchunder Singh* v. *Radhakishore Ghose*[3]; *Surendra Nath Sarkar* v. *Atulchandra Roy*[4]; *Bawal Sahu* v. *Baijnath Pertab Narain Singh*[5]; *Ponnambala Thambiran* v. *Sivagnana Desika Gnana Saband a Pandhara Sannadhi*[6]; *Muhammad Kuni Rowthar* v. *Visvanatha Aiyar*[7]; *Ramchunder Dutt* v. *Dwarkanath Bysack*[8]; Trevelyan on *Minors*, p. 199. Granting that the guardian can do this she could not delegate all her powers as guardian to another except some ministerial act or virtually appoint another guardian—*vide* Halsbury's *Laws of England*, p. 169; *Re Leeds Banking Co.*[9]; *Mussamat Rashad-un-nisa* v. *Muhammad Ismail Khan*[10]. The mother is the natural guardian. She cannot appoint another guardian. Power of accommodating other firms is not a power which can be delgated by the guardian. The natural guardian is an ignorant woman. It is not shown that the power of attorney was understood by or exp'ained to the guardian—*Achhan Kuar* v. *Thakur Das*[11].

Supposing the agent was authorized he was acting beyond the scope of his authority—Daniell on *Negotiable Instruments*, Vol. I, S. 271; *Thacher* v. *Dinsmore*[12]; *Forster* v. *Fuller*[13]. Even if he was acting within his express authority he was acting fraudulently and therefore beyond the scope of his authority. American Dec., 678; Simpson on *Infants*, pp. 332, 333; *In re Johnson*[14] C. S. No. 198 of 1908 (unreported).

The bank must, under the circumstances, be fixed with notice of fraud having been committed and it is therefore no *bona fide* holder in due course. The plaintiff bank knew that the agent was taking undue advantage of his power and acting beyond the scope of his authority.

The case *Raghunath Tarachand* v. *The Bank of Bombay*[15] is distinguishable. There is virtual agency created by law in cases

1. (1887) I. L. R. 11 B. 551.
2. (1894) I. L. R. 20 B. 61 ; 69.
3. (1892) I. L. R. 19 C. 507.
4. (1907) I. L. R. 34 C. 892.
5. (1907) I. L. R. 35 C. 320 ; 329.
6. (1894) I. L. R. 17 M. 356.
7. (1904) I. L. R. 26 M. 336.
8. (1889) I. L. R. 16 C. 330, 345.
9. (1866) L. R. I. Ch. Ap. 561.
10. (1909) 13 C. W. N. 1182.
11. (1895) I. L. R. 17 A. 125.
12. (1809) 4 American Dec. 61.
13. (1809) 4 Am. Dec. 87.
14. (1880) L. R. 15 Ch. 555.
15. (1909) I. L. R. 34 B. 51

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of partnership and when there are adult male members of the family. Otherwise if business belongs to only a single minor pro-note by the minor's guardian as such is not an absolute promise to pay and therefore not a negotiable instrument. No consideration or necessity for the debt is proved. On such notes the minor is not liable. The guardian is personally liable.

Nugent Grant.—The trade is an asset of the joint family. The making of negotiable instruments is an incident of trade. All that is necessary for trade is binding—*Ramlal Thakursidas* v. *Lakshmichund* [1]; *Chalamayya* v. *Kandayya*[2]; *Joykisto Cowar* v. *Nityanund Nundy*[3]; *Rampartab Samarth Rai* v. *Foolibai and Goolibai*[4]; *Ramcharan Das* v. *Gaya Prasad*[5]; *Raghunath Tarachand* v. *The Bank of Bombay*[6]; *The Bank of Bombay* v. *Raghunathji Tarachand*[7]. Plaintiff is holder in due course. If the minor is not personally liable the business is liable.

The Court delivered the following

Wallis J.

JUDGMENT:— *Wallis* J.—This is an appeal from a judgment of Mr. Justice *Sankaran Nair* sitting on the original side by which the plaintiff Bank recovered judgment against the assets of the minor defendant on five Promissory Notes made on the 19th and 24th July 1908 for Rs. 9,100 in all by one Lakshminarasimham acting under a power of attorney from the minor's mother and natural guardian who was carrying on business under the style of Sanka Ramasami & Son. The business was a joint family business carried on by the father on behalf of himself and the minor under his own name, and on his death his interest passed by survivorship to the minor who became the sole owner. The notes were signed by K. A. Lakshminarasimham, P. P. Sanka Ramasami & Son, and were made in favour of the firm of C. Lakshmikantham & Co., of which Lakshminarasimha was the leading partner and were discounted by Cantham & Co., with the plaintiff Bank who credited them with the amount of the bills. At the time Cantham & Co. were of good credit, but indebted to Sanka Ramasami & Son in about Rs. 20,000 on a balance of accounts. Within a month

1. (1861) 1 B. H. C. R. Appx 51.
2. (1898) I. L. R. 22 M. 170.
3. (1878) I. L. R. 3 C. 738.
4. (1896) I. L. R. 20 B. 767, 778
5. (1908) 30 A. 438,
6. (1909) I. L. R. 34 B. 51.
7. (1908) 10 Bom. L. R. 668.

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they absconded and were adjudicated insolvents and the plaintiff now seeks to recover the amount of these bills from the minor defendant.

According to the evidence the Bank were aware that the agent by whom the notes were signed was a partner in the firm of Cantham & Co., in whose favour they were made but did not know that the business of Sanka Ramasami & Son belonged to a minor as they omitted to inspect the power of attorney. It is, however, well settled that the signature having been made per proc. they must be held to have notice of the contents of the power and therefore of the fact that the business belonged to a minor and of the extent of the agent's authority under the power. The learned judge has found that the notes must be treated as made by the mother and guardian herself and having regard to the recitals in the power that as mother and guardian of her son she was desirous of carrying on business under the style of Sanka Ramasami & Son and to the power it conferred upon the agent "in her name and on her behalf in her capacity as mother and guardian to carry on the said business and sign, make, draw, accept, endorse and negotiate all cheques, receipts, letters, accounts, promissory notes, hundis, drafts, bills of exchange, indents, invoices and delivery orders and all other papers, whatsoever," I think the learned judge was right and that the notes must be treated as purporting to be made by the mother and guardian carrying on the business of Sanka Ramasami & Son by her agent under the power. The case for the respondents is that it was necessary and proper for the mother and guardian to carry on during the minority the ancestral business to which her own son had succeeded, and for that purpose to appoint an agent to carry it on and to give such agent power to draw bills and promissory notes in her name, on the ground that such a drawing of bills and notes is necessary and incidental to the carrying on of a business and that the business could not be carried on without it, and they contend that the minor, though not a party to notes made by his guardian, is liable on them to the extent of his estate.

The learned judge agreed with these contentions and was of opinion that the liability of the minor in these circumstances is similar to that of a minor member of a Joint Hindu trading

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family for bills drawn by the managing member. The extent and nature of this liability have recently been considered in *Ragunath Tarachand* v. *The Bank of Bombay*[1] where it was held that the minor was liable to the extent of his share in the firm on bills or notes drawn by the managing member in the name of the firm but in fraud of it and for purposes unconnected with it. In so doing *Chandarvarkar* J. applied the rule laid down by *Sausse* C.J. in *Ramlal Thakursidas* v. *Lakshmichand Muniram*[2] that "in carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager (or the adult members acting as managers) which are necessarily incidental to and flowing out of the carrying on of that trade. * * * The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade." It is, in my opinion, unnecessary to consider the reasoning by which the learned judge satisfied himself that this ruling was in accordance with the Smrithis and their commentaries because it seems to me the general principles laid down in the above passage are far too well settled to admit of question at the present day. The important point expressly decided for the first time in this case is that minors are to be bound not only on bills or notes drawn or made in the carrying on of the business, but on such bills or notes drawn or given by the persons carrying on the family business for purposes unconnected with the business. All that *Sausse* C. J. says in *Ramlal Thakursidoss* v. *Lakshmichand Muniram*[2] is that "third parties in the ordinary course of *bona fide* trade dealings should not be held bound to investigate the status of the family * * * whilst dealing with him on the credit of the family property." This does not seem to mean more than that it is unnecessary to enquire whether there are minors or not. Similarly the remarks of *Pontifex* J. in *Johhirabibee* v. *Sreegopalmisser*[3] are confined to "debts honestly incurred in carrying on such business." Similarly in *Sankrabhai* v. *Moganlal*[4] it was held that where an ancestral business descends to and is carried on by a widow, the reversioners are liable for debts properly incurred by her in connection with the business

1. (1909) I.L.R. 34 B. 72.
2. (1861) 1 Bom. H.C.R. Appendix 51.
3. (1876) I.L.R. 1 C. 470 at p. 475.
4. (1901) I.L.R. 26 B. 206.

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on the ground that so far as carrying on the business is concerned her position is analogous to that of the manager of a joint Hindu family.

The question of liability on bills drawn for purposes unconnected with the business and in fraud of the family did not arise in these cases but it seems to me that as held by the learned Judges the minor in such a case is liable to the extent of his interest in the firm, and this for the reason given by *Batchelor* J. in his judgment that we must be guided by the analogy of the law of partnership as joint Hindu family business is a peculiar sort of partnership.

In England according to the judgment of the House of Lords in *Lovell and Christmas* v. *Beauchamp* [1] a minor may be a partner, but judgment cannot be obtained against him on a partnership debt but the adult partner is entitled to insist that the assets are applied in the first instance in satisfaction of the partnership debts and if the proper steps are taken the right can be made available for the benefit of the creditors. In India S. 247, Indian Contract Act, which allows a minor to be a partner and declares the share of the minor in the property of the firm to be liable for the obligations of the firm, has much the same effect and renders S. 251 so far applicable. Under S. 251 each partner who does any act necessary for or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partnership to the same extent as if he were their agent duly appointed for that purpose; and Illustration (*a*) shows that where A and B are partners and A in the name of the firm draws a bill of which B has no notice and any transaction in which he has no interest, still B is liable on the bill. In the same way it seems to me a minor member of a joint Hindu trading family should be held liable on a bill drawn by the manager, his liability being limited to his share in the business on the analogy of S. 247. These are the grounds on which *Batchelor* J. based his judgment and I think the conclusion is not only sound but also in accordance with convenience. There will generally be minors in a joint Hindu trading family and it is desirable that such families should be in a position to trade as freely as other firms. I am not, however, prepared to apply this

1. (1894) A. C. 611.

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rule to minors who are not trading in partnerships but are sole owners of the business without a separate consideration of the law affecting guardian and minors, etc., the extent to which a minor is liable on contracts made by his guardian. In *Waghela Rajsanji* v. *Shek Masludin*[1] it has been held by their Lordships of the Judicial Committee that in India a guardian has no power to bind his ward by a personal covenant. There the guardian had alienated part of the ward's lands in satisfaction of a debt binding on the ward and had covenanted on behalf of himself and the ward to indemnify the creditor if the land turned out not to be rent free. Though the covenant was apparently beneficial to the minor their Lordships held it was not binding on him. At page 561 occur the following observations which appear to show how the present case should be approached. "Now it was candidly stated by Mr. Mayne that there is not in Indian law any rule which gives a guardian or manager greater power to bind the infant ward by a personal covenant than exists in English law. In point of fact, the matter must be decided by equity and good conscience generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which a guardian has such power nor do they see why it should be so in India. They conceive it would be a very improper thing to allow the guardian to make covenants in the name of his ward so as to impose a personal liability upon the ward." In *Indurchunder Singh* v. *Radhakrishore Gose*[2] where the guardians had taken certain lands on lease in their own names, but as was alleged for the benefit of the minor, their Lordships held that neither the minor nor his estate could be made liable on the contract.

On the above decisions it appears to me that neither the minor nor his estate as such can be held liable on the notes sued on.

In order to see whether the holders of the notes are entitled to any recourse against the minor it is necessary in the first place to ascertain the rule of English Law as embodying *prima facie*, according to their Lordship's observations, the rule of justice, equity and good conscience which we are bound to apply.

Further if the minor is the sole owner of the business it does not seem to make much difference whether he has acquired

1. (1887) I.L.R. 11 B. 551 (P.C.) 2. (1892) I.L.R. 19 C. 507, 512.

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it by birth and survivorship as here or by inheritance or bequest as in England. In either case it seems to me what has to be considered is the interest of the minor. In England a guardian is not ordinarily entitled to carry on a business to which the ward has succeeded and in *Land* v. *Land*[1] Sir *George Jessel* after a search for precedents held that the court had no jurisdiction to allow this to be done unless in pursuance of testamentary authority or at the instance of creditors of the estate. Mr. Simpson in his book on "Infants" suggests that the rule is too strictly stated and that one precedent was overlooked. In India at any rate the rule appears to be otherwise. In *Joy Kistocoowar* v. *Nittyanund Nundy*[2] it was held that a widow and natural guardian may properly carry on a family business belonging to a minor son through a manager, and I am not prepared to differ from this decision which, so far I know, has never been questioned and merely recognizes the usual practice. But it appears to me that even so the same rule must apply as when the legal representative or guardian is allowed to carry on the business in England, and that the guardian or legal representative and not minor or beneficiary on whose behalf the business is carried on is the person personally liable on contracts entered into in the course of the business—*Labouchere* v. *Tupper*.[3] Creditors of the business have therefore no right of direct recourse against the minor or his estate, but as the guardian is entitled to indemnity for liabilities properly incurred out of the assets of the minor embarked in the business, creditors of the business, it has been held, are entitled to proceed directly against such assets. Where, however, the guardian has no right to indemnity against the assets in the business, as where he has acted improperly, neither have his creditors, as held by Sir George Jessel in *In re Johnson*[4]. which was followed in *In re Evans*[5].

Applying these principles it appears to me that the plaintiff can at most be entitled to a decree against the assets embarked in the business and that the decree against the estate of the minor went too far in my view. In his judgment the learned Judge observed that it was not alleged or proved that the

1. (1874) 43 L.J. 311.
2. (1878) I.L.R. 3 C. 738.
3. (1857) 11 Moo. P. C. Cases 198.
4. (1880) 15 Ch. D. 548.
5. (1887) 34 Ch. 597.

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minor had any property not devoted to the trade, but this, it appears to me, is a matter to be ascertained in execution.

Two questions, then, remain. Is the guardian liable on the notes made by the agent as acting under the apparent authority conferred by the power—*Bryant Powis and Bryant* v. *Quebec Bank*[1]—and is she entitled to indemnity for this liability against the minor's assets in the business? Before dealing with these questions it may be well to refer to the terms of the power and the circumstances under which it was given. No exception can be taken to the particular agent chosen. He had married the minor's sister, had been entrusted with a power of attorney by Sanka Ramasami during his lifetime, and was the head of the large firm of Cantham & Co., then (June 30th) in good credit though it failed within the next two months. It was already probably in difficulties and we find that on March 18th the agent had raised Rs. 7,500 on promissory notes executed under the power in favour of his own firm. These sums do not find any place in Sanka Ramasami's account in the books of Cantham and Co., Exhibit B, or in Cantham and Co.'s account in Sanka Ramasami's books, and as the notes retired before they fell due, it does not appear whether the use made of the power to raise funds for Cantham and Co. at a time when they were already indebted to his firm came to Ramasami's knowledge before his death in June 1908. Shortly afterwards on June 30th the agent procured from the widow the power now in question, Exhibit *G*, by which he was authorised, among other things," to be in charge of, look after, manage, conduct, and carry on under the style of Sanka Ramasami & Son the family business of general merchant and commission agent heretofore carried on under the style of Sanka Ramasami, to enter into any contracts or agreements of any kind with any other persons, firm, or firms, company or companies, to deposit or withdraw monies in or from any bank or banks, company or companies, and sign, make, draw, accept, indorse or negotiate all cheques, receipts, letters, accounts, promissory notes, hundis, drafts, bills of exchange, indents, invoices and delivery orders and all other papers whatsover ".

Under this power he executed two promissory notes for Rs. 4,100 in favour of Cantham & Co., on July 19th and

1. (1893) Ap. Cases p. 130 at 180.

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Rs. 5,000 on July 24th and discounted them with the plaintiff Bank. The substance of the transaction was that the Bank lent money to Cantham & Co., according to the common practice on two signatures, its own as indorsers and that of Sanka Ramasami & Son as makers of the notes, the notes being made by the agent under the power in favour of the firm of Cantham & Co. to which he himself belonged. Now it is not at all clear that the words of the power which authorised him to enter into any contracts or agreements of any kind with any *other* person or persons, firm or firms, authorised him to make a promissory note in favour of his own firm. And assuming there is no express restriction it seems to me open to question whether the power authorised the agent to execute promissory notes in favour of his own firm, and whether holders taking with notice of the fact are entitled to recover upon them. According to the American authorities an agent is not entitled to execute negotiable paper in his principal's name for his individual purposes and subsequent holders taking with notice that he has done so cannot recover against the principal. See Daniel on "Negotiable Instruments," S. 282, citing *Stainback* v. *Read and Co.*[1] Lord *Blackburn's* query in *Jonmen Jony Coondoo* v. *Watson*[2] points the same way, but in the *Bank af Bengal* v. *Macleod*[3] their Lordships held that power to indorse included power to indorse in the agent's own favour and the observations in *Jonmen Jony Coondoo* v. *Watson*[2] leave the question open. It may be possible to distinguish these cases but it is unnecessary to decide the point because, in my opinion, assuming the notes to have been duly made in the exercise of the power and the guardian to be liable upon them, neither the guardian nor the holders have any right of recourse against the minor.

Sankaran Nair J. decided in the plaintiff's favour mainly on the ground that it was proper for the guardian to carry on the business through an agent and to give the agent power to execute negotiable instruments and that the business could not be carried on, as he says, without drawing hundis. There is much to be said for this view especially as a Hindu widow would not generally be competent to reserve the exercise of such a power

1. (1854) 62 Am. Dec. 648. 2. (1884) 9 A. C. 561 at p. 563.
3. (1849) 5 M. I. A. p. 1.

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to herself. At the same time there can be no doubt that the result of so holding must be to expose the minor's estate to a degree of risk that can only be justified on the ground of its being a lesser evil than closing the business, and here it may be observed that the risk to the minor sole owner is undoubtedly much greater than that of the minor member of a joint Hindu trading family whose interests are identical with those of the adult members having control of the business. In these circumstances it seems clear that the guardian cannot, in any view, be justified in giving any larger powers than are reasonably necessary. Assuming it to be necessary to give the agent power to draw bills and promissory notes, it appears to me that it cannot be necessary, and it has certainly not been shown to be necessary, to give him power to draw in favour of himself or his firm while to do so must greatly and unnecessarily increase the risk to the minor's estate. The giving of such an unrestricted power is, I think, improper, and if, as the result of giving it, the guardian finds herself involved in liability for the fraud of the agent, she has no right of indemnity against the assets of the minor in the business nor are her creditors entitled to claim through her. This ground is, in my opinion, sufficient, for the reasons already given, to dispose of the case and the appeal must accordingly be allowed and the suit dismissed with costs throughout.

Munro J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Kalinga Hebbra .. Appellant*

v.

Narasimha Hebbra .. Respondent.

Kalinga Hebbra v. Narasimha Hebbra.

C. P. C., S. 154—*Old Code, S.* 310-*A.*—"*Any present right of appeal*"—*Statute of procedure—Construction—Essentials of application of S.* 310-*A.*

The right of appeal in a pending action is not a matter of procedure; and where a person had filed an appeal under an old Procedure Code which gave him a right of second appeal if the decision went against him, the passing of a new Code which did not give a right of second appeal in a similar case will not take away the appellant's right of second appeal.

The words "any present right of appeal" in S. 154, C.P.C., do not mean anything more than that no right of appeal which has become vested in a litigant shall be affected by the present Code.

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*-A. A. O. No. 21 of 1910. 31st January 1911.

Kalinga Hebbra v. Narasimha Hebbra.

S. 310-A (Act XIV fo 1882) confers a special right on the judgment-debtor and before he can avail himself of the benefit of the section he must comply strictly with its terms. A deficient deposit cannot be made good after the time allowed by the Court appropriating deposits paid on other accounts by the judgment-debtor.

Appeal from the appellate order of the Court of the Temporary Subordinate Judge of South Canara in A. No. 200 of 1908 presented against the order of the Court of the District Munsif of Kundapur in E. A. No. 164 of 1908 (O. S. No. 465 of 1905.)

An application was put in by mortgagee of the judgment-debtor to set aside a sale in execution of a decree for money. He tendered Rs. 132-14-0, giving the following particulars of the amount:—

	Rs.	A.	P.
Amount prayed for in petition	107	4	11
Court costs	3	14	0
Poundage	10	10	0
In respect of the 5 per cent on purchase money	8	8	0

Interest on Rs. 73-7-0 at 12 percent from 13-12-07 (12-12-07) the date of the execution application, and the date till which interest had been calculated and put down in the sale proclamation. The amount mentioned in the sale proclamation was Rs. 107-7-4. The petition came on for hearing on 11-4-'08. This was four days after the 30 days allowed by S. 310 A The (decree-holder) purchaser objected to the sale being set aside. But the District Munsif directed that the deficit be made up by taking its amount from the poundage fees and being paid to the decree-holder as it was not incumbent under S. 310-A to produce the poundage fees and the sale was set aside. On appeal the order was confirmed by the Sub-Judge. Hence the second appeal.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondent.

A preliminary objection was taken by the respondent's vakil that under S. 104, C.P.C. of 1908, the order of the Sub-Judge was final and no second appeal lay.

B. Sitarama Rao, for appellant, submitted that the appeal in this case had already been filed to the Sub-court before the new Act came into force: that he had a vested right of second appeal which could not be taken away by the new Act—*vide*

Kalinga Hebbra v. Narasimha Hebbra

The Colonial Sugar Refining Company, Limited v. *Irving* [1] that S. 104 did not affect him as the appellate order was not in appeal from an order setting aside the sale under Order 21, r. 92; that the section did not therefore in terms apply; that also the Munsif's order was a decree under the old Code, and an appeal having been filed therefrom and there being no express section of the Code converting the decree into an order, the order of the appellate court also was a decree and a second appeal lay. He submitted that S. 154 would not affect him; first, because that section would apply only if the right of appeal had been affected by the other provisions of the Code; secondly, because the right of appeal—in this case a present right of appeal—"accrued" as laid down by Lord Macnaghten in the case cited above. On the merits he submitted that the appropriation by the Munsif having taken place only after the expiry of the prescribed period, the sale could not be set aside. A deposit under this section has to be unconditional—*Mussett Shakoti* v. *Jyotindra Mohan Tagore*[2]; *Hanuman Singh* v. *Luchman Sahu*[3]—such that the decree-holder could draw the money at once—*Rahim Bux* v. *Nundo Lal Gossami*[4]. It was not in the power of the court to extend the time, however small the deficit—*Chandi Charan Mandal* v. *Banki Behari Lal Mandal* [5] It is the debtor's right to appropriate, and only on those conditions could the creditor accept; no amount of protesting on his part would do—Leake p. 648. Under the circumstances of this case, therefore, there was no deposit such as the decree-holder could accept till the 11th of April, *i.e.*, 4 days after time.

K. Y. Adiga, for respondent, contended that the deposit was more than required; that the rules as to appropriation ought not to be applied to a case under S. 310-A: that *Chandi Charan Mandal* v. *Banki Behari Lal Mandal*[5] proceeds upon a misconception of the nature of court sale till confirmation (when only the title vests in the purchaser); that even that ruling does not exclude court's jurisdiction to relieve in cases of mistake or accident, and that there has been a substantial compliance in this case.

The Court delivered the following

1. (1905) A. C. 369.
2. (1896) 1 C. W. N. 132.
3. (1904) 8 C.W.N. 355.
4. (1887) I.L.R. 14 C. 321.
5. (1899) I.L.R. 26 C. 449 (F.B.)

Kalinga Hebbra v. Narasimha Hebbra.

JUDGMENT:—The preliminary objection has been taken that no second appeal lies in this matter by reason of the provisions of the New Civil Procedure Code. There can be no doubt, reading Order XL (iii), rule 1, clause (*j*) and S. 104 and Order XXI, rules 92 and 89 together, that if the new code applies to the present case the decree-holder has no right of appeal. The facts upon which it must be decided whether the present code governs the case are that the decree-holder filed his appeal against the order of the Munsif when the code of 1882 was still in force, but before the Subordinate Judge passed his order the present code had come into force. The general principle which regulates the question whether a new statute deprives a litigant who had a right of appeal which he enjoyed under the repealed statute is thus stated by Lord Macnaghten: "And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to superior tribunal which belonged to him as of right is a very different thing from regulating procedure."—*The Colonial Sugar Refining Company, Limited* v. *Irving* [1].

Applying the principle to the present case the appellant when he filed his appeal in the Subordinate Judge's Court had the right vested in him to appeal against the Subordinate Judge's order if it went against him. The next question is: Has S. 154, Civil Procedure Code, expressly or by necessary intendment deprived the appellant of this right? The section runs thus: "Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement."

It is argued that the words "present right of appeal which shall have accrued," have by necessary intendment taken away the right to appeal if the right was not capable of being immediately exercised at the time of the introduction of the code. We are not inclined to accept this construction, though we confess the matter is by no means free from doubt. We think the words relied on do not mean anything more than

1. (1905) A. C. 369 at p. 372.

Kalinga Hebbra v. Narasimha Hebbra.

that no right of appeal which has become vested in a litigant, to use the language of their Lordships of the Privy Council, shall be affected by the present Code.

We also think there is some force in the contention of the learned Vakil for the appellant that in as much as under the provisions of the old Civil Procedure Code what was passed against the appellant by the District Munsif was in the nature of a decree the provisions of the present code should not be held to change what was a decree into an order without clear words to that effect. We hold therefore that an appeal lies.

Upon the merits there can be no doubt that the amount deposited by the respondent who is the assignee of the judgment-debtors was short of the amount which S. 310-A, Civil Procedure Code, requires to be deposited. We think the lower court was not entitled to appropriate the other amounts paid on other accounts in order to make up the deficit in the amount payable as mentioned in the sale proclamation. S. 310 A confers a special right on the judgment-debtor and before he can avail himself of the benefit of the section he must comply strictly with its terms—*Chandi Charan Mandal* v. *Banki Behary Lal Mandal*.[1].

The order of the lower courts will be set aside and the petition of the respondent (E. A. No. 164 of 1908) will be dismissed. Each party will bear his own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Krishnaswami Aiyar and Mr. Justice Miller.

Arunachala Reddi .. Appellant*

v.

Perumal Reddi .. Respondent.

Arunachala Reddi v. Perumal Reddi.

C. P. C., S. 11—"*Directly and substantially in issue*"—*Mortgage suit—Prior mortgagee's rights.*

In a mortgage suit by a puisne mortgagee, the prior mortgage was recited in the plaint and the District Munsif, while dismissing the suit, found the amount due on the prior mortgage. The puisne mortgagee appealed to the District Judge but did not, in his grounds of appeal, take any objection to or make any mention of the finding on the question of the prior mortgage and the decree of the District Judge was silent upon the point.

Held:—That the finding about the prior mortgage by the Munsif could not be incorporated by implication into the decree of the District Judge and the finding did not operate as *res judicata* against the prior mortgagee. [*Srinivasa Rao Sahib* v. *Yamuna Bai Ammal*[2] referred to. *Sri Gopal* v. *Pirthi Singh*[3] distinguished.]

Second appeal from the decree of the District Court of Trichinopoly, in A.S. No. 65 of 1908, presented against the decree of the Court of the District Munsif of Ariyalur, in O. S. No. 1541 of 1906.

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* S. A. No. 75 of 1909. 24th August 1910.

1. (1899) I.L.R. 26 C. 449 (F.B.) 2. (1905) I.L.R. 29 M. 84.

3. (1902) I.L.R. 24 A. 429.

Arunachala Reddi v. Perumal Reddi.

S. Krishnamurthi Aiyar contended that in the prior litigation the puisne mortgagee did not impeach the prior mortgage. As such it was not necessary for the prior mortgagee to have his right expressly protected by the decree. *Sri Gopal* v. *Pirthi Singh* [1] is distinguishable as the prayer was for sale free of incumbrances. There was no such prayer in this case. *Srinivasa Rao Sahib* v. *Yamuna Bai Ammal*[2] is authority for saying that when admitted, the mortgagee's rights are not affected: C. M. S. A. 75 of 1906. *Mahabir Pershad* v. *Prabhu Singh* [3] goes further and says that unless the prior mortgage is impeached all that is sold and must be taken to be sold is the equity of redemption. The prior mortgagee is not a necessary party—*Surji Ram Marwari* v. *Barham Deo Persad* [4].

T. Natesa Aiyar for respondent relied on *Krishnamachari* v. *Seshadri Aiyangar.*[5]

The Court delivered the following

JUDGMENT:—In the former suit the then plaintiff set out the prior mortgage of the 6th defendant but did not make any allegation as to the amount, if any, then due under it nor ask that the sale should be made subject to it or free of it. The District Munsif found the amount due to be Rs. 178 on an issue raised by the 8th defendant in the suit, but on other grounds dismissed the suit. The plaintiff appealed to the District Judge but did not, in his grounds of appeal, take any objection to, or make any mention of the finding on the question of the prior mortgages, and the decree of the District Judge is silent upon the point.

The finding of the District Munsif who dismissed the suit cannot be incorporated by implication into the decree of the District Judge. When the suit was dismissed, the finding ceased to have any effect and we must take it that the decree of the District Judge did not dispose of or decide any question in regard to the prior mortgages. *Srinivasa Rao Saheb* v. *Yamuna Bai Ammal*[2] and C. M. A. 75 of 1906 are authorities for the position that the decree for sale though silent as to the prior mortgages must not be understood to have negatived them. In those cases the prior mortgagee was a party and though the amount of the prior mortgages was expressly admitted, the same principle is applicable in the present case. *Sri Gopal* v. *Pirthi Singh*[1], where the plaintiff disputed the existence of the prior mortgage and asked for a sale free of all incumbrances, stands on a different footing—*vide Mahabir Pershad Singh* v. *Prabhu Singh*[3].

We reverse the decrees of the lower courts and remand the suit to the District Munsif for disposal according to law. Costs will abide the result.

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1. (1902) I.L.R. 24 A. 429.
2. (1905) I.L.R. 29 M. 84 s. c. 16 M.L.J. 50.
3. (1908) 9 C.L.J. 78.
4. (1905) 1 C.L.J. 337.
5. (1901) 11 M. L. J. 333.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present:—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Umrao Singh and another .. Appellants*
v. (*Plaintiffs*)
Lachman Singh and another .. Respondents
(*Defendants*).

Umrao Singh v. Lachman Singh.

Costs—Deed—Construction—Conflicting views presented by both parties —Real character of deed upheld. Registration Act, S. 17—Family settlement —Want of registration—Inoperative as regards immoveable property.

The contest in the case was about the validity and effect of two instruments, one of 1884 and the other of 1893. The pleadings of both the parties were in one way *before* the court found against the deed of 1893 and quite the reverse *after the finding*.

Held that, notwithstanding the conflicting views presented by the appellants, their Lordships were bound to give effect to the real character of the instrument but without their costs in the Privy Council and the court below.

Held that an instrument the effect of which was in contest in the case was executed as a family arrangement and intended to be immediately, operative, final and irrevocable and was, consequently, a settlement and not a will; and that the same was inoperative as regards immoveable properties for want of registration.

Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree of the Court of the Subordinate Judge of Sitapur.

De Gruyther, K.C., and *S. A. Kyffin* for appellants.

Sir Robert Finlay, K.C., and *Ross* for respondents.

The judgment of their Lordships was delivered by

Lord Macnaghten.—This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, reversing the decision of the Subordinate Judge of Sitapur.

The disputes between the parties relate to the right of succession to one-third of the estate of Ramkote, of which a Hindu gentleman, named Kalka Bakhsh Singh, was the last owner.

In the course of the discussion before this Board the controversy was reduced to two questions only:—

(1) Was a certain document executed by Kalka Bakhsh on the 23rd of May, 1884, a testamentary or a non-testamentary instrument?

(2) Is that question now open having regard to the course of the proceedings in the courts below?

* 1911, February 28.

Umrao Singh v. Lachman Singh.

After the confiscation of Oudh the second Summary Settlement of the Ramkote estate was made with Kalka Bakhsh. He obtained a *sanad* from the Government. His name was entered in lists 1, 4, and 6 prepared under the provisions of S. 8 of Act I of 1869. And he remained absolute owner of the property until his death.

Kalka Bakhsh died on the 14th of October, 1893. He had three sons, Umrao Singh, Pirthipal Singh and Baldeo Bakhsh. Pirthipal Singh died in his father's life-time, leaving two sons, who were defendants in the suit and are the respondents to this appeal.

On the 9th of January, 1862, Kalka Bakhsh, in compliance with the directions issued by the Government, declared that after his death his estate should continue in his family undivided, in accordance with the custom of *Rajgaddi*, and that the younger brothers should be entitled to maintenance.

It is not disputed that this declaration was a valid testamentary disposition by Kalka Bakhsh of his estate in favour of his eldest son.

Kalka Bakhsh and his second son, Pirthipal Singh, were on bad terms, so much so, that Pirthipal Singh threatened personal violence to his father, and Kalka Bakhsh commenced criminal proceedings against his son. The quarrel, however, was for the time compromised by the intervention of two friends of the family, Jote Singh of Bihat and Ratan Singh of Rojah. At their instance the following document was drawn up and signed by Kalka Bakhsh in their presence on the 23rd of May, 1884:—

" This *sanad* is executed by me, Thakur Kalka Bakhsh, talukdar of Ramkote. For Pirthipal Singh, who is my son, I fix Rs. 300 annually, so that he may maintain himself. Besides this, whatever I may give I will give equally to the three sons, except provisions, which they may take from my godown(*kothar*). He may take 6 annas in kharif (crop) and 10 annas in rabi (crop) out of my treasury (*takwil*). The marriage and gauna expenses of the sons and daughters shall be borne by me. After me the three sons are to divide the property, moveable and immoveable. This has been settled through the mediation of Thakur Jote Singh of Bihat and Thakur Ratan Singh of Rojah."

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Kalka Bakhsh, though he executed the document without demur, did not comply with its terms, if, indeed, he ever meant to do so. In February, 1886, Pirthipal Singh, who apparently was then in destitution, brought a suit to recover arrears of maintenance and a sum of money equal to an amount alleged to have been given by Kalka Bakhsh to his youngest son Baldeo Bakhsh. The suit, which was founded on the instrument of May, 1884, was dismissed by the Subordinate Judge, and the dismissal was affirmed on appeal except as regards arrears of maintenance then due, amounting to Rs. 412-8-0.

In May, 1892, Kalka Bakhsh brought a suit for cancellation of the instrument of May, 1884. Pirthipal, however, died in November, 1892, before the suit could be heard, and it was consequently withdrawn.

After Kalka Bakhsh's death there was the usual quarrel as to registration in the Revenue records. On the 14th of May, 1894, the Deputy Commissioner of Sitapur, without pronouncing any opinion on the questions in dispute, made an order directing the entry of one-third of the estate in the name of Baldeo Bakhsh and the remaining third in the names of Prithipal's two sons.

Umrao Singh then transferred his interest in the estate to his brother Baldeo Bakhsh, and they brought this suit as co-plaintiffs to recover the one-third of Pirthipal Singh. They relied mainly on a will alleged to have been executed on the 4th of October, 1893, up to which date, as they contended, the testamentary instrument of the 9th of January, 1862, was in force. They asserted too that the instrument of the 23rd of May, 1884, was obtained from Kalka Bakhsh by undue influence, and was wholly inoperative.

The Subordinate Judge gave effect to the plaintiffs' claim except so far as it was founded on the alleged will of October, 1893. He decided against them on the issue as to the validity of that document, stating that the execution thereof "was not very clear to his mind." The decree was made without costs.

On appeal the Judicial Commissioners affirmed the findings of the Subordinate Judge in regard to the will of 1862 and the alleged will of 1893. But as regards the instrument of 1884 they held that its execution was not procured by undue influence, and that it operated as a valid devise to Pirthipal Singh, the

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benefit of which passed on his death to his two sons. In the result they reversed the decree of the Subordinate Judge and dismissed the suit with costs.

Their Lordships agree with the Court of the Judicial Commissioner in thinking that the instrument of 1884 was not procured by undue influence. Indeed, there seems to be no ground whatever for such a suggestion. On the other hand, it seems clear that that document is a non-testamentary instrument. It was a family arrangement, arrived at by the mediation or arbitration of two gentlemen, who were old friends of the family, and interested in maintaining its honour. It was plainly intended to be final and irrevocable. It fails of effect simply because it is not registered, as required by the Registration Act III of 1877, S. 17. It is therefore void as regards immoveable property.

As regards the second question their Lordships must hold that they are not precluded by what took place in the courts below from considering the real question in the case. In the courts below neither party pursued a consistent course. As long as the question of the validity of the alleged will of the 4th of October, 1893, was undetermined, the appellants contended that the instrument of May, 1884, was testamentary, while the defendants contended that it was a settlement and not a will. As soon as the alleged will of 1893 was successfully impeached, the defendants maintained that the instrument of 1884 was a will and not a settlement, and the appellants changed their attitude. Their Lordships think that, notwithstanding the conflicting views presented by the appellants in the courts below they are bound to give effect to the real character of the instrument. At the same time they consider that the appellants, though successful in the result, ought not to be allowed costs on appeal or any costs in the courts below.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed and the decree of the Subordinate Judge restored, and that any costs paid under the order of the Court of the Judicial Commissioners must be returned. There will be no costs of the appeal.

T. L. Wilson & Co.—Solicitors for appellants.

Young, Jackson, Beard and *King.*—Solicitors for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF ALLAHABAD].

Present:—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Bhawani Kunwar .. Appellant* (*Plaintiff*)

v.

Himmat Bahadur and another .. Respondents (*Defendants*).

Hindu Law—Widow—Alienation for discharge of husband's debts—Onus.

Bhawani Kunwar *v.* Himmat Bahadur.

Where a widow sells a portion of her husband's estate to pay off alleged debts of her husband, the onus is upon her to prove that the debts were owing by the husband.

Appeal from a judgment and decree of the High Court at Allahabad which set aside a decree of the Subordinate Judge of Shahjahanpur.

W. A. Raikes for appellant.

L. De Gruyther, K.C., and *G. E. A. Ross* for respondents.

The judgment of their Lordships was delivered by

Lord Macnaghten.—The facts of this case are very complicated in detail, but it seems to their Lordships that judgment can be given in a single sentence.

The appellant has not proved that there was any obligation on the part of Nityanand or his estate to pay the monies which were paid by his wife. The obligation lay upon the appellant to prove that there was such liability, and she has not satisfied it.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, and the appellant will pay the costs.

T. C. Summarhays & *Son.*—Solicitors for appellant.

Ranken Ford, Ford & Chester.—Solicitors for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.]

Present :—Lord Macnaghten, Lord Mersey, Lord Robson and Sir Arthur Wilson.

Leslie Williams .. Appellant‡

v.

Haines Thomas Giddy .. Respondent.

Discretion—Government Board—Discretion given by statute—Judicial discretion—Court's power to interfere with arbitrary exercise of discretion.

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* 1911, February 15.

‡ 4th April, 1911.

Leslie Williams v. Haines Thomas Giddy.

The discretion given by S. 4 of the Public Service Superannuation Act of 1903 (New South Wales) to fix the gratuities of retiring public servants is not an arbitrary discretion but a discretion to be exercised reasonably, fairly and justly; and where it is plain that the award of gratuity was intended to be unreal and unsubstantial, though made under the guise of exercising discretion, in that the Board threw in only a farthing for each year of service after a certain period, in the calculation of the gratuity :—

Held—That it was at best a colorable performance and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament.

The facts and arguments will appear from the judgment.

Their Lordships' judgment was delivered by

Lord Macnaghten:—The respondent, Giddy, who was plaintiff in this action, was an employee in the public service of the State of New South Wales. He entered the service on the 9th of December, 1875. He retired after thirty years' service on the 16th of September, 1905.

On his retirement, in accordance with the provisions of S. 4 of the Public Service Superannuation Act, 1903, he became "entitled to a gratuity not exceeding one month's pay for each year of service from the date of his permanent employment." The gratuity, in the words of the enactment, was "to be calculated on the average of his salary during the whole term of his employment and to be payable * * * in the case of * * * retirement after the commencement of the Public Service Act, 1902, only in respect of service prior to such commencement."

The average of the plaintiff's salary during the whole term of his employment was found to be £23-10*s*.-1*d*. per month.

On his retirement the Public Service Board awarded him a gratuity or allowance of £454-11*s*.-1*d*. In arriving at this sum, the Board reckoned his service up to the 23rd of December 1895, but no longer. Under the Act of 1903 he claimed to have his service reckoned up to the 16th of August 1902, the date of the commencement of the Public Service Act, 1902. He was officially informed by letter from the Crown Solicitor, dated the 6th of July 1908, that in respect of that claim no further sum could be paid. Subsequently, however, the Public Service Board professed to take his claim into consideration. But instead of awarding a gratuity or allowance calculated on a salary of £23-10*s*.-1*d*. per month, they struck off the pounds, they struck off

the skillings, and they allowed him just one penny for each year of service subsequent to the 23rd of December 1895, or seven pence in all. An award so contemptuous on the face of it seems to import incapacity of some sort on the part of a civil servant thus remunerated or disparaged. There was nothing of the kind. The learned counsel for the appellant hastened to disclaim any intentional slur on the plaintiff's conduct. No fault was to be found with the manner in which he had discharged his duties.

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So the plaintiff brought this action to recover the sum of £139-19*s.*-2*d.*, which would have been the amount of the additional allowance at the full rate of £23-10*s.*-1*d.* for each year of additional service.

A special case was settled by direction of the Judge, stating the following questions for the opinion of the court:—

(1) "Whether the plaintiff's service. in respect of which the gratuity is payable, should be computed up to the 23rd of December 1895, or the 16th of August 1902?

(2) Whether, if the said gratuity is payable in respect of service between the 23rd of December 1895 and the 16th of August 1902, the said Government is entitled to assess the gratuity payable in respect of the said service at the sum of seven pence?"

And the special case provided that if the court should be of opinion that the gratuity was payable in respect of the whole of the service prior to the 16th of August 1902, and that the Government were not entitled to assess the gratuity payable for service subsequent to the 23rd of December 1895 at seven pence, judgment should be entered for the plaintiff for £139-19*s.*-2*d.*, with costs.

The special case came on to be heard in the Supreme Court before *Simpson*, Acting C. J., and *Cohen* and *Pring*, JJ. All the learned judges were of opinion that the first question must be answered in favour of the plaintiff. On the second question there was a difference of opinion. *Simpson*, A. C .J., and *Cohen*, J., thought that it could not "be successfully contended that the Government have any right to depart from what they have deliberately done in respect of the plaintiff's service up to the 23rd of December 1895, and to exercise another and different discretion by allowing him seven pence only as a gratuity for his subsequent service." *Pring*, J., on the other hand, was of opinion that the court could not interfere with the uncontrolled discretion of the Government, and that the judgment should be entered for the defendant.

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Before this Board the ruling of the Supreme Court on the first question was not challenged.

On the second question their Lordships agree in the conclusion at which the majority of the court arrived. But they are not prepared to hold that the Government were precluded from exercising their discretion by the action which they took at the time when it was considered that the plaintiff was not entitled to claim in respect of service subsequent to the 23rd of December 1895.

The real question seems to be this:—Did the Government, or rather did the Public Service Board, in whose province the matter lay, exercise any discretion at all as regards the plaintiff's claim in respect of the service subsequent to the 23rd of December, 1895? They have awarded seven pennies for seven years' employment, or to be quite accurate, they have awarded one farthing for every quarter of a year spent in the service of the Government, and they have thrown in an extra farthing to make even money. Well, this is not the first occasion on which seven years' faithful service has met with a recompense at once unexpected and undesired. That is probably the best that can be said for the action of the Board. But was it reasonable? Was it fair? Few would deem it a generous or handsome tribute to the work of an old and faithful servant even with the extra farthing thrown in. Plain folk would call it a mockery—a sham—a pretence. Nobody, of course, can dispute that the Government or the Board had a discretion in the matter. But it was not an arbitrary discretion as *Pring* J. seems to think. It was a discretion to be exercised reasonably, fairly and justly. The learned counsel for the appellant, who were not apparently in the secrets of the Government, seemed to think that the Board would have stood better in court if they had not resorted to the artifice of a pretended exercise of discretion. It was suggested that the Board may have thought that the plaintiff had got enough already and that perhaps on the former occasion they took into consideration years of service beyond the limit which they thought applicable. But, if so, they did unintentionally the very thing they were told by the Act not to do. They can hardly be heard to say that they have erred intentionally in order to conceal or compensate an unintentional error. Whatever their motive may have been, whether they were resolved, right or wrong, to stick to a determination once officially announced and to let the service understand that nothing was to be gained

by asking for a reconsideration of an erroneous decision or whether they had some better reason which has not yet been disclosed or discovered, it seems to their Lordships to be quite plain that an illusory award such as this—an award intended to be unreal and unsubstantial, though made under guise of exercising discretion—is at best a colorable performance, and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament.

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Holding therefore, as they do, that the Government were not entitled to assess the gratuity payable to the plaintiff in respect of service between the 23rd of December 1895 and the 16th of August 1902 at the sum of seven pence, their Lordships think that, in accordance with the provisions of the special case judgment should be entered for the plaintiff for £ 139-19 *s*.-2 *d*. with costs. They will humbly advise His Majesty accordingly.

The order giving special leave to appeal provided for the plaintiff's costs of the appeal as between solicitor and client. But as there is no appearance on the part of the plaintiff, the order will be silent as to costs.

Solicitors:—Messrs. *Light and Foulton* for appellant.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(ON APPEAL FROM THE ALLAHABAD HIGH COURT.)

Present:—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Khunni Lal .. Appellant* (*Defendant*)

v.

Gobind Krishna Narain and another .. Respondents (*Plaintiffs*).

Caste Disabilities Act—Regulation VII of 1832 *and Act XXI of* 1850—*Effect of convert's rights in* 1845—*Revival of barred right—Convert from Hinduism to Mahomedanism—Family settlement—Compromise of suit—"Alienation"—Distinction—Test—Hindu Law—Reversionary suit.*

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The effect of S. 9 of Regulation VII of 1832 (Bengal) and afterwards of Act XXI of 1850 which extended the principles of Regulations VII of 1832 to the whole of British India is virtually to set aside the provisions of the Hindu Law which penalises renunciation of religion or exclusion from caste.

A Hindu became a convert to Mahomedanism in 1845. *Held* that the convert's son who remained a Hindu did not acquire any enforcible right to his father's share in the joint family property which he could either assert himself or transmit to his heirs for enforcement in a British court of justice, and even if the enactments permitted it, no suit could be brought to enforce the son's right after the lapse of 12 years from the time the cause of action arose, and the right being barred in 1857 nothing in Article 142 of Act IX of 1871 or Article 141 of Act XV of 1877 revived the barred right.

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* 1911, Feb. 14 & 15; Mar. 28.

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The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life tenant. But where the compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is, then it is not an alienation open to the attack of reversioners.

A Hindu became a convert to Mahomedanism in 1845. His son who was a Hindu predeceased him and the father died soon after. There was litigation between the son's daughters and the father's daughter's son about the succession. The parties compromised it by taking 8½ and 7½ annas shares each respectivly.

Held in a suit by the daughter's son attacking the compromise that the compromise was a family settlement and not an alienation by the daughters.

Consolidated appeals from three decrees of the High Court at Allahabad, which reversed three decrees of the Subordinate Judge of Bareilly.

H. Cowell for appellant.

L. De Gruyther, K.C., and *B. Dube* for respondents.

The judgment of their Lordships was delivered by

Mr. Ameer Ali:—These appeals, which have been consolidated by an order dated 1st November, 1910, arise out of three actions in ejectment, brought by the plaintiffs in the Court of the Subordinate Judge of Bareilly, who dismissed the suits by one judgment on the 20th of May, 1905. His dicision, however, was reversed on appeal by the High Court of Allahabad, which decreed the plaintiffs' claims, on the 23rd of April, 1908. The defendants have appealed to His Majesty in Council, and the point for determination is the same in each case.

The plaintiffs claim as next reversioners to their grandfather (mother's father) Raja Daulat Singh, to recover possession of certain properties held by the defendants, on the allegation that the deed of compromise under which the latter purport to derive title is not binding on them. The defendants, on the other hand, are transferees from one Raja Khairati Lal, a grandson by a daughter of Raja Ratan Singh, the father of Daulat Singh, and a party to the compromise in question.

The history of Ratan Singh's family and the circumstances which led to the compromise have been twice before this Board, and will be found summarised in the earlier of the two cases It is unnecessary, therefore, to enter into them at any length. For the purposes of the present appeals it is sufficient to state that Raja Ratan Singh, who appears to have held a high position in the Court of the then King of Oudh, owned considerable property within British territories, part of which is in suit, and

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that he and his son Daulat were members of a joint Hindu family and thus entitled in joint tenancy each to a moiety of the properties.

It may be taken now as established beyond dispute that in 1845 Ratan Singh abandoned Hinduism and adopted the Mahomedan faith. But although his renunciation of the Hindu religion involved, under the Hindu law, the forfeiture of civil rights to the extent of depriving him of his share in the joint estate, Daulat advanced no claim based on such forfeiture, and father and son remained joint until the latter's death in January, 1851.

Daulat left him surviving a widow named Sen Kunwar, and two daughters, Chhattar Kunwar and Mewa Kunwar. On the death of Ratan Singh some months later (September, 1851) the entire property which had stood all along in his name in the Collector's Register was recorded in the name of his widow, Rani Raj Kunwar.

Disputes then arose between the heirs of Daulat on the one side and Raj Kunwar on the other. Eventually, and in consequence of these disputes, the Court of Wards took over, in 1852, possession of the entire estate, making Raj Kunwar, who is stated to have been a person of weak intellect, an allowance of Rs. 500 a month. The rights of Daulat's heirs do not appear to have been admitted to any part of the property, as no allowance was made to them, and, in fact, it is alleged they were referred to the civil courts for the establishment of their rights. Matters remained in this condition for several years. Sen Kunwar died in 1857 and Raj Kunwar, Ratan's widow, the following year. In 1860, under the advice of Mr. John Inglis, a well-known District Officer, then Collector of Bareilly, the daughters of Daulat and the grandson of Ratan, Khairati Lal, entered into the compromise which the plaintiffs now seek to set aside so far as it affects them.

By this compromise Daulat Singh's daughters, Chhattar Kunwar and Mewa Kunwar, obtained between them an 8½ anna share, taking the entire estate as 16 annas; whilst Khairati Lal received a 7½ anna share. Partition was effected in terms of the compromise, and the parties obtained possession of their respective shares allotted to them. Chhattar Kunwar died in 1866. There was litigation between Chhattar's husband and Mewa

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Kunwar as to the right to Chhattar's share, which was ultimately decided in Mewa Kunwar's favour who thus obtained possession of the entire 8½ anna share received by the two sisters in 1860. Mewa Kunwar died in 1899, and the share held by her has devolved on the plaintiffs, her sons.

Their case is that on the abandonment of Hinduism by Ratan Singh he forfeited his half share in the joint property which vested in Daulat Singh, that they as his heirs are entitled to the entire 16 annas, and that they are not bound by the compromise of 1860, as Chhattar Kunwar and Mewa Kunwar, being mere life tenants, had no authority, in the absence of legal necessity, to alienate the 7½ anna share in favour of Khairati Lal.

The defendants, who are transferees either from Khairati Lal or his heirs, contend, *inter alia*, that the compromise entered into by the two ladies was not an alienation; that it was a family arrangement for the settlement of disputes under which they obtained more than they were legally entitled to; that in view of the British legislation (to which the defendants refer) the forfeiture, on which the plaintiffs rely, could not be enforced, and that, therefore, there was no divestment of the right of Ratan in respect of his half share, and that even if any such right, as the plaintiffs allege, devolved on Daulat in consequence of Ratan's conversion in 1845 it became "extinguished" on the lapse of 12 years from the date of such devolution.

The Subordinate Judge in a well-considered judgment upheld the defendants' pleas and dismissed the suits. The learned Judges of the High Court, on appeal by the plaintiffs, arrived at a different conclusion. They were of opinion that on the conversion of Ratan Singh, Daulat became "sole and absolute owner of the whole estate," inasmuch as Regulation VII of 1832 "did not abrogate the Hindu Law as to the consequences of apostacy," and Act XXI of 1850 was not enacted until some five years after his adoption of the Mahomedan faith. With regard to the compromise of 1860, although they considered it to be "just and wise" and "perhaps the best arrangement that could be made," they felt pressed by authority to hold in effect that it amounted to an alienation which the ladies, in the absence of legal necessity, were not competent to

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make, and that consequently it was not binding on the plaintiffs. In this view of the question they reversed, as already stated, the decision of the Subordinate Judge, and decreed the plaintiffs' claims in all three suits. The learned Judges did not deal with the question of limitation raised by the defendants.

Their Lordships regret they are unable to concur in the judgment of the High Court.

In 1845, when Ratan Singh abandoned Hinduism and adopted the Mahomedan faith, the rule laid down in S. 9 Regulation VII of 1832, for decision in civil suits where the parties ranged against each other belonged to different persuasions, was in force in the Bengal Presidency. It declared in express terms that in such cases—

"When one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or other of the parties to the suit shall not be either of the Mahomedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which but for the operation of such laws, they would have been entitled."

Act XXI of 1850 extended the principle of S. 9, Regulation VII of 1832, of the Bengal Code, throughout the territories subject to the Government of the East India Company. After reciting the provisions of S. 9, and stating that it would be beneficial to extend its principle to the rest of British India, it enacted that—

"So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

The intention in both enactments is perfectly clear; by declaring that the Hindu or Mahomedan law shall not be permitted to deprive any party not belonging to either of those persuasions of a right to property, or that any law or usage

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which inflicts forfeiture of rights or property or by reason of any person renouncing his or her religion, shall not be enforced, the legislature virtually set aside the provisions of the Hindu law which penalises renunciation of religion or exclusion from caste.

The effect of the legislation of 1832 and 1850 was that on Ratan Singh's abandonment of Hinduism, Daulat Singh did not acquire any enforcible right to his father's share in the joint family property which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice.

In the view their Lordships take of this branch of the case it is not necessary to discuss the question of limitation raised by the defendants. But it may be observed that whatever right Daulat acquired under the Hindu law to the share of his father came into existence in 1845 on the conversion of the latter to the Mahomedan religion. No suit could be brought, even if the enactments referred to above had permitted it, to enforce the right after lapse of 12 years "from the time the cause of action arose" (S. 12, Act XIV of 1859). Nothing in Article 142 of Act IX of 1871 or of Article 141 of Act XV of 1877 could lead to the revival of a right that had already become barred. In this connection their Lordships would refer to the judgment of this Committee in the case of *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami* [1], where it was pointed out that the "intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right."

Such was the relative position of the parties in 1860, when the compromise was entered into. The heirs of Daulat had no existing enforcible right to the share of Ratan Singh, and the entire property was recorded in the name of his widow. Under these circumstances the parties, under the advice of the District Officer, instead of engaging in a long litigation, arrived at a mutual settlement of their claims. The real nature of the compromise is well expressed in a judgment of the High Court of the North-West Provinces in 1868 in the suit of Mewa Kunwar against her sister Chhattar Kunwar's husband. The learned Judges say as follows:—

"The true character of the transaction appears to us to have been a settlement between the several members of the family of

1. (1893) L. R. 20 I. A. 183.

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their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the courts to uphold and give full effect to such an arrangement." [1]

Their Lordships have no hesitation in adopting that view. The true test to apply to a transaction which is challenged by the revisioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life-tenant. In the present case Khairati Lal acquired no right from the daughters of Daulat, for "the compromise," to use their Lordships' language in *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* [2] "is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is."

In their Lordships' judgment the decisions on the authority of which the learned Judges of the High Court have held the compromise not to bind the plaintiffs, are not applicable to the present case.

On the whole their Lordships are of opnion that the judgment and decree of the High Court of Allahabad should be reversed and those of the Subordinate Judge restored, and they will humbly advise His Majesty accordingly.

The respondents will pay the costs of this appeal and of the appeal in the High Court.

Pyke, Parrott & Co.—Solicitors for appellants.

T. L. Wilson & Co.—Solicitors for respondents.

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1. (1868) 3 Agra H. C. R, 82, 84. 2. (1874) L. R. 1I. A. P, ..

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(ON APPEAL FROM THE CALCUTTA HIGH COURT.)

Present:—Lord Macnaghten, Lord Robson and Sir Arthur Wilson.

Bishun Chand Bachhaot	.. ..	Appellant*
vs.		(*Plaintiff*)
Bijoy Singh Dudhuria	.. ..	Respondent
		(*Defendant*).

Bishun Chand v. Bijoy Singh.

Execution sale—Fraud—Misrepresentation by judgment-debtor's pleader—Auction-purchaser not responsible.

Held in a suit to set aside an execution sale on the ground of fraud and misrepresentation by the judgment-debtor's pleader that he was going to apply for an adjournment of sale and consequent omission to be present and bid at the sale, that there was no fraud, and even if the alleged representation of the judgment-debtor's pleader be true, the auction-purchaser was not responsible.

Appeal from a judgment and decree of the High Court at Calcutta, confirming that of the Subordinate Judge of Murshidabad.

De Gruyther, K.C., and *K. Brown* for appellants.

Sir Robert Finlay, K.C., and *A. W. Dunne* for respondents.

The judgment of their Lordships was delivered by

Lord Robson.—This is an appeal from a decree of the Bengal High Court of Judicature which confirmed a decree of the Subordinate Judge of Murshidabad.

The suit was brought in September, 1902, by the respondent, Bijoy Singh, against the appellant for a declaration that the purchase by the appellant of a house at an auction sale, held under the order of the District Court of Murshidabad, in certain execution proceedings, was invalid on the ground that it was brought about by the fraud of the appellant and the other defendants, Tara Chand, the judgment-creditor and Chatrapat Singh, the judgment-debtor, in those proceedings.

The respondent, Bijoy Singh, was a creditor of Chatrapat Singh, and held a decree for the amount of his debt, Rs. 10,000. He applied to the District Court of Murshidabad for execution against Chatrapat's properties and accordingly, in September, 1900, the house in question was attached and ordered to be sold on the 15th January, 1901. The debtor procured a postponement of the sale until the 21st March, 1901, by a part payment of Rs.

* 1911, February, 3, 7 and 8 and March, 10.

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4,000. In January and February, 1901, suits were begun by the debtor's two sons against the respondent, alleging that the house was family property; that they were entitled to shares therein according to the Mitakshara Law, and asking for injunctions restraining the sale of their shares. The sale was accordingly stayed in February, 1901, on terms that security for the whole amount of Bijoy Singh's debt should be furnished. This was done on the 8th March, 1901, and the sale on behalf of the respondent thus indefinitely stayed.

In the meantime proceedings were also being taken against Chatrapat Singh by the defendant Tara Chand, who had obtained a decree in the Calcutta Small Cause Court for the amount of his debt, Rs. 1,800, as far back as September, 1896. That decree was transmitted to the District Court of Murshidabad for execution, and on the 22nd February, 1900, the house in question was duly attached, and the sale fixed for the 15th May, 1901. On that day the judgment-debtor petitioned the court to postpone the sale for seven days. On his promise that the debt should be paid in that time, Tara Chand consented, and this delay was granted by the court. The promise was not kept, and the sale accordingly took place on the 22nd May, 1901, when the appellant Bishun Chand Bachhaot became the purchaser at the price of Rs. 12,000. That sum was paid by him, and has since been distributed among the general body of creditors. It is now alleged that the real purchaser was the judgment-debtor himself, and that the appellant was only a "*benamidar*" or mere nominee.

The charges of fraud made by the respondent in his statement of claim were of a sweeping character. It was alleged that Tara Chand's decree was false, and obtained by collusion with the judgment-debtor; that there was similar fraud in relation to the attachment and the sale proclamation; that the suits by the sons were really instituted by the judgment-debtor in order to obtain a stay of the respondent's suit, and so enable a sham sale to be effected in the collusive suit of Tara Chand; that the sale fixed for the 15th May, 1901, was then adjourned with the fraudulent consent of Tara Chand, because it was known that effective bidders would be present; that on the 22nd May, the judgment-debtor's pleader, one

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Harendra, fraudulently told the respondent's agent that the sale was again to be adjourned, and thus prevented him from attending, and that only dependants and followers of the judgment-debtor were present at the sale. The charges against Tara Chand in relation to his debt and decree were conclusively disproved. There can be no doubt that Tara Chand's decree, which was of long standing, was genuine, and that he sought and obtained execution under it in perfect good faith. Both the Subordinate Judge and the High Court have found in the appellant's favour on this very important part of the case.

The learned Subordinate Judge has also found that the purchase money for the house was found by the appellant himself and not (as the respondent alleges) by the judgment-debtor. The High Court do not dissent from this view, so that on the evidence it cannot be said that the appellant was a mere *benamidar*. Further, it was found that the respondent's allegations of fraudulent non-service of process of attachment and sale were not correct.

These findings materially attenuate the general case of fraud set up by the respondent and, in what remains of the case, their Lordships are unable to see any sufficient or substantial evidence of fraud on the part of the appellant.

The genuineness of Tara Chand's debt and decree being now admitted, it becomes necessary to scrutinise carefully the charges brought against him in relation to the execution. His consent to the postponement of the sale for seven days on the debtor's promise of payment was not necessarily fraudulent. No doubt it fitted in well with the specific charges of fraud originally brought against him but, when those charges are eliminated from the case, there is nothing to show that this particular act may not have been quite innocent. The respondent, however, can make no case unless it be treated as a step in the alleged conspiracy. Nor can much importance be attached to the fact that Tara Chand's pleader had intimate business connections with the judgment-debtor's pleader, Harendra. The fact is that Tara Chand's agent, Basanta, desired to retain Harendra in the proceedings, but Harendra, being already retained for the judgment-debtor, recommended his friend Ram Krishna, who thereupon acted for Tara Chand.

The appellant is a money-lender and a man of substance. When cross-examined as to his means he stated his income tax and offered to produce the receipts, so the suggestion that he was merely an impecunious nominee was not sustained. Bishun Chand v. Bijoy Singh.

He said he had heard of the proposed sale at the house of his pleader, Baikant Babu, who had also acted occasionally for Chatrapat. Baikant told him the property would be sold cheap, owing to the litigation of the sons which, he thought, would come to nothing in the end—an opinion which proved correct. The appellant thereupon instructed him to arrange for a representative to attend the sale on his behalf and to bid up to Rs. 10,000 or Rs. 12,000. He forthwith paid Rs. 3,000 to Baikant to meet the deposit that might be required and afterwards sent, out of his own funds, the balance of Rs. 9,000. Other bidders competed for the property. They are said, perhaps truly, to have been friends or associates of the judgment-debtor, but it is not correct to say they were "followers and dependants," nor is there anything in the evidence or the circumstances to establish the suggestion that they were acting in collusion with the appellant.

The respondent says he was willing to give Rs. 60,000 for the house, but was prevented from attending by Harendra telling his agent on the day of the sale that he was instructed to apply for another postponement. Harendra was called by the respondent, and would only say that he had no recollection of this; but assuming that he said it there is nothing to show that the appellant should be held responsible for any misrepresentation by Harendra.

On the 20th June, 1901, respondent preferred a claim under S. 311 of the Civil Procedure Code, in the District Court of Murshidabad, praying that the sale might be set aside, but his petition was dismissed, and the sale duly confirmed after evidence had been heard on both sides in relation to the points raised by the respondent.

Litigation also arose after the sale between the appellant and the sons of the judgment-debtor, who set up against him their claim to shares in the house under the Mitakshara Law. That claim was dismissed and the appellant obtained possession

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in January, 1902. It is said that he has made no use of the property and still holds it for the benefit of the judgment-debtor, but this suit was commenced in September, 1902, so that the appellant has not been able to deal effectively with what was probably a speculative purchase.

Their Lordships are of opinion that the allegations of fraud and conspiracy made against the appellant have not been brought home to him and that, under all the circumstances, there is no sufficient ground for setting aside a sale, confirmed by the court after prompt local inquiry, and for inflicting on the appellant a forfeiture of the considerable purchase money paid by him out of his own funds.

Their Lordships will, therefore, humbly advise His Majesty that the decrees of the High Court and of the Court of the Subordinate Judge ought to be reversed and this appeal allowed, with costs here and in the courts below.

Lee and Pemberton.—Solicitors for the appellant.

T. L. Wilson & Co.—Solicitors for the respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Iyer.

Kota Subbayya Gupta Garu	.. Appellant* (*Plaintiff*)
v.	
The Secy. of State for India & others	.. Respondents (*Defendants*).

Madras Acts—Revenue Recovery Act II of 1864, Ss. 3, 4, 5, 26—*Defaulter —Vendors and purchasers—Liability to pay revenue accrued due before sale.*

A person who becomes the registered proprietor of land on a certain day becomes liable to pay the arrears of revenue remaining due on it on that day and becomes a " defaulter " within the meaning of the Act on failure to pay the same.

Appeal from the decree of the Subordinate Judge's Court of North Arcot in O. S. No. 10 of 1906.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for appellant.

L. A. Govindaraghava Aiyar for respondents.

This is a suit to set aside a revenue sale. The proclamation which preceded the revenue sale mentioned the revenue due

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*A. No. 4 of 1908. 3rd February, 1911.

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upon the land to be Rs. 1902 while the actual revenue due as admitted and as found was only Rs. 322. The faslis for which the revenue was said to be in arrear were 1309, 1310, 1311 and the first instalment of 1312. During the faslis 1309 and 1310 the patta stood in the name of the predecessor of the plaintiff though separate registry in the name of the plaintiff was made only in fasli 1310. Plaintiff purchased the property in the beginning of fasli 1310. While the property in question and other properties were under the same patta in previous faslis the Government collected large sums of revenue from the suit village alone which were more than its due proportion, capable of leaving a surplus even after defraying the revenues of the faslis in question if worked at the rate of the proportionate amount due from it alone. Alleging the above contentions the plaintiff sued to set aside the sale. The purchaser in the revenue sale pleaded (1) that the arrears were really due; (2) that the actual revenue due for the suit village was explained to the bidders at the time of the auction, and that (3) even if there were overpayments from the suit village in previous faslis that cannot be taken into account.

The lower court dismissed the suit holding that though there were irregularities the plaintiff had not sustained substantial damage; that the plaintiff was not a 'defaulter' for faslis 1309 and 1310 as the patta was not transferred to his name but that the suit village was liable for the revenue all the same.

The plaintiff appealed.

T. R. Ramachandra Aiyar.—The plaintiff was not the defaulter for faslis 1309 and 1310. The Revenue Recovery Act says that the 'defaulter's moveable and immoveable properties could be sold, *i. e.*, at the time of the sale the property sought to be sold must be property of the defaulter. The defaulter was plaintiff's predecessor but at the time of the sale the property had become the plaintiff's Therefore the sale notice which demanded arrears for the faslis not due from the plaintiffs or the suit lands was illegal as well as the sale thereon—see the analogous cases under the Rent Recovery Act—*Pichuvaiyangar* v. *G. T. Oliver*[1] *Vencatachalapathi Iyer* v. *Robert Fischer*[2]. 'Defaulter' is defined

1. (1902) I.L.R. 26 M. 260. 2. (1907) I.L.R. 30 M. 444, 446.

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in S. 2, Act I of 1890. See also *Subramania Chetty* v. *Mahalingasivan*[1]. Thoug the Sub-Judge held that the property was worth only Rs. 6,000 the propert y is really worth Rs. 15,000. This was alleged in the plaint and not expressly denied in the written statement.

L. A. Govindaraghava Aiyar.—The plaintiff is really a defaulter for all the four faslis under S. 5 of the Revenue Recovery Act and the purchaser also can be arrested for default—Board's Standing Order No. 28, Cl. (2). The Full Bench case of *Subramania* v. *Mahalingasivan*[1] has reference only to Ss. 69 and 70 of the Indian Contract Act.

The Court delivered the following

JUDGMENT :—The suit in this case was instituted to set aside the sale of the village of Gopalpuram in the Karvetnagar Zemindari for faslis 1309 to 1311, and for a portion of the revenue due for fasli 1312. The village was sold in court auction in execution of a decree against the Karvetnagar Zemindar in 1886, and was purchased by one Ramasami Chetty who transferred it to the plaintiff on the 26th May 1890. The village was separately registered in the plaintiff's name by the Collector of the District on the 5th August 1901 till which date the registry had remained in the name of the Zemindar. The arrears for faslis 1309 and 1310 accrued due therefore while the Zemindar was the registered proprietor. The sale was held for the realisation of a sum of Rs. 1,344-3-6 out of which more than Rs. 1,000 was due for faslis 1309 and 1310 The sale was impeached as illegal and irregular on various grounds and the plaintiff alleged that in consequence of the irregularities complained of, the village whch he says is worth Rs. 20,000 was sold for the very inadequate price of Rs. 6,260. The lower court found that there was no illegality in the sale, that there was one bad mistake in the sale proclamation in that the assessment imposed on the village was stated to be Rs. 1,902-0-10, while it was really only Rs. 322-8-0 but that no loss resulted from this mistake as the price fetched at the sale was fair, and that bidders who attended the sale were informed of the mistake in the proclamation and of the correct amount of the assessment imposed on the village. At the hearing

1. (1909) I.L.R. 33 M. 41 (F.B.)

Subbayya Garu v. The Secy. of State for India.

of the appeal three points were argued by Mr. Ramachandra Aiyar who appeared for the appellant:—

(1) That there were no arrears of revenue due on the village; (2) that in consequence of the gross misstatement regarding the asessment the village was sold for a low price, its real value being much more than Rs. 6,260.

The first contention, we think, the appellant has entirely failed to establish. Exhibits F, FI, L and M, which were relied on for the purpose, do not support the contention at all. The substance of the appellant's complaint appears to be that in previous years when the registry had not been separated the owner of Gopalpuram had paid a larger amount than was properly leviable on the village, and that, therefore, there was money to his credit in the hands of the Collector which should have been appropriated for the revenue of subsequent years. But no separate credit could be claimed for a single village of the Zemindari before the change of registry.

Moreover, no attempt is made to show what amount had been previously paid in excess of what was due. The second contention also, in our opinion, has not been properly substantiated. The plaintiff is admittedly in possession of accounts showing the actual income of the village for 10 years. He has withheld them from the court, and no good reason has been assigned for their non-production. His fourth witness, his own agent, is not able to state the *beriz* with any definiteness. His 3rd witness, a monegar, who says, he attended the sale and intended to bid at the auction on behalf of one Kandappa Mudali, took only Rs. 1,000 with him to be used, if necessary, as a deposit which at 15 per cent would not enable him to offer appreciably more than Rs. 6,260. We agree with the lower court in the reasons given for not accepting the evidence of the second witness. The village was sold at court auction in 1896 for Rs. 6,205, and we are not satisfied that the lower court was mistaken in saying that the plaintiff admitted in his deposition that there was nothing payable then on account of a mortgage on this and some other villages. The sale might have been made subject to a mortgage, but that cannot be assumed to mean that any money was then actually due on it. In this view we do not think it necessary to consider whether any one was or

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could have been misled by Exhibit I to suppose that the assessment fixed on the village was Rs. 1902-0-10.

It remains for us to deal with the third and most important contention urged by the learned pleader for the appellant, *viz.*, that the Collector had no power at all to sell on the 26th September, 1903, the village of Gopalpuram of which the plaintiff was then the registered proprietor for arrears due for faslis 1309 and 1310 as he was not a defaulter with respect to those arrears. He relies on S. 26, which provides that the Collector "shall proceed to recover the arrears by the attachment and sale of the *defaulter's* land," *i. e.*, according to the argument, land of which the defaulter is the registered proprietor at the time when the Collector takes steps to bring it to sale. Our attention is drawn also to S. 5, which enacts that arrears of revenue are to be recovered by the sale of the defaulter's moveable and immoveable property. A careful consideration of Ss. 3 to 5 has led us to the conclusion that the contention that the plaintiff was not a defaulter with respect to the arrears for faslis 1309 and 1310 is not sound. It is now well established that the word "defaulter," for the purposes of Act II of 1864, means the registered owner of the property with respect to which arrears of revenue are due—see *Boja Sellappa Reddi* v. *Virdhachala Reddi*[1] and *Subramania Chetty* v. *Mahalinga Sivan*[2] and the still more recent case of *Sahasranamu Aiyar* v. *The Secretary of State for India*[3] in which the previous cases are reviewed.

It is unnecessary to refer to earlier cases in support of this position and the appellant does not contest it. According to S. 2 of the Act, every landholder is bound to pay the revenue due upon his land on or before the day on which it falls due. According to S. 4, "when the whole or a portion of a kist shall not be so paid the amount of the kist or of its unpaid portion shall be deemed to be an arrear of revenue." It need hardly be pointed out that an arrear of revenue remains an arrear until it is paid and the landholder or registered proprietor is liable to pay it. When plaintiff became the registered proprietor there were arrears of revenue due on the village and he, as the landholder, became liable to pay it to the Collector,

1. (1907) I.L.R. 30 M. 35. 2. (1909) I.L.R. 33 M. 41 (F. B.)
3. S. A. No. 201 of 1904 unreported.

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and on failure to pay it he became, in our opinion, a defaulter. We may refer to S. 2 of Act I of 1890, which defines a "defaulter" as "a person from whom an arrear of land revenue * * *is due.". We are of opinion that a landholder purchaser is bound to pay not only the revenue due on the land after he has become the holder but all revenue due on the land including arrears that accrued due before he became the purchaser, and that on failing to do so he becomes a defaulter with regard to them. S. 2 fixes the time at which each kist of the revenue is payable, but cannot reasonably be taken to mean that the landholder is not bound to pay it afterwards. Such a contention cannot be urged if the holder at the time when a kist falls due continues to be the landholder after it has become an arrear. The Act, in our opinion, lays the obligation to pay the revenue, including all arrears, on every landholder, irrespective of the time when he becomes the holder, and if he does not do so he becomes a defaulter. According to S. 5 when revenue is in arrear the Collector has power to recover the arrears by the sale of the defaulter's moveable and immoveable property. Our construction of Ss. 3 to 5 is in accordance with the interpretation placed on them by the Board of Revenue. Board's Standing Order No. 28, Clause (2), lays down that when the transfer of any land is registered the transferee takes the land subject to the payment of any arrears of assessment or other legal charges on it, and to the same "*obligations and conditions, special or general, as the transferor held it on.*" Our attention is not drawn to any authority against the construction we put on these sections. Ordinarily, no doubt, a transferee of property is not *personally* liable to perform the obligation incurred by his transferor before the date of the transfer, but we do not see any hardship in the enactment, in a statute intended to provide a summary process for collecting the public revenues, of a provision that every transferee choosing to get himself registered as the owner should be liable to all the obligations of his transferor in the same manner as if he were the registered owner when the arrears accrued due. The consequence of putting a different construction on the sections would lead to much inconvenience. We hold that the plaintiff was a defaulter with respect to the arrears of faslis 1309 and 1310 as well as with respect to those of faslis 1311 and 1312. Notice of demand of the arrears was

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sent to the plaintiff, (Exhibit II), as well as the attachment and sale notices (Exhibits G2 and H.) We do not think that he has any real ground for complaint.

The appeal fails and must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sankaran Nair.

Kothilinga Setu Royar (deceased) & others ..Appellants*

v.

Sahasranama Iyer & others .. ..Respondents.

Madras Revenue Recovery Act, S. 3—Defaulter—Landholder—Levy of water cess—Proprietor primarily liable and not tenant.

Where the Government levies water cess by reason of increase in water supplied in consequence of improvements made by the Government, the zemindar is the person primarily liable to pay it, and he can, if circumstances justify his doing it, only demand an enhancement of rent from the tenants on obtaining the sanction of the Collector under S. 11 of Madras Act VIII of 1865. [*Nynappan Servai* v. *Secretary of State* [1] not followed. *Zamorin of Calicut* v. *Sitarama*[2] and *Secretary of State* v. *Ashtamurti* [3] referred to. *Subramania Chetty* v. *Mahalingaswami Sivan*[4] and *Vidyapurna Thirtha Swami* v. *Ugganu* [5] followed].

The proprietor is the "land-holder" and also the person liable to become a "defaulter" within the meaning of the Revenue Recovery Act.

Second appeals from the decree of the District Court of Tinnevelley in A. S. Nos. 1 to 4 of 1902, presented against the decree of the Court of the District Munsif of Ambasamudram in O.S. Nos. 420 and 421 of 1900, and 131 and 132 of 1901.

The second appeal No. 20 of 1904 coming on for hearing, the Court made the following

P. R. Sundara Aiyar for appellant.

The Advocate-General (P. S. Sivaswami Aiyar,) and K. Kuppuswami Aiyar for respondents.

ORDER.—Before disposing of the second appeal, we shall direct the District Judge to return a finding on the question whether there has been any increase in the supply of water to the Moolachikulam tank on account of the improvements, if any, made by Government. Further evidence may be received. The finding should be submitted within two months from this date, and seven days will be allowed for filing objections.

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* S. A. 201-204 of 1904. 17th January, 1911.

1. S. A. No. 597 of 1907.
2. (1883) I. L. R. 7 M. 405.
3. (1888) I. L. R. 13 M. 89.
4. (1909) I. L. R. 33 M. 41.
5. (1910) 20 M. L. J. 640.

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In compliance with the above order the District Judge submitted a finding to the effect that there had been an increase in the supply of water to the Moolachikulam tank on account of the improvements made by Government.

The above second appeals coming on for further hearing the Court delivered the following

JUDGMENTS :—*Benson* J :—The District Judge has now returned a finding that there has been an increase in the supply of water to the Moolachikulam tank in consequence of improvements carried out by Government.

It is conceded that on this finding Government is entitled under Madras Act VII of 1865 (amended by Act V of 1900) to impose the water cess levied in this case.

The only other question is whether it is the zemindar (the second defendant) or the tenant (plaintiff) that is bound to pay it.

The District Judge has decided that the zemindar is the person liable, and that, if the circumstances are such as to justify him in demanding an enhancement of rent from the tenants, he should obtain the sanction of the Collector under S. 11 of Madras Act VIII of 1865.

I am of opinion that the decision of the District Judge is right, and in accordance with the scheme of the Revenue Recovery Act (Madras Act II of 1864) as explained by this court in *Zamorin of Calicut* v. *Sitarama*[1] ; *Secretary of State* v. *Ashtamurthi*[2]: and the recent Full Bench case of *Subramania Chetty* v. *Mahalingasami Sivan*[3].

In the first of these cases *Turner*, C. J. and *Muthuswami Iyer* J. said: "According to S. 2 of the Act, it is the proprietary right that is liable to be sold. According to S. 1 it is the person in whom such right vests, that is, the 'land-holder.' According to S. 3, it is the proprietor that is liable for the payment of the revenue. According to S. 39, it is his right and property that passes by revenue sale."

In the second case *Parker*, J. said: "Regulation XXVI of 1802 provides that Collectors shall keep registers of landed property paying revenue to Government and shall also enter all

1. (1883) I. L. R. 7 M. 405. 2. (1888) I. L. R. 13 M. 89.
3. (1909) I. L. R. 33 M. 41.

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Benson J.

transfers of landed property from one proprietor to another. The Regulation does not appear to contemplate the contingency of the person paying the revenue not being the proprietor. * * * It is admitted that the jenmi is really proprietor. * * * He therefore is, and has a legal right to be, the landholder within the meaning of S. 1 of the Revenue Recovery Act." In the Full Bench case it was observed that the word 'defaulter' is not defined in the Revenue Recovery Act, but it was held that reading that Act along with Regulation XXVI of 1802, the term "defaulter" applied only to the puttadar registered in the Collector's register and that he remained the "landholder" under the Act, and liable for the revenue under S. 3 even after the real ownership had been transferred to some other person by sale or otherwise.

In the present case, however, the tenant relies on the unreported case of *Nynappan Servai* v. *The Secretary of State*[1] in which it was held that "a zemindari tenant in occupation is the holder of land subject to the payment of revenue direct to Government in respect of the water cess, and therefore a landholder who becomes a defaulter under the Act. I was a party to that decision, but further consideration in the Full Bench case of *Vidyapurna Thirthaswami* v. *Ugganu*[2] and in the present case has led me to the conclusion that the decision in *Nynappa Servai's case*[1] is opposed to the decision of the Full Bench in *Subramania Chetty's*[3] case above referred to and to the scheme of the Revenue Recovery Act and ought not to be followed. In *Subramania Chetty's* case[3] it was held that the term 'defaulter' "applies only to the registered puttadar." I do not think the Full Bench contemplated any other person as liable to become a "defaulter" under the Act, whether in respect of land revenue properly so called, or cesses which like land revenue are secured on the land and are recoverable as land revenue. I would therefore confirm the decree of the District Judge and dismiss the second appeals with costs, two sets. The memoranda of objections are also dismissed with costs.

Sankaran Nair J :—The finding is that there has been an increase in the supply of water to the Moolachikulam tank on

1. S. A. No. 597 of 1907; *see* 1910 M. W. N. 322.
2. (1910) 20 M.L.J. 649.
3. (1909) I.L.R. 33 M. 41.

account of the improvements made by Government, and it is therefore conceded by all parties that the water must be treated as Government water and the Government is accordingly entitled to impose water cess.

Kothilinga Setu Royar v. Sahasra-nama-Iyer. — Sankaran Nair J.

The next question is, who is the person bound to pay such water cess to Government: the zemindar or the ryots?

The Judge has held that the zemindar is the person who would suffer if Government proceeded to recover the tax by attachment or sale of the land and therefore he is the person bound to pay. The appellant contends, on the authority of the decision in *Nynappan Servai* v. *The Secretary of state*[1] that the tenant is bound to pay.

As the Judge's opinion that the zemindari itself may be sold by Government if water cess, which is revenue, is not paid, seems to be in accordance with the other cases decided by this court, it seems necessary to review them before we follow the case cited. There is no difference between water cess and ordinary revenue under Act II of 1864. Both Regulation XXV of 1802 and Regulation XXVI of 1802 contemplate settlement of land revenue only with the proprietors of land and require transfers of *land* from one *proprietor* to another to be registered. If the registry is not transferred, the obligation of the registered proprietor continues to subsist and the land remains security for the revenue. They do not contemplate, as pointed out by *Parker*, J. in *Secretary of State* v. *Ashtamurthi*[2], with reference to the later regulation, the contingency of any person paying the revenue not being the proprietor.

Section 3 of Act II of 1864 imposes upon every "landholder" the obligation to pay the revenue due on *his land*. If it is not paid, he becomes a defaulter and his land may be sold. "The land, buildings upon it and its products" are the security for the land-revenne (See S. 3). The context shows that the full proprietary interest in the land is meant. The purchaser succeeds to all the rights and property of the former "landholder" (S. 39), *i. e.*; to the full proprietary interest subject to all the agreements between the defaulter and his tenants (see S. 41). Reading now the definition of 'landholder'

1. S. A. No. 597 of 1907. 2. (1888) I. L. R. 13 M. 89 at p. 115.

Kothilinga Setu Royar v. Sahasranama Iyer.

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in S. 1, which comprises "all persons holding under a Sanad-i-milkiyat-i-istimrar, all other zemindars shrotriemdars, jagirdars, inamdars, and all persons forming the land-revenue under Government; all holders of land under raiyatwar settlements, or in any way subject to the payment of revenue direct to Government," by the light thrown upon it by the Regulations and the other sections of the Act, I have little doubt that it means the 'proprietor' referred to in the Regulations and not any subordinate tenure-holder or any tenant.

The land is the security for the revenue. At a revenue sale the purchaser gets the full proprietary interest subject to the rights of the tenants. Naturally, therefore, the proprietor is the person entitled to pay the revenue to prevent the land being sold and the person to whom the Government must look for payment. He is, therefore, the 'land-holder.'

The decided cases bear out this view. *Zamorin of Calicut* v. *Sitarama*[1] and *Secretary of State* v. *Ashtamurti*[2] were cases in which the Government sold the land when the puttadar was not the owner. In the first case, the sale was affirmed on the ground that that owner was estopped from puting forward his claim as he had allowed the putta to stand in the name of his tenant, and, in dismissing the suit, the High Court said: "According to S. 2 of Act II of 1864 it is the proprietary right that is liable to be sold. According to S. 1, it is the person in whom such right vests, that is, the land-holder. According to S. 3, it is the proprietor that is liable for the payment of revenue. According to S. 39 it is his right and property that passes by the revenue sale." The contention that a tenant may be a landholder and that his interest alone may be sold is inconsistent with this judgment. This principle was enforced in the next case. There a person had taken possession of certain waste land under a cowle from Government, and had subsequently obtained a putta for it after he brought it into cultivation, and *the land* was sold on default made by him for arrears of revenue. The question was fully argued and in an elaborate judgment the sale was set aside. Mr. Justice *Parker* held that the jenmi, the proprietor, "is and has a legal right to be the landholder within the meaning of S. 1 of the Revenue Recovery

1. (1883) I.L.R. 7 M. 405

2. (1888) I.L.R. 13 M. 89.

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Saukaran Nair J.

Act." *Shephard* J. agreed, and pointed out the distinction between a tax for which the land is liable to be sold and a personal charge payable by the occupier in respect of the land. In that case, though the puttadar was interested in the land and could not have been turned out by the owner without payment for the improvement which consisted in bringing the land into cultivation, the sale was set aside in its entirety, the purchaser not obtaining even the rights which the puttadar admittedly had. Once the land is assessed to revenue in the name of the proprietor, any subsequent transfer will be treated under the Regulations of 1802 as invalid against the Government claim to realize the revenue from the registered holder or by the sale of the land. In *Seshagiri* v. *Pichu* [1] Mr. Justice *Muthusami Aiyar* held that the real owner is also liable to pay the revenue while *Kernan* J. held that though the transferee may be the real owner, yet he is not a 'defaulter' under Act II of 1864. Relying on the opinion of *Muthusami Aiyar* J. it was held in *Srinivasa Thatha Chariar* v. *Rama Aiyan* [2] that not only registered proprietors but also real owners may be treated as defaulters within the meaning of S. 32 of Act II of 1864. In *Boja Sellappa Reddy* v. *Vridhachala Reddy*[3] Mr. Justice *Subrahmania Aiyar* took the oposite view, though curiously enough the cases in I. L. R 11 Madras and I.L.R. 10 Madras are not referred to in his judgment. He was of opinion that the owner cannot by virtue of his ownership alone be compelled to pay the revenue, and he pointed out that the landholder is the registered holder, and, though the unregistered owner may lose his land if it is sold for arrears of revenue due by the registered holder, he cannot be treated as the defaulter and is not therefore a person bound to pay the revenue though he may be interested in paying it. In this state of the authorities the question came before the Full Bench in *Subramania Chetty* v. *Mahalingaswami Sivan*[4], and we held that the transferee of the registered holder, though the real ower of the property, is not a 'defaulter' and the reason given is that, reading Act II of 1864 with Regulation XXVI of 1802, "the term 'defaulter' applies only to the registered puttadar," or, in other words, the 'landholder' is the registered puttadar as he alone is the defaulter under the Act.

1. (1882) I. L. R. 11 M. 452. 2. (1893) I. L. R. 17 M. 247.
3. (1906) I. L. R. 30 M. 35 at p. 38. 4. (1909) I.L.R. 33 M. 41.

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In second appeal No. 159 of 1907, *Nynappan Servai* v. *Secretary of State*[1], a different view from that laid down in the previous cases seems to have been taken. Apparently accepting the view that, where there is a registered proprietor, no other person is to be treated as a 'landholder' under the Act, the learned Judges proceeded to decide that when the revenue payable is not under a settlement, any person who may be deemed to be the holder of the land must be comprised in the term 'landholder' and therefore, a tenant in occupation is a 'landholder', and 'defaulter' under the Act, with reference to the water cess which is revenue for this purpose.

It necessarily follows from this decision that in cases of sale for non-payment of such revenue the purchaser will get only the interest of the tenant, the 'landholder' under S. 39 of the Act.

It appears to me that this is opposed to the scheme of the Revenue Recovery Act and to the decisions. As I have pointed out above, the Government looked to the full proprietary interest in the land for security for payment of revenue. In order to make that the security, they have to make the proprietor their debtor; for, as pointed out by *Shephard* J. in *Secretary of State* v. *Ashtamurthi*[2] "a security presupposes an obligation and unless therefore an obligation has been imposed on the landholder, it is difficult to see how his interest in the land can be affected." As decided therein the proprietor is the person under the Act treated as the landholder and none other can be treated as such. The fact that there is no putta cannot make another liable. It is not clear from the judgment whether, besides the tenant the zemindar also may be treated as the 'land-holder' for the purpose of recovering the same debt. The defaulter is also personally liable and it can scarcely have been intended to create two classes of defaulters.

I am, therefore, of opinion that the Judge is right in holding that the person to pay the cess or revenue is the zemindar and that the judgment in the Weekly Notes should not be followed.

I accordingly dismiss the appeal with costs—two sets.

The memoranda of objections are also dismissed with costs.

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1. S. A. 597 of 1907. 2. (1888) I.L.R. 13 M. 89 at p. 123.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Present :—Lord Macnaghten, Lord Atkinson, Lord Robson and Sir Arthur Wilson.

Srinivasa Moorthy .. Appellant*

v.

Venkata Varada Iyengar & others .. Respondents.

Srinivasa Moorthy *v.* Venkata Varada Iyengar.

Hindu Law—Joint family — Partible property — Severance of self-acquisitions and joint property—Onus—Letters Patent, Cl. 12—" *Dwell*"—*Trustee—Adverse title, setting up of.*

In a joint Hindu family governed by the *Mitakshara,* the father kept his own earnings separate from the property that came to him at the time of partition. He also left at his death documents which would clearly show how much of the assets left by him were his own acquisitions and therefore at his disposal. All the testator's papers came at his death into the hands of the defendant.

Held.—That the courts in India rightly drew the inference that the material documents were withheld by the defendant because they would disprove his story.

Where the defendant took up a hired house in Madras, meaning to remain there several months, and was actually living there when the suit was instituted, he could not be heard to say he was not "dwelling" within the jurisdiction of the Madras High Court.

No person who has accepted the position of trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself.

A person who obtains probate of his father's will as executor cannot afterwards repudiate the will :—

The facts appear from the judgment of their Lordships.

Their Lordships' Judgment was delivered by

Lord Macnaghten:—This is an appeal from the judgment of the Madras High Court in a suit for the administration of the trusts of the will of Venkata Varada Iyengar, who died on the 24th of August, 1892, domiciled in the State of Mysore. The judgment under appeal affirmed in substance the decision of *Moore* J., sitting on the Original Side of the court.

* 3rd February 1911.

Srinivasa Moorthy Venkata Varada Iyengar.

The appellant, who was the only son of the deceased, was one of the executors and trustees named in his will and sole residuary legatee. He joined in obtaining probate. He took upon himself the management of the estate and possessed himself of all the assets. For some years he acted in execution of the trusts of the will. Called upon to account and charged with various breaches of trust he now asserts that the will was wholly inoperative and that the entire estate was joint family property, and that it belongs to him in his individual capacity by right of survivorship.

To such a contention advanced under such circumstances it would be a sufficient answer to say that no person who has accepted the position of trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself. But out of respect for the argument of counsel at the bar and the elaborate judgments in the courts in Madras, it will be proper to deal shortly with the facts of the case and the grounds of the decision under appeal

The testator was born at Madura in 1834. He was the son of Srinivasa Iyengar, who was Treasurer of the Collector of Madura. In March 1854, after a quarrel with his father, he left the family house and went to Mysore. He maintained himself there by his own exertions. He held various appointments under the Mysore Government, and got together a considerable sum of money in his father's life-time. His father died in 1864, and a partition was then effected between the testator and the other members of the family. On the partition the testator received as his share a sum of money which after recouping him for his outlay on account of his father's funeral and on account of other family expenses, amounted to about Rs. 7,000.

The testator continued to improve his fortune after his father's death. His estate when he died was worth about four lakhs of rupees. He left a widow and an only daughter as well as his son surviving him.

The testator's will was dated the 3rd of August 1892. He named as executors his son and four other persons. One of those four persons did not prove the will or intermeddle with

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the estate. The other executors were N. T. Venkata Varada Iyengar, the first respondent, Biligiri Iyengar, an attorney of the Madras High Court (now deceased) and Krishna Iyengar (also now deceased). After stating that he had given certain jewels to his son the testator proceeded to declare his will as follows :—

"I have from time to time written and kept list of these and of all my other principal ancestral and self-acquired properties. My son Rajasvi Srinivasa Moorthi (may he live long), and after him his heirs, shall get all these and all my other estate, subject to the conditions mentioned hereunder, and others have no right thereto."

Then followed certain bequests. Provision for the daughter was made in paragraphs 10, 11 and 12, which were to the effect that Rs. 40,000, being four-fifths of the sum for which the testator's life had been insured, should be settled on her and her children. The remainder of the insurance money was to go to the widow for life.

Shortly after the testator's death the appellant and the three other executors who proved the will obtained probate in the Court of the British Cantonment at Bangalore, and on the 20th of February, 1893, they applied to the Madras High Court for probate, limited to the Presidency of Madras.

On the 5th of May, 1893, probate was issued to the appellant and the other three executors, and the usual undertaking was given by them to administer the estate and exhibit an inventory.

On the 4th May, 1894, the appellant filed a partial inventory showing that Rs. 65,146 had been realised in the Presidency town. The sum of Rs. 50,000 was also received from life policies.

For some time the appellant made payments to the daughter and the widow as interest on the fund in his hands.

In August 1898, the appellant wrote to his co-executor Biligiri repudiating his position as trustee, and stating that the will was invalid on the ground that all his father's property had belonged to him as survivor.

In the month of September 1898, he filed an affidavit in the Madras High Court setting up the same case.

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In 1899, the daughter brought a suit against the appellant and his co-executors, but as the leave of the court had not been obtained in accordance with S. 12 of the Letters Patent of the High Court, the suit was dismissed against the appellant who was not then within the jurisdiction of the court. Accounts were directed as against the other executors, but no further steps were taken in that suit.

In August 1901, the appellant's co-executors brought the present suit against the appellant alleging various breaches of trust on the part of the appellant in which they seem to have participated to some extent themselves. They alleged that the assets realised in the Madras Presidency in the hands of the appellant were more than sufficient to enable them to carry out the trusts of the will, and they asked for the usual accounts, administration of the estate, and removal of the defendant from the office of trustee. The plaint was afterwards amended by striking out the names of the two plaintiffs who died pending the suit.

On the 11th of October 1904, *Moore* J. delivered judgment, ordering that the surviving plaintiff and the defendant should be removed from their office as executors and trustees under the will, and directing the usual accounts to be taken with liberty for all the beneficiaries to come in and prove their claims.

On the 16th of March 1905, *Moore* J. made a final decree appointing a Reciever and directing certain payments in accordance with the result of the accounts which had been taken.

The defendant appealed to the High Court from both decrees. The High Court dismissed both appeals with costs, and ordered the appellant to pay into court, on or before a day named in the order, Rs. 1,15,000 with interest, to answer the amounts found due from him, with directions to the Receiver, in case of default, to raise the required amount out of the estate and to execute the decree as if it were a decree in his favour for that sum.

From this decree, which is dated the 1st of March 1906, and the other orders and decrees made in the suit, the defendant appealed to His Majesty in Council. The argument of the learned counsel at the bar was addressed to : (1) the question of jurisdiction, and (2) the question as to the nature of the testator's

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estate. The question of jurisdiction is too plain for argument. Both courts held that the cause of action arose partly within the jurisdiction of the High Court, and although the judge of first instance thought himself bound by a decision which had really no application to the case to hold (contrary to his own opinion) that the defendant was not "dwelling" within the jurisdiction, the High Court not unnaturally thought that inasmuch as he had taken up his abode with his wife and family in a hired house in Madras, meaning to remain there several months, and was actually remaining there when the suit was instituted, he could not be heard to say that he was not "dwelling" within the jurisdiction of the High Court.

As regards the second question both courts rejected the defendant's contention. In the High Court *Subrahmanya Aiyar* J. with whom the *Chief Justice* agreed, held that it could not be doubted that "the testator kept his own earnings separate from "the property that came to him at the time of the partition," and also that there was no doubt "that the testator left at his death "documents which would clearly show how much of the assets left by him were his own acquisition and therefore at his disposal." All the testator's papers came at his death into the hands of the defendant, and the inference which the learned judge drew from the evidence in the case was that the material documents were withheld by the defendant because they would disprove his story. Both courts took a view of the defendant's character not altogether favourable. He was a person of some education, with some knowledge of the rights of members of an undivided family, and an astonishing disregard of truth.

Their Lordships see no ground for dissenting from the conclusion at which the learned judges of the High Court have arrived, and in the result they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors :—*Chapman, Walker and Shephard* for appellant.

Solicitor :—*Douglas Grant* for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CAPE OF GOOD HOPE.]

Present :—Lord Macnaghten, Lord Robson and Sir Arthur Wilson.

Samuel Jacobus Greyvensteyn .. Appellant*

v.

Daniel Wilhelmus Hattingh & others .. Respondents.

Greyvensteyn *v.* Hattingh.

Torts—Locusts—Owner's right to drive away from land—Analogy to the course of a natural river—Liability to neighbouring owner.

The principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners, are not necessarily appropriate to the course of an insect pest which it is the interest of every one concerned to repel or destroy. The pest has no settled course and whatever its course may be, no one is bound to respect it. The progress of fire would be a much nearer analogy to the moving horde of locusts than the course of a river. Visitations of locusts, though no doubt unpleasantly frequent, are in the nature of extraordinary and incalculable events, rather than a normal incident like the rise of a river in a rainy season ; and an owner of land is justified in driving away locusts from his own land without being liable to his neighbour for the consequences. Even as a formal incident of agricultural industry one will be entitled to drive the locusts away just as they are entitled to scare crows without regard to the direction they may take in leaving.

[*Menzies* v. *Breadalbane*[1] distinguished ; *Farquharson* v. *Farquharson* (unreported decision in 1741), *Smith* v. *Kenrick*[2] and *Whalley's case*[3] ref. to.]

Appeal from an appellate Judgment of the Supreme Court of the Cape of Good Hope.

The facts and arguments sufficiently appear from their Lordships' judgment.

Their Lordships' Judgment was delivered by

Lord Robson.—This is an appeal by the plaintiff in the action from a judgment of the Supreme Court of the Cape of Good Hope which affirmed the decision of a Divisional Court (Mr. Justice *Buchanan*) dismissing the action with costs.

The parties are all farmers in the District of Moltens, in the Cape of Good Hope. On the 25th November 1907, the appellant's farm was entered from the north by a swarm of locusts. They were

* 26th March 1911.

1. (1828) 3 Bligh, N. S. 414, 418. 2. (1849) 7 C. B. 515. S.C. 78 R.R. 745.
3. (1884) 13 Q. B. D. 131.

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"voetgangers," *i.e.*, young insects who had not yet acquired the use of their wings, and who trekked across the country on foot, eating the grass and crops on their way. The farms of the respondents lay to the south of the farm thus invaded, and were separated from it only by a comparatively narrow strip of veldt belonging to various persons. The locusts trekked across the Appellant's farm in a direction which made the respondents reasonably apprehensive for the safety of their own lands, and the steps they took to avert the anticipated danger have given rise to the complaint of the appellant. He alleged, firstly, that the respondents wrongfully and maliciously trespassed on his lands and drove the locusts back on to the cultivated portions thereof, so as greatly to increase his damage. On this point there was a sharp conflict of testimony. The respondents allege that they went on the appellant's farm at his request or with his approval in order to repel a common danger, and that if any trespass was, at any time, in fact committed, it was of a trivial character and without either the effect or the intention of doing the appellant any material harm. Mr. Justice *Buchanan*, who heard the evidence, has made clear findings of fact on this part of the case, and their Lordships see no reason why those findings should not be fully accepted. The learned judge did not believe that there was any wilful or malicious driving of the locusts on to the appellant's cultivated lands and he accepts the respondents' story as to how they came to enter his farm and what they did there. He further finds that the sums paid into court by the respondents to meet any damage they may have caused by the alleged trespass, apart from the damage done by the locusts, was more than sufficient. There was ample evidence to support all these conclusions, and the appellant's case on this head fails.

But the alleged trespass was not the main issue in the case. When the respondents were forbidden to remain on the appellant's land, they, with the consent of the adjacent proprietors, took up positions on the veldt outside his boundary and drove the locusts back on to his farm and in various directions away from the direction in which their own farms lay. The result of this proceeding was, of course, detrimental to the appellant's land. It is contended on his behalf that such action on the part

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of the respondents was wrongful. His case is that locusts are like flood water and that their natural course must not be diverted, even in self-defence, if injury is thereby caused to a neighbouring proprietor.

According to this argument the respondents were bound to receive the locusts. In support of this proposition the appellant's counsel cited a number of cases which, in the view of their Lordships, have little or no analogy to the present case.

In *Menzies* v. *Breadalbane*[1], the defendant was erecting an embankment which would have the effect of throwing the ordinary flood stream of the River Tay off his lands and entirely on the lands of his neighbour. The House of Lords held, on the facts of that case, that the embankment was an obstruction and diversion of the natural and ancient course of the stream in times of flood and that the natural course of a river could not legally be altered by one proprietor so as to create a new waterway to the prejudice of other proprietors. The same principle was illustrated in another aspect by the decision in *Farquharson* v. *Farquharson*[2], an unreported case cited by the Lord Chancellor in *Menzies* v. *Breadalbane*[1]. In that case it was held that a riparian proprietor might erect a mound to prevent the river from encroaching on his land and creating a new waterway for itself.

Great reliance was placed by the appellant on the decision in the first mentioned case, but the principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners, are not necessarily appropriate to the course of an insect pest, which it is the interest of everyone concerned to repel or destroy. The supposed analogy between the two things is wholly fallacious. The pest has no settled course, and whatever its course may be, no one is bound to respect it. Indeed, the progress of a fire would be a much nearer analogy to the moving horde of locusts than the course of a river.

The case of *Smith* v. *Kenrick*[3] was also cited by the appellant. That was a case of adjacent mine owners. The defendant's mine was on a higher level than that of the plaintiff,

1. (1828) 3 Bligh. N.S. 414, 418. 2. Unreported, decided in 1741.
3. (1849) 7 C.B 515. S.C. 78 R.R. 745.

and was subject to no servitude in favour of the latter. As the defendant's mining operations proceeded on his own property in the manner most convenient to himself, the plaintiff's mine was flooded by water from the workings of the defendant. This was held to be no wrong on the part of the defendant, for it took place in the ordinary and natural user of his property, but no one suggested that the plaintiff was not entitled to protect himself by barriers which would have dammed the stream of water back on the defendants mine, where it had its origin. On the contrary, that was held to be his proper remedy, and such a remedy is fairly analogous to the conduct of the defendants in the present case. Greyvensteyn v. Hattingh.

The appellant, of course, admitted that an owner or occupier of land is entitled to defend or protect his property so far as he can, but he said they had no right to do so by transferring the mischief from their own land to that of their neighbour, and according to him that was what the respondents did when they prevented the locusts from leaving his land in order to keep them from coming on their own. In support of this proposition the case of *Whalley* v. *Lancashire and Yorkshire Railway Company*[1] was cited. In that case an abormal rainfall caused water to accumulate in large quantities against the defendant's embankment, and they released it by making holes in the embankment so that the water flowed on to the land of the plaintiff, and did much greater damage than if it had flowed there direct without the temporary obstruction of the embankment. This was held to be wrong; but the decision does not help the appellant. It cannot be said that the obligation of a landowner not actively to transfer to his neighbours a danger which he himself has created or, increased, is inconsistent with the right of a landowner to repel some extraordinary misfortune which comes to him by way of his neighbour's land.

In *Whalley's* case [1], *Cotton,* L. J., points out that, if an extraordinary flood is seen to be coming, the owner may protect his land from it, and so turn it away without being responsible for the consequences. Visitations of locusts, though no doubt unpleasantly frequent, are in the nature of extraordinary and incalculable events, rather than a normal incident like the rise of a river in a rainy season.

1. (1884) L.R. 13 Q.B.D. 131.

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On the facts as found in this case their Lordships are of opinion that the respondents did no more than what Lord Justice Cotton has defined as being within their rights. But their conduct may be justified on a wider and simpler ground. Even if the invasion be regarded as a normal incident of agricultural industry in South Africa, the Respondents would be entitled, as an agricultural operation, to drive the locusts away just as they are entitled to scare crows, without regard to the direction they may take in leaving.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: *Biddle* & *Co.* for the appellant.

Solicitors: *Widdle* & *Co.* for the respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Munro and Mr. Justice Sankaran Nair.

Raja Ramachandra Appa Row Bahadur Garu & others .. Appellants*
(*Plff. & legal rep. of the deceased 1st appt.*

v.

The Sey. of State for India in Council .. Respondent.
(*Defendant*).

Madras Acts—Cess Act VII of 1865—*S.* 1—11—" *At pleasure*"—*Arrears*—*Cess when in arrears?—Levy to be within the fasli—Levy for past years invalid.*

Liability to pay cess does not attach itself by the mere use of the water. It is at the pleasure of Government to levy or not to levy cess for water used. The liability arises only on and after the imposition of the cess. The cess has to imposed within the fasli: and consequently an order charging water cess for faslis other than the fasli in which the order is made (*Eq.* for a period of ten years) prior to the levy is illegal.

Per Chief Justice:—The word "arrears" in S. 2 of the Act means payments which have become due and have remained unpaid after the levy was made; and the Government have no power to collect the rate for a period before the levy is made.

Appeal from the decree of the Court of the Subordinate Judge of Kistna at Masulipatam in O. S. No 51 of 1903.

K. N. Aiya Aiyar for appellants.

The Advocate-General—(*P. S. Sivaswami Aiyar*) for respondents.

K. N. Aiya Aiyar for appellant:—I do not want a declaration for the future. As for the past years I submit it is open

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*A. 107 of 1905. 24th April, 1910.

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under S. 1 of Madras Act VII of 1865 for Government to levy 'at pleasure' water cess or not to levy. When once the Government does not levy, it cannot afterwards levy for the past period. The water-cess is payable only annually as revenue and according to kistbandi—Board's Standing Orders (1907) Vol. II, p. 6, R.9. The rule in force during 1892 to 1902 is that found in p. 2 of the Appendix to the Board's Standing Orders, 1890. These lands are entered in the Inam patta as dry. I cultivated these lands as wet from 1868. I made no application for the supply of water, and there has been no demand to pay water-cess. An 'arrear' implies that there has been a demand—Ss. 3 to 5 of Act II of 1864. Under S. (?) of Act II of 1864 the Collector alone can levy—S. 2 of Regulation II of 1803. Moreover, in 1884 the Collector, after demanding arrears of water-cess for some years ordered that the demand for arrears then was wrong. On two occasions water-cess levied was refunded. [*S. Nair* J.—*Vide* Regulation VII of 1828; MAXWELL on *Interpretation of Statutes*, p. 307. There can be no retrospective effect to a rating or taxing Act unless it specifically says so, as it will work a hardship—CRAIE'S *Interpretation of Statutes*, p. 324; *Queen* v. *Mayor of Maidenhead*[1] *Bradford Union* v. *Clerk of the Peace for Wilts*[2]; *Reg.* v. *Leigh Rural Council*[3]; *Waddington* v. *Poor of London Union*[4]; *Rex* v. *Inhabitants of Maulden*[5]. The cases of *Raja Suraneni* v. *Secretary of State*[6] and *Chidambara Row* v. *Secretary of State*[7] do not lay down that arrears can be claimed. They say that the Inam Commissioner alone is the authorized agent of the Government in such matters and not Collectors or their assistants. For estoppel I rely upon the acts of the Collector which amounted to say that no water cess will be levied— *Secretary of State* v. *Dattatraya Rayaji Pai*[8]; *Ahmad Yar Khan* v. *Secratary of State*.[9] 'Arrear' is defined in *Kripasindhu Mukerjee* v. *Ananda Sundara Debi*.[10]

The Advocate General for respondent:—There is no limit of time within which the levy of the cess must be made. In fact S. 1 says that it can be levied 'at pleasure' which means also 'when-

1. (1882) L. R. 9 Q. B. D., 494 502.
2. (1868) L. R. 3. Q. B. C. 604.
3. (1898) 1 K. B. 836.
4. (1858) 28 L. J. C. L. M. C. 113.
5. (1828) 8 B. & C. 78.
6. (1902) I. L. R. 26 M. 51, 53.
7. (1902) I. L. R. 26 M. 66.
8. (1901) I. L. R. 26 B. 271.
9. (1901) I. L. R. 28 C. 693 (P. C.)
10. (1907) I. L. R. 35 C. 34, 53.

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ever it likes.' [*Chief Justice.*—What is meant by levy?] .' Impose' or sometimes 'collect.' In this case there was a demand made before collection. In some Acts [*e.g.*, Income Tax Act II of 1886, S. 30, cl. (v)] it is expressly laid down that proceedings must be taken within 3 months of the end of the year. [*C. J.*—What is the basis of the liability?] User under circumstances beneficial.—[*C. J.*—Can there be an implied contract in the matter?] The object of the Act is to make a man liable for the *use* of water even if there was not a conscious or willing use—*vide* amendment of the Act in 1900. Even an accidental user will be a ground of liability. [*C.J.*—Webster's Dictionary says 'levy' mean- levy or 'collect']. Sections. 2 and 3 of Act VII of 1865 make a distinction between 'levy' and 'impose.'-Government can levy even for water which percolates. Contractual obligation is not necessary. [*S. Nair* J.—Under the Act VII of 1865 and the rules thereunder the ryot has to make an application]. An application is not a condition precedent. Unauthorized user is punishable by penal assessment—Rule 5, p. 4, Vol. II, Board's Standing Orders (1907). But less than the penal sum may be levied. [*C.* J.—Is not the object of this rule to levy a penalty only for a year's use so as to insure an application for the next year? If you are right, then the Government can claim penal assessment for each of the sixty years for which you can sue]. I can, but it does not follow that I will use that power in any case. Rule 2 provides for cases in which applications are put in. Rule 5 covers all other cases [*S. Nair* J.—Suppose a ryot wants to know whether an application is necessary and the Collector says 'no', then under what clause would he come?] In that case only the trouble of writing the details is dispensed with, but the ryot has to pay if he uses water under such circumstances. Moreover, a Collector has no right to dispense with application. He is not the agent of the Government. [*S. Nair* J.—Have these rules the force of law?] Yes; they are rules made under the provisions of the Act. In cases in which a ryot will not be entitled to water free of separate charge, what is it that would make him escape his liability to pay? [*S. Nair* J.—Did you give him the option of refusing the water when you were asked to supply it? Not only you did not, but you also induced him actually to think that he will not be charged for water if taken]. There can be no estoppel in such a case. There can be no estoppel against a statute.

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A Collector is only an agent for collection. He has no authority to make exemptions in cases of water-cess; much less can a Tashildar exempt. All that either of them can say is whether on an application he will allow or not the water applied for. Even if there be no rules framed so as to cover this case then under the Act the liability arises. [*C. J.*—Act II of 1864 assumes the existence of right to collect revenue, but Act VII of 1864 creates a right to water-cess under certain circumstances. 'Arrears' means whatever has been demanded and not paid]. [*S. Nair* J.—Before Act VII of 1865 all revenue on land or for water or for any other purpose connected with such land, such as other cesses, were collected as one consolidated sum]. Even before the Act the Government was collecting water-cess. There is no retrospective effect now sought to be given to it. No liability is sought to be imposed for any period prior to the passing of the Act. [*C. J.*—Can you create an '*arrear*' retrospectively ? This is a fiscal enactment?] There is nothing to prevent me in the statute. Water-cess is not on the same footing as land revenue. Water-cess is payable only if water is used. I refer to *Harrison* v. *Stickney*[1] which says that there is no rule of law which prevents a retrospective rating. [*C. J.*—That is not 'retrospective' in the sense of a rate for years prior to the year of demand. That case will apply if you had spent something in one year and wish to recoup yourself in later years.] Once it is granted that I can levy this year for water taken last year, what is there to prevent me from imposing ten years hence ? I can certainly impose water-cess in a case of clandestine user. [*S. Nair J.*—An exception for a special reason cannot be used as a reason for a general rule.] 'Is used' in S. 1 means 'has been used'. [*C. J.*—Why so, in a fiscal enactment?] [*Munro* J.—An application from the party is only for convenience.] Yes. [*S. Nair* J.—You have, moreover, to satisfy yourself that the use of water has been beneficial. For how long back are you to examine ? And imagine what would be the difficulty of ascertaining the beneficial character of a crop 10 or 15 or 20 years ago.] That can be easily ascertained from the Village Accounts. [*C. J.*—How can you ascertain the amount and benefit of percolation several years ago?] That is a matter of proof and an easy one from the oral and documentary accounts at the disposal of the Government. [*C. J.*—

1. (1848) 2 H. L. C. 108 : 9 E. R. 1023, 1039.

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Does not all this difficulty suggest that the cess is to be levied only for one *fasli* subject to the opinion of the Collector as to the beneficial character of the use of the water?] [*S. Nair.*—Ryots very rarely keep accounts, how are they to rebut?] The Act which amended Act VII of 1865 says that the amendment is to be read as if it was in the original Act from 1865. Great hardship would accrue to the Government if they are not to get cess for user. On 'retrospective operation,' See CRAIE's *Statutory Law*, pp. 321, 324. I distiuguish the cases quoted on the other side as to there being no right to order a retrospective effect as to rating on the language of the special Acts therein concerned and on the ground that the rate-payers of one year ought not to suffer for the neglect of those of the previous year. No general rule on the non-retrospective character can be deduced; vide *Regina* v. *Leigh Rural Council*[1]. *Secretary of State* v. *Dattatraya Rayajee*[2] lays down a principle which does not touch the present question. If it decides that the Government is bonnd by any acts of any of its officers even though they be not authorized for such acts, it is against various other well-recognised decisions. Only the acts of authorized agents can bind the Government—*Raja Suraneni* v. *Secretary of State.*[3] If the Collector cannot excuse or refund water-cess, then it is clear his assistants also cannot. [*S. Nair* J.—You say the Collector is entitled to collect water-cess Suppose he makes a *bonafide* erroneous decision, on a construction of the Act and the rules, that a certain land need not pay water-cess, then is not the Government bound by it?] No. The Government is not bound by it, for the Government and its agent the Inam Commissioner alone can state what lands are entitled to water free of charge and what not. Even if the rules are wrong or are wrongly interpreted, it is open to the Secretary of State to say that he will not be bound by it—*Secretary of State* v. *Kasturi Reddi*[4]. [*S. Nair* J.—Why not we say that an erroneous decision of a Collector is binding on the Government until set aside by a superior officer? Otherwise what is the use of an appeal being provided for?] There is no provision for an appeal in these matters. [*Court*—Supposing the Government misled a man 20 years ago on a misconstruction of the Act that he would not be

1. (1898) I. K. B. 836.
2. (1901) I. L. R. 26 B. 271.
3. (1902) I. L. R. 26 M. 51, 54.
4. (1902) I. L. R. 26 M. at 268.

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liable for water cess, do you say that it can now say that it was mistaken and that the cess for these 20 years must be paid?] I say, yes. The Crown is not to be prejudiced by the neglect, laches, blunders, misconduct, etc., of its officers. [*C. J.*—Not even when the officers are agents?] Unless the agents have a power of-attorney are or constituted under the Act. [*Munro* J.—Under the Act the Government has the power to levy water-cess. Therefore it can say also that it will not levy.] No—ROBERTSON'S *Precedents of the Crown*, pp. 577, 578 to the effect that the King is not estopped by his recitals or fictions though it may operate against the person through whom the King acts. "Everything for the benefit of the King shal be taken largely; everything against him shall be taken strictly." Estoppel as between ordinary men does not apply in this case. See the authorities quoted there and *Collector of Masulipatam* v. *Cavaly Venkata Narasappa*[1] where a Collector's mistaken acts in respect of an escheat were held not binding. See *Goura Chandra Gajapati Narayana Row* v. *Secretary of State for India*[2] where the mistaken acts of the officers of the Government for 32 years were held not to create an estoppel though those acts were approved by the Government; BIGELOW 598, Note (2); EVEREST on *Estoppel*, 7 and 8. In the case of the King, estoppel need not be mutual; he can take advantage whenever he likes. For an estoppel must be of a fact and not of an intention not to do a thing (*e.g.*,) that no cess will be imposed—HALSBURY'S *Laws of England*. [*Munro* J.—Is it not a representation of a *fact* to tell a man that his land will not be liable for water-cess?] No. It is only of an intention—*George Whitchurch, Ltd.* v. *Cavanagh*[3]; *Maddison* v. *Alderson*[4].

K. N. Aiya Aiyar, in reply, quoted S. 35 of Board of Revenue Regulations. The whole schemeof revenue administration is to collect revenue at the end of every year. If in any year water has been taken unauthorizedly, then during the time of the annual jamabundi water so taken during the year is assessed—*vide* Vol. II, p. 7, B. S. O.; 5, Vol. I, p. 14. "The settlement in each Taluq of all items of land-revenue must be completed at the end of each year." Village accountants have

1. (1861) 8 M. I. A 529, 553.
2. (1905) I.L.R. 28 M. 130 (P.C.)
3. (1902) A. C. 117, 130.
4. (1833) 8 A. C. 467, 477.

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to keep accounts of water taken unauthorizedly. Rule 5 applies only for one year. Board's Standing Orders have the force of statutory law, having been framed under the Act. It is the land that bears the assessment. If owners change, then the levy for past years would certainly work a hardship. Acts done by authorized agents, though mistaken, do bind the principals—even the Government. It is the Collector that is empowered to collect and to *refund* (B. S. O. 183 Vol. I, p. 342.) all sums collected in any revenue department. It is only if Government wants to sue it is 60 years. There is no period for which coercive process can be taken under the Act. That shows the extreme hardship to which ryots could be driven.

The Court delivered the following

JUDGMENTS:—*Chief Justice*:—This is a suit in which the plaintiff claims a refund of water-cess and a declaration that the lands for which the cess has been paid are not liable to water-cess. The Subordinate Judge dismissed the suit and the plaintiff appeals. The claim for a declaration was not pressed in appeal.

Water-cess on the lands in question was collected in 1895, but it was refunded on the ground that it had been illegally collected—see the order of the Tahsildar (Ex. *LL*) dated the 18th June 1895. This order states that the order for the refund of the tax was made by "the Collector." The order of the officer who directed the refund, on the ground that the cess had been illegally collected, is not in evidence.

Nothing appears to have been done till March, 1903, when the Collector served a notice on the plaintiff to show cause why water-tax should not be levied on the land in question. Subsequently the Collector made an order directing that "single' water-tax should be charged on the land during the previous ten years and *Fasli* 1312 (apparently taking things back to the year when the tax had been collected) and refunded under the order of the officer of Government). See Exhibit *AAA.*

The plaintiff asks for a refund of the cess paid by him under protest for the period antecedent to this order, that is, for 11 years up to and inclusive of *Fasli* 1312. He does not now dispute his liability to pay the tax from and after the receipt of the order of

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the 6th March 1903. The Government claim the right to collect the tax for eleven years as arrears of water-cess payable under Madras Act VII of 1865. The circumstances in which the tax was collected in 1895, and refunded on the ground that the collection was illegal, are not very clear. But I am quite prepared to hold, for the purposes of this case, following *Chidambara Row* v. *The Secretary of State for India*[1], that the action of the officer of Government in 1895 did not bind Government in the sense that they could not thereafter "levy at pleasure on the land" a separate cess for the water. But I am not prepared to hold that the order of the Collector, notwithstanding the fact that it was not repudiated by Government till eight years later, was ineffective for all purposes. Assuming that what was done prior to 1895 amounted to a levy of a separate cess for water under the Act, Government have, in my opinion, not made out (and the onus is clearly on them) that, whereas the officer who made the levy was the authorised agent of Government in that behalf, the officer who set aside the levy and directed the refund was not.

Government have recently levied a separate cess for the water, and the question is—and this was the main question argued before us—does this levy, under the powers conferred by the Act or under the rules, which, by the Act, Government are empowered to make, operate retrospectively so as to entitle the Government to claim "arrears"?

I know of no other fiscal enactment in which such a power has been given. The cess is levied on the land. It is a charge on the land "irrespective of the fact whether the owner of the land for the time being has had any benefit from the supply or use of the water or not." To create such a charge retrospectively might, especially in cases where there had been a change of ownership, in my opinion, in many cases work a hardship.

Under the Act the Government have a discretion "to levy at pleasure, on the land so irrigated a separate cess for such water." They are under no obligation to levy this separate cess. Rules have been made as to the circumstances in which, and the rates at which, the separate cess is to be levied. It was not suggested that the making of these rules constituted a levy of the cess. If I am right in my view that we cannot hold on the evidence

1. (1902) I.L.R. 26 M. 66.

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that the tax continued to be "levied" from 1895 or some earlier date, onwards, there can, I think, be no question (in fact I do not think the Advocate-General contended otherwise) that the Collector's order of the 6th March 1903 constituted the levy. We are asked by the Advocate-General to hold that the tax is payable for a period of time before it was "levied." In my opinion, there is nothing in the Act or the Rules which would warrant such a conclusion.

I think the word "arrears" in S. 2 of the Act means payments which have become due and have remained unpaid after the levy was made. The section provides that arrears of water-cess payable under the Act shall be realised in the same manner as arrears of land revenue. Under S. 3 of the Madras Revenue Recovery Act (II of 1864) the landholder pays the land revenue due on his land "according to the *kistbandi* or other enjoyment." Section 4 provides that when this revenue is not "so paid" it is to be deemed to be an arrear of revenue. Under the Revenue Recovery Act an arrear kist is not paid under an engagement. I think an "arrear" of water-cess under the Act of 1865 has the same meaning. The engagement may, of course, be express or implied, but I do not think the mere use of the water, at any rate when the use was under the *bona fide* belief—a belief brought about by the action of the officer of the Government—that Government did not intend to charge for the use, constitutes an engagement. The case of *Harrison* v. *Stickney* [1] and the other authorities cited by the Advocate-General, with all respect to him, seem to me to have very little bearing on the question we have to decide. I, of course, accept the proposition that there is no rule of law which prohibits a retrospective rate—that is, a rate for the purpose of raising funds for the purpose of discharging a liability already incurred. But the contention on behalf of Government is that they have power to collect the rate for a period before the levy is made. *Raja Suraneni Venkata Papayya Row* v. *The Secretary of State for India in Council* [2] does not touch this point, as in that case, I understand it, there was no claim for "arrears." In that case the right of Government to levy wet assessment and supply water was held to be a right by way of easement and not

1. (1848) 2 H. L. 108. 2. (1902) I.L.R. 26 M. 51.

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a right under the Act. As regards the Rules, they would seem to contemplate two classes of cases—cases where cultivators of land registered as dry apply for water (Rule II, Standing Orders of the Board of Revenue, Vol. II, p. 3) and cases where water is taken before an application is made (Rule V). The present case obviously does not fall within Rule I. The only rule which applies would seem to be Rule V, under which Government have taken power to levy a penal rate.

The defence that the plaintiff did not pay under coercion was not pressed.

I would allow the appeal as regards the claim for a refund of the cess paid for the period prior to the 6th March 1903, that is, Rs. 9,391-10-4 and interest at 6 per cent per annum from date of plaint up to date of payment on Rs. 9,118 1-8. Time for payment is six months from this date.

Respondent will pay the court fee on the claim for refund here and in the court below. In other respects the parties will pay their own costs.

Munro J.:—The material facts are not now in dispute and may be briefly stated. The Government is entitled under Act VII of 1865 and the Rules framed thereunder to levy water-cess on the lands to which the suit relates, when irrigated by Government water. For a long time the lands were so irrigated, but no charge for water was made save on one occasion. The amount thus collected was in 1895 refunded by the Collector on the ground that the charge was illegal, and water continued thereafter to be supplied without charges. In 1903 the then Collector found out the mistake that was being made, and by an order dated 6th March, 1903, directed that single water-rate should be charged for ten faslis ending with fasli 1311, and also for fasli 1312, in which fasli the order was passed. The amount thus held to be due was collected on the 27th May 1903, the plaintiff, appellant, paying under protest. The plaintiff then brought the suit out of which the present appeal arises to recover the amount paid and for other reliefs not now pressed.

To the charge for *fasli* 1312 I do not think the plaintiff is entitled to object. Water was taken in that fasli and was charged for within the fasli. The question then is whether the charge for the previous ten faslis was legal. This will depend

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upon whether the charge was justified by Madras Act VII of 1865 or the Rules framed thereunder.

Under S. 1 of the Act whenever water from a Government source is supplied or used for purposes of irrigation, the Government, certain conditions being fulfilled, "may levy, at pleasure, on the land so irrigated, a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water-cess as aforesaid may be levied, and alter or amend the same from time to time." For the rules made by the Government under this section and relevant in the present case we have been referred to the second and following pages of Vol. II of the Standing Orders of the Board of Revenue, Edition of 1907. The Act also provides under S. 2 that arrears of water-cess may be realised in the same manner as arrears of land revenue, that is, in accordance with the procedure laid down in Madras Act II of 1864.

It has been contended for the defendant that the water-cess charged for the ten faslis prior to fasli 1312 may be properly regarded as arrears of water-cess for those faslis, and is, therefore, recoverable under S. 2 of the Act. Now an arrear of land revenue is defined in Act II of 1864 as revenue which is not paid by the date on which it falls due according to the *Kistbandi*. Water-cess is, under the rules, payable according to the *Kistbandi*, and an arrear of water-cess should, I think, be defined, *mutatis mutandis*, in the same way as an arrear of land revenue. It is difficult to conceive how water-cess which was not demanded in respect of the lands in suit till fasli 1312, and which the plaintiff was given to understand was not due as above stated, can be said to have fallen due in faslis prior to 1312 so as to come under the definition of arrears for those faslis. It is contended, however, that the liability to pay water-cess was incurred in each fasli by the mere fact of taking Government water, and apart from any order of the authorities demanding payment for the water. A perusal of the Act and Rules shows that this contention is untenable. Under S. 1 the Government may "at pleasure" levy water-cess. Equally "at pleasure" it may not. Until, therefore, the Government indicates its intention to charge water-cess, no liability is incurred by taking water. Turning to the rules, we find in Rule V, which deals with the unauthorised use of water, that

the Collector has power to make a penal charge, and may also, at his discretion, reduce or remit the penalty, so that there is no liability until the Collector has made his order.

It is not alleged that the Government has itself made any charge for the water taken for the lands in suit. The only charge is the charge made by the Collector by his order of the 6th March, 1903. The legality of that order depends upon whether it is authorised by the rules under which the Government has delegated certain powers. The question is whether the rules justify an order charging water-cess for faslis other than the fasli in which the order is made. One of the underlying principles of the land revenue administration is that all charges should be ascertained and recorded within the fasli to which they relate—see Board's Standing Order No. 12 which deals with the Jamabandi or Annual Settlement. I have no doubt that the principle is meant to underlie rules for charging water-cess, and there are numerous indications in the rules that it does. On the other hand, I can find nothing in the rules which can be construed as a provision for imposing water-cess for prior faslis. The rule which, according to the defendant's contention, applies to the present case, is Rule V. I think, however, it would be very difficult to hold that the present is a case of unauthorised use of water. If the rules do not apply, and I think they do not, the charge was illegal, and the plaintiff is entitled to recover. Even if Rule V is held to be applicable, the defendant is in no better position. Under that rule, when water is taken without permission, a water-rate equal to twice the water-rate prescribed in Rule I for the particular crop irrigated is ordinarily to be levied as a penalty. One object of the penalty is, it may be reasonably presumed, to deter the person charged from taking water without permission in future years. For persistent breach of the rules or other sufficient cause the Collector may enhance the penal charge up to five times the ordinary water-rate. Persistent breach of the rules would imply that the person charged has already been warned and, possibly, penalised in prior faslis, and to that extent, no doubt, what has happened in prior faslis is enquired into. But the charge for the persistent breach of the rules is manifestly a charge for the last breach, and not a charge for water taken in prior faslis. The manner in which the penalties are limited is also a clear indication that they are imposed in respect of the last

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occasion on which water has been taken without permission. Nor can it be successfully argued that the charge may be treated as good for the five faslis ending with 1312 in as much as for 1312 the Collector might have charged five times the ordinary water-cess. If the rule applies, the Collector might have done so, but in fact he did not; and we are only concerned with what he did. I think it is clear, therefore, that the Collector had no authority to pass the order of the 6th March 190- with regard to faslis prior to 1312. I would, therefore, allow the appeal as regards the charge for the ten faslis ending with fasli 1311, and dismiss it as regards the charge for fasli 1312, and the other reliefs not pressed. I agree with the principle on which costs are awarded by my learned colleague.

Sankaran Nair J.:—For the Agraharam village of Velupuru quit-rent was charged and Inam patta issued in the year 1859 by the Inam Commissioner. In that patta the lands situated in the said Agraharam were entered as dry lands. In 1868 the wet Ayacut of the Agraharam village was fixed at 177 acres and from that date, in all the accounts of the subsequent faslis, it was shown that 177 acres were exempted from water-tax, that is, were lands for which water had to be supplied free from sources of irrigation belonging to Government. On the 3rd June, 1892, the Deputy Collector, Mr. Suryarao Naidu, localised the mamool wet and passed an order declaring that the extent aforesaid was exempt from any water-tax. However, on 31 acres out of this land water-cess appears to have been collected some time after. But on the 27th June 1895, the Collector passed orders refunding to the Inamdar, owner of the village, Rs. 124-0-8 the amount of tax collected, as in his opinion no cess ought to have been levied. In 1903, another Collector considered that the Deputy Collector's order dated 1892 was passed under a wrong impression and without proper inquiry and cancelled it and levied from the plaintiff (Inamdar) the charge, which, he was of opinion, ought to have been paid on the extent of land which was irrigated during the ten previous faslis and also the charge payable for fasli 1312.

The plaintiff now brings this suit for a declaration that the lands in his Agraharam village were wrongly entered in the pattah given to him by the Inam Commissioner as dry lands; that they were really mamool wet lands, that is to say, land

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in respect of which he is entitled to be supplied with water by the Government to carry on wet cultivation without any liability to pay water-cess; and to recover from the Secretary of State the sum of Rs. 9,391–10–4, the amount collected by the defendant from the plaintiff on account of water-cess for eleven years from fasli 1302 to 1312.

The Subordinate Judge found that the entry in the patta by the Inam Commissioner was not an error. His finding on this point is not challenged in appeal. With reference to the plaintiff's contention that the Ayacut of wet cultivation was finally declared after a full consideration in 1868 by the Deputy Collector and it was afterwards acted upon by the Collector, and such decision is therefore binding upon the defendants, he held that the Inam Commissioner was the proper person empowered by the Government to deal with these questions and the Collector's action in this matter "based as it was on an erroneous principle" was *uttra vires* and not therefore binding upon the defendant. Against this finding also no objection has been taken before us.

The only question therefore which has to be determined is the plaintiff's right to recover the amount levied for water-cess. This cess is levied under Act VII of 1865 which is "an Act to enable the Government to levy a separate cess for the use of water supplied for irrigation purposes in certain cases."

Section 1 of the Act declares that when water from a source belonging to Government is supplied or used for irrigating land "it shall be lawful for the Government to levy at pleasure, on the lands so irrigated, a separate cess for such water," and it also provides that the Government may prescribe the rules under which, and the rates at which, it shall be levied. Under S. 2 arrears shall be realised in the same manner as land revenue is realised. The rules, therefore, so far as they are authorised by the Act, have the force of law. Under those rules a cultivator may apply for water to the head of the village who is required to submit it to the Tahsildar. In certain cases the Tahsildar has to submit them to the Public Works Department, and the Tahsildar may then pass final orders on the application. There are printed forms of application on which orders have to be passed. In that application the applicant has to state the

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area for which water is wanted and whether it is required only for one year or not. If it is not stated to be for a year only water will continue to be supplied for the succeeding years without any fresh application. There are water-rates per acre fixed for the extent for which the water is supplied. Thus the applicant knows the cess he has to pay for the water that may be supplied to him. When water is taken for land without the sanction of the Tahsildar double water-rate is charged. For persistent breach of rules or for other sufficient cause a penal charge equal to five times the ordinary water-rate may be levied.

The Advocate-General contends that when water is used for the cultivation of the land a liability to pay the water-cess attaches itself to the land and that such liability is not imposed by reason of the engagement between the cultivator who applies for the water and the Government as evidenced by the grant of his application in the first case and the supply of water in accordance therewith, nor by the imposition of the cess under Section 1, Cl. (*b*), after the Collector has satisfied himself that the conditions referred to therein exist when the water is used without such sanction of Government. If the Advocate-General is right, the Government may enforce that liability at any time, and no official, unless specially authorised to do so, can waive it.

The words of the section are that "it shall be lawful for the Government to levy, at pleasure, on the land irrigated a separate cess." These words do not support the contention advanced that the liability attaches itself the moment water is used.

I am also satisfied that the Government cannot at any time at their pleasure impose the cess; the cess, in my opinion has to be imposed within the fasli, *i.e.*, before the crop in the land has been harvested. If this view is right, that would also shew that the liability arises only by the imposition and not by the use of the water; otherwise the Government would be able to recover it at any time. This appears to be the case from the words of the section itself and also from the rules. Section 1, Cl. (*b*), provides that in the circumstances therein referred to, the Collector has to satisfy himself that the irrigation is beneficial to and sufficient for the requirements of the crop on the land irrigated. This can only be properly done when the crop is on the

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land and as it appears to me that it was not collected, that the Collector is to decide these questions by taking evidence after the year is over. Whether the irrigation is beneficial and whether it is sufficient for the requirements of the crop can only be satisfactorily settled by personal inspection. It would depend upon various circumstances about which evidence can scarcely be forthcoming afterwards. The fact that the jurisdiction of the civil court is ousted in this respect also supports this view. This is also consistent with the rules which require that Jamabandi, *i.e.*, the annual settlement, "must be completed within the fasli year at the latest" and that such annual settlement should be "conducted with a view to ascertain and record the demand of all the items of land revenue within the Taluqs." (The word "all" is in italics in the rule itself). A different rule cannot apply to Cl. (*a*) of S. 1. It seems to me to be clear therefore that if lands have been cultivated with water from Government resources then it is the duty of the Government officials at the time of the *jamabandi* within the fasli and before the crop is harvested, to impose the charge leviable if such water has been used without the sanction of the authorised officials. The fact that there is another rule which provides for the persistent breach of the rules would also go to show that double water rate is to be imposed within the fasli. Under the Act, therefore, the Collector was not authorised to levy the water cess for ten years.

If the plaintiff-inamdar may now be declared liable for water which was used by the cultivator, how is he to apportion the liability or recover any additional rent from the tenants? It would be extremely difficult to ascertain their liabilities *inter se* and even if ascertained, recovery of arrears for a comparatively long time would in some cases be impossible, and in other cases difficult. If the Government demand is collected during the fasli these difficulties are avoided.

If the charge could be levied years after, the Collector, as he claims in this case, is entitled to recover in *fasli* 1313 the water-cess for faslis subsequent to fasli 1302, a *bonafide* purchaser may be called upon to pay the cess due long before his purchase, of which he had no notice and about which there may have been previous orders (as in this case) exempting the owner from payment.

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These considerations support the inference derivable from the natural meaning of the words that the liability arises from the imposition of the cess, not by the use only, and that the cess has to be imposed before the expiry of the fasli year when the crop is on the land.

It also appears to me that the rules framed by the Government under the Act—which have got the force of law in so far as they are authorized by the Act itself—shew that the plaintiff is not bound to pay this assessment. The rules which I have set forth above contemplate two classes of cases, where water is used with sanction applied for and granted and water is used without such sanction. The present case does not fall within the first class where the cess payable is ascertained nor within the second class which refers to unauthorised use of water. The Tashildar is the person to sanction the application for water, but an officer to whom he is subordinate, the Deputy Collector had issued orders, under which water had to be supplied to the plaintiff, and when the Tashildar on one occasion collected a water-cess, the District Collector directed a refund. It cannot be said that there was any unauthorised use of water for which a 'penal' charge can be levied.

As I have already pointed out, it is unnecessary to make applications for water every year, once the application is granted until the order granting it is cancelled.

Every year's demand has to be ascertained within the year itself and among the objects of the *jamabandi* is stated to be the careful inspection of the cultivation, the consideration of all claims to remission, and the collection of all kists as they fall due. If the Collector had the power to declare, in 1903, that the land is liable to pay water-cess, his predecessor had also the power, it appears to me, to decide that such land is not liable to pay the cess. The Collector, in 1903, might have cancelled the orders issued before just in the same way as the Collector who passed the order in 1895 could have cancelled it himself, as there is no law preventing him from doing so. But until the order is cancelled by himself or by a superior authority there is no reason why those interested should not be bound thereby.

I am, therefore, of opinion that the claim of the Collector to impose assessment on the lands for the ten faslis in question

cannot be sustained. As to the fasli 1312, as the Collector's order was in force till it was cancelled and it was alleged that no water was taken during the rest of the fasli, the claim to impose assessment during that year also cannot be sustained. The plaintiff is entitled to a refund with interest at 6 p.c. I accordingly agree to the decree suggested by my Lord Chief Justice.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Anivillah Sundararamaya .. .. Appellant*

vs.

Cherla Seethamma and others .. .. Respondents.

Hindu Law—Joint family—Father's power of alienation—Gift to daughter.

Held that a gift of 8 acres of ancestral land by a Hindu father to his daughter after marriage when the family was possessed of 200 acres of land was valid. [*Churamon Sahu* v. *Gopi Sahu*[1]; *Ramaswamy Aiyar* v. *Vengudu-swami Aiyar*[2]; *Kudutumma* v. *Narasimhacharyulu*[3]; *Kamakshi Ammal* v. *Chakrapani Chettiar*[4], referred to.]

Second appeal against the decree of the Subordinate Judge's Court of Kristna at Ellore in A. S. No. 18 of 1908, presented against the decree of the Court of the District Munsif of Tanuku in O. S. No. 56 of 1906.

The Advocate-General (*P. S. Sivaswami Aiyar*) for appellant.

P. Narayanamurthi for 1st respondent.

V. Ramesam for 6th to 8th respondents.

The Advocate General, for the plaintiff-appellant, contended that the gift was invalid. Even if the gift was made at the time of the marriage it would be invalid. *Kudutumma* v. *Narasimhacharyulu*[3] is against me. But it was conceded in that case by the vakil that the gift would be valid if it had been made at the time of the marriage. In *Ramaswami Aiyar* v. *Venguduswami Aiyar*[2] the property gifted was very small. Gift of land at the time of the marriage to a daughter is only a *kamya* or optional act but not a *nitya* or obligatory act. Hence it is not binding on the son. As for अवश्यं कर्तव्याणि or those which should be necessarily done

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*S. A. No. 572 of 1909. 23rd March 1911.

1. (1909) I. L. R. 37 C. 1.
2. (1898) I. L. R. 22 M. 113.
3. (1907) 17 M. L. J. 528.
4. (1907) I. L. R. 30 M. 452.

Anivillah Sundararamaya v. Chella Seethamma.

vide Parthasarathy Misra's *Nyaya Ratnamala*, pp. 413-414; *Samskara Ratnamala*, p. 549 (Part I); *Danamayukha*, p. 135, ll. 10 and 11 (Benares Ed.); *Samskara Ratnamala*, p. 501 (Part I). These texts only contemplate a gift to a male. A woman cannot be the recipient of a gift to confer spiritual bliss on a person. They show that a gift of immoveable property to the bridegroom is not an obligatory act on the person who gives a girl in marriage. *A fortiori* there can be no obligatory gift of immoveable property to the girl. [*Krishnaswami Aiyar* J.—Though there is no text making it obligatory, the custom of the community may make it binding.] It should be shown to be the invariable custom at any rate usual for families of the same status to make gifts of immoveable property to girls.

The following texts were also referred to:—*Smrithi Chandrika*, Ch. IV, Ss. 26-36, dealing with the share of sisters on the occasion of the partition of brothers; *Aparark*a, Vol. II, p. 780; *Mitakshara*, Ch. S. 1, Pl. 27-29.

P. Narayana Murthi for 1st respondent:—The present case is stronger than *Kudutumma* v. *Narasimhacharyulu*[1], as it is the father that has given the property and not the brothers. A gift made to the son-in-law belongs also to the daughter—*vide* Ghose's *Hindu Law*, 2nd Edn., p. 313, Footnote. There is a text of Vyasa to that effect. See Ghose, p. 389, for translation; *vide* p. 360 also *vice versa*. A gift to the daughter would belong to the son-in-law. If it is proper to make gifts at the time of marriage it would be equally proper if made afterwards. Though the texts do not require gifts to be made to daughters at the time of marriage, if made they are not invalid. *Churamon Sahu* v. *Gopi Sahu*[2] referred to, where *Mookerji* J. approves of *Kudutamma* v. *Narasimhacharyulu*[1]; *Bachoo* v. *Mankuvarhai*[3].

S. Varadachariar, in reply, distinguished the case in *Churamon Sahu* v. *Gopi Sahu*[2] because there *Mookerji* J. establishes at considerable length that *Dwiragama* is a marriage. It shows that that justifies the gift.

[The case was again *re-argued owing to the resignation of the Hon. Mr. Justice Krishnaswami Aiyar*.—ED.]

1. (1907) 17 M.L.J. 528.
2. (1909) I.L.R. 37 C. 1.
3. (1907) I.L.R. 31 B. 373 (P. C.) p. 380.

Anivillah Sundara-ramaya v Cherla Seethamma.

T. R. Venkatarama Sastri for the *Advocate-General.*—The court below has decided the suit following the decision in *Kudutamma* v. *Narasimhacharyulu*[1]. There the vakil for the respondent conceded that such gifts are proper. *Ramaswami Aiyar* v. *Vengudusawmi Aiyar*[2] and *Churamon Sahu* v. *Gopi Sahu*[3] dealt with the power of the widow to make a gift of the family property. Even supposing it is proper, can a father, who has adult sons living, make such a gift without the consent of his sons ? If there are no coparceners, the father can make such a gift. The widow also can—Colebrook's *Mitakshara* : Ch. I, S. (i), Pl. 17, 29. The discussion there is about the right of sons in the property by birth. The texts come to this, namely, that the father can make a gift of moveables, &c. (not immoveables) in certain cases when there are coparceners. Pl. 29 has no application to the present case. The son is an adult member ; and his consent must have been obtained. If the son was under age the present purpose does not come under Pl. 29. Even from the religious point of view it is not an indispensable act of duty. So even if the father was the only capable member, he could not have made such a gift. Gifts are prescribed for maiden daughters and a share to unmarried sisters—Ch. I, S. (v). Pl. 9 ; Ch. I, S. (vii), Pl. 6, 9, 13 ; and *Mitakshara*, Ch. II., S. 10, p. 13 ; *Mayne*, S. 484, 7th Edn., p. 652. *Ramaswami Aiyar* v. *Vengudvswami Aiyar*[2] ; *Nataraja* v. *Venkatachella Pillai*[4] ; *Kumarasami* v. *Nanjappa Goundan*[5] ; *Kamakshiammal* v. *Chakrapani Chettiar*[6]; *Bachoo* v. *Mankuvarhai*[7] ; S. A. 1306 of 1907 ; ref. to. No custom has been set up and no evidence has been recorded.

P. Narayana Murthi, for 1st respondent contended that there is a finding that the gift was in pursuance of a promise made at the time of the marriage. The father can alienate property, whether ancestral, moveable or immoveable, for certain necessary and proper purposes—S. A. 1306 of 1907. If the father can make a gift the son cannot object. The son, on the death of his father, should provide for the marriage of his sister who is unmarried. There he is performing a duty—GHOSE, p. 313. Gifts

1. (1907) 17 M.L.J. 528.
2. (1898) I.L.R. 22 M. 113.
3. (1909) I.L.R. 37 C. 1.
4. (1901) 12 M.L.J. 93.
5. (1902) 13 M.L.J. 21
6. (1907) I.L.R. 30 M. 482.
7. (1904) I.L.R. 29 B. 51.

Anivillah Sundara-ramaya v. Cherla Seethamma.

to daughters are obligatory. Year after year gifts are made and ought tobe made to daughters. This is sanctioned by MADHAVIY'S *Dayavibagha* (Burnell's) pp., 40-41 citing a text of KATYAYANA. Such gifts can be consolidated. MADHAVIYA is an authority exclusively in South India—2 Montriou's Cases p. 505; *Ramaswami Aiyar* v. *Venguduswami Aiyar*[1]; *Churamon Sahu* v. *Gopi Sahu*[2]. Strang H and Vol. I, p. 172, *Sarasvati Vilasa* pp. 26-7 (Foulke's Edn.) ref. to.

The Court delivered the following

JUDGMENT.—The plaintiff and his father were members of an undivided family. The father made a gift of about eight acres of land which formed ancestral property to the first defendant, his daughter, in 1899. The father died in 1904, and the plaintiff sues to recover possession of the land given to the first defendant by his father, on the ground that the father was not competent to make a gift of joint family property. The family owned not less than 200 acres at the time of the gift.

The lower appellate court was of opinion that the plaintiff's father had intended at the time of her marriage to give some properties to the first defendant and as he was only carrying out that intention by making this gift, it is valid.

The marriage took place about forty years before the gift. There is no evidence that the father then had any intention to give any property to the first defendant. We are, therfore, unable to accept that finding. Is the gift then valid?

The Hindu law texts fully support the proposition that it is competent to a father to make gifts of jewels or other ancestral moveable property to his daughter on her marriage. In a learned judgment it has been held by the High Court of Calcutta that a widow may make a valid gift of a reasonable portion of even the immoveable property of her husband to her daughter on the occasion of the performance of certain ceremonies which are usual when the wife on the attainment of puberty leaves her parental home for that of her husband—*Churamon Sahu* v. *Gopi Sahu*[2]. That a gift of land to the son-in-law on the occasion of his marriage is an act warranted by the authorities and customary

1. (1898) I.L.R. 22 M. 113.   2. (1909) I.L.R. 37 C. 1.

in this presidency was held by the Madras High Court in *Ramasawmy Iyer* v. *Vengudusawmi Iyer* [1].

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We see no reason to differ from these two decisions. The father or the widow is not bound to give any property. There may be no legal but only a moral obligation. It is also true that in the case before us the father did not make any gift and discharge that moral obligation at the time of the marriage. But it is difficult to see why the moral obligation does not sustain a gift because it was not made to the daughter at the time of marriage, but only some time later. The moral obligation of the plaintiff's father continued in force till it was discharged by the gift in 1899. This question was raised in the case of *Kuduttamma* v. *Narasimhacharyulu.* [2]. There, after the death of the father, the brother made a gift of certain joint family property to his sister, who was married during the lifetime of the father, who gave her or his husband no property at the time of marriage. It was found there that the father had expressed no intention at any time of making any gift. He had made no promise either. It was held, however, that there was a strong moral obligation on the father to make a gift out of the joint family property on the occasion of the marriage either to the daughter or son-in-law as a provision for them and the gift, which in the circumstances of the case was an eminently reasonable one, was not in excess of the powers of the brother though he was not even the managing member at the time of her marrriage. This case was followed in *Churamon Sahu* v. *Gopi Sahu* [3]. It is directly in point and is consistent with principle. It was argued that the case of *Ramasawmy Aiyer* v. *Vengudusami Iyer* [1] refers only to a gift to a son-in-law and there is no authority to support gifts to daughters. But the texts relating to gifts on marriage show that they are made to the bride, and regard being had to the fact that these gifts are intended as a provision for the married couple and are made by the father, probably in lieu of her share of the family property, when by marriage she is leaving it for another family, it seems more appropriate that such gifts should be made in her name than that of her husband. In both cases, *Kudutamma* v.

1. (1898) I. L. R. 22 M. 113. 2. (1907) 17 M. L. J. 528.

3. (1909) I. L. R. 37 C. 1.

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Narasimhacharyulu[1] and *Churamon Sahu* v. *Gopi Sahu*[2], the gifts were made to the women.

It was also contended that a father is entitled to give only jewels and other moveable property, and the Hindu law texts do not justify any gift of land on marriage occasions. In all the three cases we have referred to, the gifts were of immovable property and so far as this presidency is concerned, it is enough to say that gift of land has been common for more than a century and that the payment of money when paid is in lieu of land. See *Ramasawmi Aiyar* v. *Vengudusawmi Aiyar* [3]. When the necessity of the gifts is recognized it seems unreasonable in these days to make its validity depend upon the nature of the property, upon the question whether it is moveable or immoveable. It is not suggested that the alienation in question is unreasonable as in *Kamakshi Ammal* v. *Chakrapani Chettiar* [4]. In the case of *Churaman Sahu* v. *Gopi Sahu*[2], the value of the property given away was more than a third of the father's property. Here, if the father had enforced a partition, he would have admittedly got not less than one hundred acres and it is impossible to say that a gift of eight acres is unreasonable.

The second appeal is dismissed with costs.

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1. (1907) 17 M.L.J. 528.
2. (1909) I.L.R. 37 C. 1.
3. (1898) I.L.R. 22 M. 113.
4. (1907) I. L. R. 30 M. 452.

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[The case having been heard first by *Munro* and *Krishnaswami Iyer* JJ, the following was the opinion of Mr. Justice *V. Krishnaswami Aiyar*, but as he ceased to be a Judge before delivering the same, the case was heard anew by *Munro* and *Sankaran Nair* JJ. :—We print below the judgment which the Hon'ble Mr. Justice *Krishnaswami Iyer* had written before intended to deliver, with his kind permission—Ed.]

The question in this case relates to the validity of a gift of a small portion of joint family property by the plaintiff's father to his daughter, the 1st defendant. We cannot accept the Sub-Judge's finding that the gift had any connection with the marriage of the 1st defendant which took place more than thirty years before it. The Subordinate Judge's statement that the father had intended to make a gift at the time of the marriage and made the gift in pursuance of such intention is entirely beside the point. There was no promise to the daughter of any gift of property, and the gift, which only took place in 1899, long after the marriage, must be judged without reference to the marriage. All that we have is that out of two hundred acres owned by the family eight acres were given to the 1st defendant.

It has been decided by a Full Bench of this court that a gift by a father of his undivided share is not binding upon the son—*Baba* v. *Timma* [1]. It has further been held that it is immaterial whether the donee is a relation or a stranger—*Ponnusami* v. *Thatha*[2] and *Virayya* v. *Hanumantha*[3]. But a distinction has been drawn as regards a gift to the daughter's husband of a small portion of joint family property at the time of marriage or in connection with it—*Kudutumma* v. *Narasimhacharyulu.*[4] In *Churaman Sahu* v. *Gopi Sahu*[5] the Calcutta High Court upheld a gift of family property against an undivided son to the daughter's husband at the time of what is called the "Dwiragamana" ceremony. A similar principle was laid down in *Ramasawmi Aiyar* v. *Vengudusawmi Aiyar*[6] upholding a gift by the widow, who had inherited her husband's property, of a small portion of that property to the daughter's husband at the time of marriage. There are two outstanding features in these cases:—(1) that the

1. (1883) I. L. R. 7 M. 357.
2. (1886) I.L.R. 9 M. 373.
3. (1891) I.L.R. 14 M. 459.
4. (1907) 17 M.L.J. 528.
5. (1909) I.L.R. 37 C. 1.
6. (1898) I. L. R. 22 M. 113.

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property given bore a small proportion to the entire family property and (2) that the gift was to the son-in-law in connection with the marriage of the daughter. The decisions in *Nataraja Pillai* v. *Venkatachella Pillai*[1] and *Kamakshi Ammal* v. *Chakrapani Chettiar*[2] are not in conflict with the principle of the above cases. As regards the first of these two cases, it may be pointed out that the court decided it on the ground that no authority was cited in support of a gift of joint family property to the daughter or her husband. Moreover, it does not appear that the property bore only a small proportion to the entire family property. The gift was held invalid in *Kamakshi Ammal* v. *Chakrapani Chettiar*[2] on the ground that the property given was a considerable portion of the family property. Holding, therefore, that the authority of *Ramasawmi Aiyar* v. *Vengudusami Aiyar*[3], *Kudutumma* v. *Narasimhacharyulu*[4] and *Churaman Sahu* v. *Gopi Sahu*[5] remains unaffected, we have still to see whether the gift in the present case, which was in no way connected with the marriage, can be upheld. The learned Advocate-General who appeared for the appellant seemed to impugn the correctness of the decisions in *Kudutamma* v. *Narasimhacharyulu*[4] and *Churaman Sahu* v. *Gopi Sahu*[5] and differentiated them also from the present case. He argued that gifts to a daughter, as distinguished from a daughter's husband, are nowhere prescribed; that even if they are allowable, they are not obligatory as there is no penalty prescribed for failure to make the gift, and that *kamya* or non-obligatory acts of disposition of family property are not binding on undivided sons under Placita 27-29 of Mitakshara, Ch. I, S. 1. He referred to the *Samskara Rathnamala*, pp. 501 and 549, and the *Dana Mayukha*, p. 185, to show that land is not a *vyvahika* gift prescribed, but only a *kamya*, a disposition according to the pleasure and capacity of the giver.

The texts referred to as regards gifts on occasions of marriage may at once be dismissed from consideration as the gift in question in the present case was not a *vyvahika* disposition. Though the provision of a penalty for the breach of a rule is proof of its obligatory character, it is also a well-known principle

1. (1901) 12 M. L. J. 93.
2. (1907) I.L.R. 30 M. 452.
3. (1898) I.L.R. 22 M. 113.
4. (1907) 17 M.L.J. 528.
5. (1909) I.L.R. 37 C. 1.

of the Hindu *Dharma Sastra* that a *pratyavaya* or penalty is to be imported where the rule itself is in terms obligatory.

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It is necessary, however, to examine at some length the texts of the Hindu Law, some of which are still untranslated, in order to arrive at the true position of gifts under that system. The great importance of gifts in the case of the house-holder had been recognised in *Vedic* texts. In *Taithiriya Samhita*, Kanda II, Prapataka VI, Anuvaka 62, it is stated ; " All creatures praise gifts. Nothing is too difficult to achieve by means of gifts Therefore all take delight in gifts." In similar terms runs the statement in the *Taithiriya Aranyaka*, Prapataka X, Anuvaka 63. "Gifts are presents in sacrifices. All creatures live with the help of donors. Enemies are turned aside by gift. They become friends by gift. Everything finds its stay in gift. Therefore do they speak of gift as great." Other passages are cited at p. 176 of Part I of Vol. I of MADHAVA'S Commentary on the *Parasara Smrithi*. In MANU, Ch. X, verses 75 and 79, gifts are prescribed as among the Dharmas of Brahmins, Kshatriyas and Vaisyas. In MADHAVA'S Commentary on the *Parasara Smrithi*, pp. 145 and 454, the same rule is laid down with reference to the *Dharma* or duty of making gifts. In his commentary on YAGNAVALKYA'S *Acharadhyaya*, verse 203, VIGNANESWARA writes that "one should make gifts of cows, land, etc. every day according to his ability and in a proper manner without detriment to the family, to a suitable person." Verse 201 of YAGNAVALKYA'S *Acharadhyaya* mentions land as among the objects of gift. APARARKA in his Commentary on verse 201 of YAGNAVALKYA'S *Acharadhyaya* states that gifts of cows and lands should be imperatively made to parents, etc. At pp. 182 and 183 of MADHAVA on the *Parasara Smrithi*, there is an exposition of obligatory gifts. A gift that should be made every day is called *Ajasrikam*. *It must, therefore, be deemed to be incorrect to say that gifts cannot be obligatory, and the failure to make them can involve no penal consequences.*

There are special texts which prescribe gifts to a daughter. They are a sufficient answer to the learned Advocate-General's argument that sanction of a gift to the son-in-law cannot operate as an injunction to make gifts to the daughter. APA-

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RARKA in his Commentary at p. 282 cites a text of VYASA which may be translated thus:—"A gift to the father is hundred-fold and that to the mother is said to be thousand-fold. The gift to the daughter is of endless (merit) and the merit of the gift to the brother never dies." The same text is cited by MADHAVA at p. 186 of his Commentary on the *Parasara Smrithi*.

The power of the father to deal with self-acquired immoveable property when there are sons is restricted by certain texts of the *Mitakshara*. But the Privy Council have decided, in view to other conflicting passages, that there is nothing in the circumstances of the self-acqusition being immoveable to prevent its free disposition by the acquirer. See *Rao Balwant Singh* v. *Rani Kishori*[1]. Having referred to this decision which has set the matter at rest, all the texts that may be cited in support of the son's right of interdiction against the disposition by the father of immoveable property especially, we must treat as no longer of any binding authority. It has also been decided by the Privy Council in *Bachoo* v *Mankuvar Bhai*[2] that a gift by the father of a portion of the income of common family property is binding upon the sons. So far as the sons are concerned, the father's debts, which are neither illegal nor immoral, are binding upon them so as to affect their share of the undivided property. In addition to these rules laid down by the decided cases, there are certain texts to be borne in mind as regards a father's power. VYASA is cited in the *Madhaviya*, pp.41-42, and in the *Vyavahara Mayukha*, p. 93, as authorising the gift by a father of even immoveable property to female relatives. It is not, of course, expressly stated that this may be done so as to affect the undivided interest of the son. In commenting on verse 175 of YAGNAVALKYA'S *Vyavaharadhyaya*, the *Mitakshara* says that a person should not give what is common property. The text also goes on to say that a wife or son should not be given though they are the property of the husband or father. VIGNANESWARA also prohibits the gift of the entire property when there is issue. These passages, which have remained untranslated, are a strong indication that so far as the son is concerned, it is only when the father makes a gift of everything belonging to the family that a son,

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1. (1898) I. L. R. 20A. 267 (P.C.) 2. (1907) I.L.R. 31 B. 373.

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(being himself according to the archaic law the property of the father) has a right of interdiction. The express statement in the text of YAGNAVALKYA is "that the father may give without detriment to the family." The same important pronouncement is made by APARARKA. At p 404 he states, citing a text of *Daksha*, that "what is common should not be given nor everything when there is issue." There are, no doubt, references in the same context to occasions of distress for gifts and sales. At pp. 772 and 780, in his comments on the same Sloka of YAGNAVALKYA, No.175, the commentator points out that everything should not be given when there is issue, though it may be after division. The general rule as to what is common not being capable of gift does not appear to me to prohibit a gift by the father as against the son when the gift is made without detriment to the family. In MADHAVA's commentary, at p. 189, the text of YAGNAVALKYA is quoted as prohibiting a gift by the father when there is issue. A text of *Brihaspati* and one from the *Siva Dharma* are also quoted in support of the view that a gift may be made by the father without detriment to the family. The statement in the *Mitakshara*, Ch. I, Sec. 5, pl. 9 and 10, that the son has a right of interdiction against the father's donation must be reconciled with the statement of the *Mitakshara* in the commentary on Sloka 175 of YAGNAVALKYA already referred to in the light of the explanation suggested by the *Subodhini* that it is probably intended to prevent dissipation of the property by the father The texts relating to the daughters being entitled to the fourth share of a son at a partition, though treated as obsolete, and those relating to a species of *stridhanam* given after marriage though they do not postulate the existence of a son at the time of the gift, may be treated as indications of the principle that a gift by the father of a portion of the undivided family property to the daughter is not necessarily opposed to the spirit of the Hindu Law. They are set out and discussed in the learned judgment in *Ramasawmy Aiyar* v. *Venguduswami Aiyar*[1]. It seems to us that there is abundant textual authority for the view that gifts of property, moveable or immoveable, and common to the father and the son, to the daughter are treated as obligatory, and if they do not exceed a small proportion having regard to the provision that the gift should not cause detriment to the family, are

1. (1898) I.L.R. 22 M. 113.

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valid and must be upheld though it may be another question, whether the gift of a portion of the joint family property against the right of a co-parcener other than the son, grandson and great-grandson is sanctioned by the texts of the Hindu Law. The obvious trend of the decision of the Judicial Committee in *Bachoo* v. *Mankuvar Bhai*[2] is in the same direction. I would therefore uphold the decree of the Subordinate Judge and dismiss the second appeal with costs.

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2. (1907) I.L.R. 31 B. 373 at p. 380.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Kondi Ramasawmy Chetty .. Appellant*
v. (*Plaintiff*)
Neli Hari Krishna Chettyar & others .. Respondents
(*Defendants*).

Ramaswam Chetty *v.* HariKrishn Chettyar.

Limitation Act, Arts. 62, 29, 49, 120—*Suit by assignee of decree against attaching creditor for refund of assets realized,*

A suit by the assignee of a decree against the attaching creditor of a decree for recovery of money received by the latter in execution when the assignee himself was not in a position to execute the decree, his claim petition and the subsequent suit having stood dismissed at the time of realization, is governed by Art. 120 and not by Art. 29 or 59 or even by Art. 62. In order that Art. 62 may apply, the money must have been actually or constructively received by the defendants for the plaintiff's use.

The facts of the case are briefly these. Plaintiff was the assignee from the decree-holder, one Ramakrishna Chetty, in O. S. 481 of 1893, and his assignment was recognised on 1-3-98. The 1st defendant in the present suit attached the said decree in execution of the decree in O. S. 243 of 1893 which he had obtained against the said Ramakrishna, and the present plaintiff put in a claim petition under S. 278 which claim was dismissed on 12-2-01. Then the present plaintiff brought a suit, O. S. 217 of 1901, under S. 283, C. P. C., which was dismissed by the first court on 31-12-02. This judgment, however, was reversed on appeal on 14-12-03. The 1st defendant on 29-1-03 and on various dates up to 6-11-03 realised the sums due under the original decree in O. S 8 of 1893 and he and the 2nd defendant, who was another decree-holder against the said Ramakrishna, shared the sums between them. The plaintiff brings the present suit on 9-1-08 to recover the sums thus realised by defendants 1 and 2 as being his money, his right to the decree having been recognised by the appellate court on 14-12-03. The defendants pleaded that the suit was barred by limitation under Art. 29 or 62 of the 2nd schedule to the Limitation Act. The 1st court allowed the plaintiff's claim, holding that Art. 120 was applicable but the District Judge, on appeal, reversed it on the ground that Art. 62 applied; and as such the suit was barred. The plaintiff appealed to the High Court.

*S. A. No. 895 of 1909. 13th February, 1911.

Ramasawmi Chetty v. HariKrishna Chettyar.

S. Muthiah Mudaliar, for plaintiff, contended that Art. 120 applies, at least against 2nd defendant, and he relied on *Narayana* v. *Narayana*[1]; *Krishnan* v. *Perachan*[2].

T. Rangachariar, for the respondents, contended that the article applicable is Art. 29 of the Limitation Act and not any other. He distinguished the cases cited for the appellant.

The Court delivered the following

JUDGMENT:—The question is whether this suit is barred by limitation. The Subordinate Judge has held that Art. 62 of Sch. II of the Limitation Act, 1877, applies and that the suit is barred as it was brought more than three years after the defendants realised the decree amount. We do not think that Art. 62 applies. For that article to be applicable the money realised by the defendants must have been actually or constructively received by the defendants for the plaintiff's use. But seeing that at the time the money was realised the plaintiff was debarred from collecting the money himself by reason of the dismissal of the suit, we do not think the money can, in any sense, be said to have been received by the defendant for the plaintiff's use. See *Narayana* v. *Narayana*[1]. We do not think that either Art. 29 or Art. 49 applies to a case like the present, and no other article is suggested. In these circumstances, we have to fall back upon Art. 120, and under that article the suit is in time. We, therefore, reverse the decree of the Subordinate Judge and restore the decree of the District Munsif with costs in this and in the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Rangathayi Ammal	.. Appellant*
v.	(*Plaintiff*)
Neli Munusawmy Chetty	.. Respondent
	(*Defendant*).

Hindu Law—Widow—Maintenance—Wrongful withholding—Arrears—Costs.

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* A. No. 194 of 1908. 15th March, 1911.

1. (1889) I. L. R. 13 M. 437. 2. (1892) I. L. R. 15 M. 382.

Rangathayi Ammal v. Munusawmi Chetty.

What a Hindu widow is entitled to for her maintenance is an amount which in the opinion of the court would be required to enable her to live comfortably according to the standard of comfort obtaining in the community to which she belongs, regard being had also to the extent of property out of which she is entitled to maintenance. No hard and fast rule can be laid down that she is entitled to a particular fraction of the income, although she can in no event claim more than the income of the share of the estate which her husband would have been entitled to, if a division had taken place during his lifetime. A wrongful withholding in the sense of a morally improper withholding is not necessary to entitle a widow to arrears of maintenance; nor is demand essential for the purpose. She may no doubt waive her right, but waiver cannot be necessarily inferred in every case from the fact of separate residence alone.

Arrears will be refused only in cases when the person liable to make the payment had justifiable grounds for inferring "that the claim was abandoned" and had in consequence not set aside any portion of his annual income to meet such claim. [*Raja Yerralagadda Mallikarjuna Prasada Naidu* v. *Rajah Yerralagadda Durga Prasada Naidu*[1] referred to.]

Where a widow was removed by her relations after her husband's death from her husband's home for the sake of her protection: *Held* that the circumstances of the case did not establish waiver.

In a suit for maintenance the defendant need not be allowed proportionate costs on the amount disallowed to the plaintiff unless the claim be an exorbitant one. The object of such a suit is to ascertain the liability of the family estates, and the costs of doing so should ordinarily come out of the estate.

Appeal from the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 45 of 1907.

K. Ramachendra Iyer for appellant.

N. R. K. Tatachariar for respondent.

The Court delivered the following

JUDGMENT:—The main question for decision is what is the proper rate of maintenance to be awarded to the plaintiff against the minor defendant, her step-son. The Subordinate Judge finds that the family property in the hands of the defendant would be worth Rs. 19,500 and that the annual income thereof might be taken to be Rs. 1,710. He awards maintenance to the plaintiff at Rs. 15 per mensem, being of opinion that one-sixth of the income of the estate or one-third of the income of her husband's share would be a proper allotment to her. He made no award for the plaintiff's residence or any extraordinary

1. (1901) I. L. R. 24 M. 147.

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expenses. The learned vakil for the appellant objects to the principle adopted by the lower court and further offers to show that the value of the family property and the income derivable therefrom would be considerably more than what the Subordinate Judge has found them to be. We need hardly point out that what a Hindu widow is entitled to for her maintenance is an amount which, in the opinion of the court, would be required to enable her to live comfortably according to the standard of comfort obtaining in the community to which she belongs, regard being had also to the extent of the property out of which she is entitled to maintenance. No hard and fast rule can be laid down that she is entitled to a particular fraction of the income, although she could, in no event, claim more than the income of the share of the estate which her husband would have been entitled to, if a division had taken place during his lifetime. We do not consider it necessary to investigate the question of the exact value of the property in the defendant's possession. Having regard to the social status of the family and to the other circumstances of the case, we think that a sum of Rupees twenty (Rs. 20) a month would be a proper and sufficient amount to be allowed to the plaintiff. This amount will include her claim for house rent. We direct that Rs. 240 per annum be substituted in the decree of the lower court for Rs. 180 and that the necessary consequential alterations be also made therein. The plaintiff has objected to the refusal of the lower court to decree arrears of maintenance from the date of her husband's death up to the 10th February 1909, when she made a written demand for maintenance. The Subordinate Judge says that till that date there was no wrongful withholding of maintenance. A wrongful withholding is not necessary to entitle a widow to arrears of maintenance, if by that expression is meant, that the withholding should be morally improper. No demand is necessary to give a right to receive arrears. Her status as the widow of one of the members of a joint family holding property in common is sufficient to entitle her to receive maintenance from the date of her husband's death. She may no doubt by living with her parents or otherwise, impliedly waive her right to be maintained by her husband's relations during the time that she lives away from them, but waiver cannot be necessarily inferred in every case from the fact of separate residence alone. The true

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principle to be applied is laid down in *Raja Yerralagadda Mallikarjuna Prasada Nayudu* v. *Raja Yerrrlagadda Durga Prasada Nayudu*[1] by the Privy Council that arrears will be refused only in cases where the person liable to make the payment had justifiable grounds for inferring "that the claim was abandoned" and had in consequence not set aside any portion of his annual income to meet such a claim. In the present case the plaintiff was removed by her relations from her husband's home after his death on the ground that it was necessary to do so for her protection. The parties have been quarrelling ever since in the courts. The defendant had no valid grounds for supposing that the claim for maintenance would not be pressed. We must, therefore, allow the claim for arrears from the date of the plaintiff's husband's death at Rs 180 a year. The plaintiff will receive costs from the defendant on the relief awarded to her both in this court and in the court below. We do not think that in a suit for maintenance the defendant should be allowed proportionate costs on the amount disallowed to the plaintiff unless the claim be an exorbitant one. The object of such a suit is to ascertain the liability of the family estate and the costs of doing so should ordinarily come out of the estate. The defendant, in this case, is not entitled to any cost and the plaintiff is entitled to her's in either of the courts.

The memorandum of objections is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Raja Kumara Venkata Perumal Raja Bahadur, minor, by Mr. W. A. Varadachariar.. Appellant* (*Plaintiff*)

v.

Thatha Ramaswmi Chetty & others .. Respondents (*Defendants*).

C. P. C. (Act XIV of 1882) *Ss.* 13, 257-*A.—Compromise decree, nature of —Error of law no ground of attack—S.* 257-*A, scope and effect of—Waiver—Public policy.*

S. 13, C. P. C. (1882), as such, is not applicable to compromise decrees. The basis of a compromise decree is a contract between the parties to

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*A. No. 193 of 1907. 13th February, 1911.

1. (1901) I. L. R. 24 M. 147.

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the litigation, and though the principles applicable to contracts may have to be considered in determining the rules of estoppel applicable to such decree, yet it cannot be regarded as a mere contract but stands on a much higher footing. Indeed in certain respects compromise decrees are even on a higher footing in certain matters as regards the estoppel they create than decrees by courts passed on contest. A compromise decree, unlike decrees passed on contest, cannot be impeached on the ground of error of law.

The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise must depend on the answers to the following questions:—Did the parties decide for themselves the particular matter in dispute by the compromise? Was the matter expressly embodied in the decree of the court passed on the compromise, or was it directly involved in, or was it the basis of what was embodied in the decree? For settling this point, it would be legitimate, and sometimes necessary, to look into the pleadings between the parties in the suit terminated by the compromise decree. Even if the compromise was made before the defendant put in his written statement, it would be still proper to look at the allegations in the plaint to understand the terms of the compromise. It is, no doubt, open to the parties to agree to terminate a suit in a particular manner without any questions raised by the plaintiff or put in issue between the parties being determined, but whether the compromise proceeded on such an understanding is a matter of construction in each case, and no hard-and-fast rule applicable to all cases can be laid down. Whatever is necessarily involved in the decree pronounced cannot be reopened by either party To this extent Expl. II to S. 13, C.P.C. (1882), is applicable to compromise decrees.

The prohibition contained in S. 257,—A., C.P.C. (1882), is not based on any rule of public policy rendering agreements in contravention of the section illegal. It is merely unenforceable in execution proceedings or by a fresh suit as the case may be. The rule is merely enacted for the benefit of the individual judgment-debtor and one reason for the rule was probably that litigant parties should not have the right to interfere with the decrees of courts, a reason which would probably indicate that the rule is applicable only to execution proceedings, and it is open to a judgment-debtor to waive the benefit of the rule.

Distinction between compromise decrees and decrees by default and by confession of judgment pointed out.

Appeal from the decree of the Court of the Subordinate Judge of North Arcot in O. S. No. 3 of 1906.

The facts are—Two decrees were obtained against the plaintiff in the High Court on its Original Side by one Venkataraghava Chetti the predecessor in title of the defendants. The decrees were transferred to the District Court of North Arcot for execution. Plaintiff agreed to pay certain sums of money in consideration of the decree-holder postponing the date of sale. These

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agreements were sanctioned by the District Court. Four mortgages were executed by plaintiff in favour of the decree-holder fore the decree debts. Two of these were sought to be set aside on the ground that the mortgages were void as contravening the provisions of the 2nd clause of S. 257-A of C. P. C. (Act XIV of 1882). One of the grounds of defence was that the plaintiff's claim was barred by *res judicata* by virtue of the compromise decree in a suit of 1893 brought to recover Rs. 3,000 and odd on the footing of these mortgages.

L. A. Govindaraghava Aiyar for appellants :—Compromise decree operates as *res judicata* only as to the actual claim adjudicated. In other words, it is only the object-matter that is barred. *Arunachellam Chetty* v. *Mayyapa Chetty*[1] has no bearing on the question. *Ahmed* v. *Moidin*[2] is a case under the Oaths Act. *In re South American and Mexican Coy*[3] is distinguishable. *Great North West Central Railway Co.* v. *Charlebois*[4] and *Ramaswami Naik* v. *Ramaswami Chetty*[5] are in point. [*Sundara Aiyar* J.—In both the cases the agreements were opposed to public policy.] *Krishnabai* v. *Hari Govind*[6]; *Rajendranath Ghose* v. *Tarangini Dassi*[7]; *Sarkum Abu Torab Waheb* v. *Rahaman Buksh*[8]; *Goucher* v. *Clayton*[9]; *Surjiram Marwari* v. *Barham Deo Persad*[10].

The cases go to show that though the object matter of the suit may be barred the issues, though necessary for the determination of the case, are not barred.

For a question to be *res judicata* the issue decided in the former suit should be clear and certain—*Koyyana Chittamma* v. *Dossy Gavaramma*[11]; *Bubal* v. *Tikeram*[12]. In the present case the issues that should be taken to have been decided in the former suit are not certain.

A question will be *res judicata* if it is one of mixed law and fact—*Birhnu Priya Chowdhurain* v. *Baba Sundari Debya*[13]. The question in the present case is not one of mixed law and fact

1. (1897) I.L.R. 21 M. 91.
2. (1901) I.L. R. 24 M. 444.
3. (1895) L. R. I. Ch. 37.
4. (1899) L. R. A. C. 114.
5. (1906) I. L. R. 30 M. 255.
6. (1906) I. L. R. 31 B. 15 (F. B.)
7. (1904) 1 C. L. J. 248.
8. (1896) I. L. R. 24 C. 83.
9. (1905) 34 L. J. Ch. 239.
10. (1905) 1 C. L. J. 337 at 352.
11. (1905) I. L. R. 29 M. 225.
12. (1881) I. L. R. 4 A. 11.
13. (1901) I. L. R. 28 C. 318.

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—for to constitute a question to be one of mixed law and fact both the law and the fact in the former suit should be uncertain.

K. Srinivasa Aiyangar for respondents :—The question is covered by *Minalal Shadiran* v. *Kharsetji* [1] and the principle underlying it. In this case the matter has been decided in the suit of 1893 and it cannot be reagitated. The decision in the previous case necessarily implies that the documents are valid. It is submitted that the express words of S 13, C.P.C., will apply to the case of consent decrees—BLACK on *Judgments*, Vol. I, para 78; *Hukdar Syed Bacha Sahib* v. *Kampanna Pillai* [2]; *Minalal Shadiran* v. *Kharsetji* [3] per *Aston* J. *Mathers* v. *Green*[4] is distinguishable because in that case the patent infringed was practically a new one, the original patent having expired. On the effect of consent judgments *vide* American Cyclopædia, Vol. 23, p. 729.

L. A. Govindaraghava Aiyar replied.

The Court delivered the following

JUDGMENT.—The suit in this case was instituted for the recovery of a sum of Rs. 10,929-10-0 with interest which the plaintiff alleges to be due to him from the defendants from the 27th April, 1900. The plaintiff's case is that the villages mentioned in Schedules A and B appended to the plaint were mortgaged by the plaintiff to the defendants' father, Subbi Chetty, on the 21st of May 1890 under two documents for a sum of Rs. 100,000 and Rs. 51,500, respectively; that the first of these mortgage-deeds, filed as Exhibit A in the suit, was void and unenforceable, being contrary to S. 257-A of the Code of Civil Procedure, and that the second deed, Exhibit B, was also void for the same reason with respect to Rs. 31,343-9-1 out of the total sum of Rs. 51,500; that the villages mortgaged under the two deeds passed into the possession of the mortgagee and continued to remain in his possession till July 1900, when they were taken possession of by the Court of Wards when the superintendence and management of the plaintiff's zemindari of Karvetnagar were assumed by it, and that the villages remained in the Court of Wards' possession till 1905, when the Court of Wards released its superintendence and handed over possession of the villages to the mortgagee. The plaintiff claims to be entitled

1. (1895) L.R. I. Ch. 37.
2. (1910) 21 M.L.J. 449.
3. (1906) I. L. R. 30 B. 395.
4. (1865) 34 L. J. Ch. 298.

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to recover the entire profits of the villages in Schedule A and included in the mortgage-deed, Exhibit A. He claims also to be entitled to an account from the defendants of the incomes of the villages included in Exhibit B on the footing that the amount due to the defendants under Exhibit B was only Rs. 20,156-14-3 and estimates the amount that would be due to the plaintiff on such account being taken at Rs. 2,935-9-6.

Subbi Chetty had obtained two decrees against the plaintiff in Civil Suits Nos. 197 of 1882 and 117 of 1883 on the Original Side of this Court for large sums of money. These decrees were transferred for execution to the District Court of North Arcot. He took out execution of the decrees in the District Court, and while the execution proceedings were pending, the parties made an adjustment of all their disputes, and the result was the execution of four mortgage bonds by the plaintiff to Subbi Chetti, two of which are the bonds, Exhibits A and B, now sued on. The total amount found to be due to Subbi Chetti was Rs. 1,79,000 in which was included about Rs. 20,000 and odd on other accounts and the remainder was the amount due on account of the two decrees. The execution proceedings had previously been adjourned on several occasions in both cases, and the judgment-debtor had agreed, in consideration of the decree-holder consenting to the adjournments and giving him time for payment, to pay enhanced interest; the sanction of the District Court had been obtained by the parties for the agreements to pay enhanced interest but not the sanction of the High Court as required by S. 257-A of the Civil Procedure Code. The total amount thus added to the amount of the decree in C. S. No. 197 was about Rs. 40,000 and Rs. 4,000 was added to the amount due under C. S. No. 117. The four mortgage bonds were all executed on the same day and evidently represented a single transaction. Each of them refers to the amounts secured under the other bonds and purports to be for the remaining amount out of the total found due by the plaintiff. Exhibits A and B are both usufructuary mortgage-deeds. The period fixed for redemption was 15 years and the mortgagee was entitled to possession during the term, the entire usufruct being appropriated towards the interest due on the bonds. The plaint alleges that this court which passed the decrees in the two

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Suits Nos. 197 of 1882 and 117 of 1883 not having sanctioned the arrangements made by the parties "for the payment of a larger sum than was legally due" under them, the mortgage Exhibit A and so much of the mortgage Exhibit B as went in satisfacton of the decree in C. S. No. 197 are void in law, and he institutes this suit on the footing that the defendants obtained and kept possession of the properties included in Exhibit A without any title at all and of those included in Exhibit B as a mortgagee only for the sum of Rs. 20,000 and odd. The defendants denied that the mortgage-deeds secured the payment of any sum in excess of the amounts legally due under the two decrees, and contended *inter alia* that the bonds were, at any rate, valid for the amounts really due under the decrees and that they had in any event acquired by 12 years adverse possession a title to hold the properties comprised in the mortgages for the amounts secured by them respectively. They further pleaded that the question relating to the validity of the mortgage-deeds was *res judicata* by reason of the decree in O. S. No. 19 of 1893 on the file of the District Court of North Arcot, which was instituted against the plaintiff by Subbi Chetti in which he sought to enforce some of the obligations which the plaintiff was bound to perform under Exhibits A and B and the two other mortgage-deeds of the same date. Sixteen issues were framed by the lower court, of which the 4th issue referred to the question of *res judicata* and the 2nd issue raised the question whether the mortgages were invalid as contravening the provisions of S. 257-A. of the Civil Procedure Code. The Subordinate Judge held on the 2nd issue that the bonds were not invalid, as in his opinion S. 257-A only applies to execution proceedings. He decided the question of *res judicata* also against the plaintiff. We invited the learned Vakils on both sides to confine their arguments in the first instance to the question of *res judicata* raised by the 4th issue as, in case we agreed with the lower court on that issue, a consideration of the other issues in the case would be unnecessary. The facts required for the disposal of that issue may be very briefly stated. O. S. No. 19 of 1893 was instituted by Subbi Chetti against the plaintiff for the recovery of Rs. 3,843-1-4, which he claimed as due to him on the footing of the four mortgage deeds executed on the 21st of May 1890, including Exhibits A and B, and also to compel the plaintiff to

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provide Subbi Chetti with necessary documents of title to enable Subbi Chetti to recover during the currency of the mortgage-deeds, the rents due under various leases of trees, *thangedu* bark and other kinds of forest produce, which the plaintiff had executed in the years 1886, 1887, 1888 and 1889 to one Subbaraya Mudali, one Sesham Chetti and Mutaiya Mudali, one Rami Chetti, one Munisami Chetti, and one Chenga Reddi. The above amount was made up of Rs. 741-1-1, road cess paid by Subbi Chetti which the Zemindar ought to have paid and the proportionate rents which Subbi Chetti claimed as due to him out of the amounts collected by the plaintiff from the abovementioned lessees under the leases referred to above which included villages not comprised in the mortgages. The plaint in that suit was dated the 30th June, 1893, It does not appear that the Zemindar put in any written statement. The suit was terminated by a compromise. Exhibit IX (*a*) dated the 10th April 1895, and a decree Exhibit IX dated the 17th April 1893 was passed in pursuance of the compromise. The terms of the compromise are very important for the decision of this appeal. Paragraph No. 1 provided for the payment to Subbi Chetti of an amount of Rs. 4,549-9-4 "towards the plaint amount, costs and interest." Paragraph No. 2 was to the effect that the plaintiff herein should pay to Subbi Chetti within six months for the period intervening from the date of plaint to the date of the decree at the rate of Rs. 200 per annum on account of the *ijara* amount of Chintam Sesham Chetti and others in respect of *thangedu* bark of the mortgage villages and at the rate of Rs 280 per annum or the *ijara* amount of Rami Chetti and others. Paragraph No. 3 relating to the period subsequent to the Razinama is from this important and is in these terms :—"Within one month from this date the defendants should make arrangements so that the *ijara* amount should be paid directly to the plaintiff by the respective *ijaradars* at the abovementioned rates from the date of the razinama to the termination of the lease in respect of the above mentioned *thangedu* bark."

Mr. Govindaraghava Aiyar, for the appellant, contends that the Razinama decree does not make the question of the validity of the mortgage-deeds *res judicata.* He urges that a compromise decree is not a judicial decision; that, although the parties

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to it cannot go behind the particular relief or reliefs granted or refused by it, it has no operation with respect to anything beyond those reliefs. He contends also that such a decree, being passed on an arrangement between the parties to the compromise, is on the same footing as a contract; that an agreement for the payment of a sum exceeding the amount legally due under a decree being void under S. 257-A of the Civil Procedure Code unless sanctioned by the court which passed the decree, a decree passed on such agreement is also void; and that the question whether such an agreement is void being one of law, the compromise decree, taking it to involve a decision as to the validity of the mortgages, is not binding upon the plaintiff in this suit.

Mr. Srinivasa Aiyangar for the respondents, on the other hand, contends that a compromise decree is legally as valid and binding on the parties as one passed by the court after contest and that every question necessary for awarding relief to Subbi Chetti in O. S. No. 19 must be taken to have been decided against the plaintiff in this suit. Our attention has not been drawn to any reported decision of this court where the question how far a decree passed upon a compromise between parties will constitute the questions raised or involved in the suit *res judicata* in future litigation between them was considered and decided. We have therefore to consider the nature of such a decree and the principles on which the law of estoppel is to be applied with respect to it.

The basis of a compromise decree is, of course, a contract between the parties to the litigation, and the principles applicable to contracts would often have to be considered in determining the rules of estoppel applicable to such decrees; at the same time such a decree cannot be regarded as a mere contract, and has got a sanction far higher than an agreement between parties. The arrangement between them is adopted by the court and passes into an adjudication of the court and acquires all the solemnity of a judicial pronouncement. The parties to the decree cannot therefore put an end to it at their pleasure in the manner that they could rescind a mere contract. This was decided in *The Bellcairn* [1]. There, the Assistant Registrar of the court,

1. (1885) L. R. 10 P. D. 161.

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by the consent of the parties to a compromise decree rescinded it, but the rescission was held to be illegal by the Court of Appeal. Lord *Esher*, M. R. observed (page 165): " I agree with *Butt* J. that when at a trial the court gives a judgment by the consent of the parties it is a binding judgment of the court, and cannot be set aside by a subsequent agreement between the solicitors, or the parties, even though it be placed in the form of an order by consent on a summons and taken to a Registrar or Master, and by him made as a matter of course. It is only the court, with full knowledge of the facts on which it is called on to act, which can set aside the first judgment, and I doubt whether, unless some fraud in regard to such judgment is shown, even the court would have jurisdiction to set aside its first judgment. It is clear then that the second consent order was absolutely void."

Again, it seems to be clear that a party to a consent decree cannot impeach it on the same grounds on which a mere contract could be impeached, such as absence of consideration or mistake—see BLACK on *Judgments*, 2nd Edition, Vol. I, page 16, foot-note. Speaking of such judgments the learned author observes: " The judgment is not the agreement; it is the act of the law invoked by the parties in executing the agreement." He observes in an article in the American Cyclopædia of Law and Procedure, Vol. 23, page 729: " A judgment by consent of the parties is more than a mere contract *in pais*; having the sanction of the court, and entered as its determination of the controversy, it has all the force and effect of any other judgment, being conclusive as an estoppel upon the parties and their privies, and not invalidated by subsequent failure to perform a condition on which the consent was based, although it may be inquired into for fraud practised upon one of the parties, or as against other creditors of defendant." But while the agreement acquires in some respects greater force by a decree being passed in pursuance of it, the jurisdiction and powers of the court in passing such a decree are limited. The court does not decide the disputes between the parties. It only embodies the decision of the parties themselves and makes their decision its own, giving it the force and solemnity of its own adjudication.

Section 375 of the Civil Procedure Code (Order XXIII, Rule 3, of the present Code) lays down with respect to a compromise

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proved to the court's satisfaction that the compromise "shall be recorded, and the court *shall* pass a decree in accordance therewith so far as it relates to the suit." The jurisdiction of the court therefore is to record the agreement between the parties and to adopt it as its own decree in so far as it relates to the suit. It has, however, the power and is bound to consider the question whether the compromise is a lawful one. It cannot record a compromise which is unlawful. As the jurisdiction of the court is limited to an enquiry into its lawfulness, the law relating to decrees generally does not necessarily apply in all cases to consent decrees and these are governed by the rules relating to contracts. Incidents relating to contracts often hold good with respect to such decrees. Rules relating to construction are the same with respect to them as with respect to contracts. It has been held that a provision in a compromise decree that a lease shall be forfeited for non-payment of rent may be relieved against in the same manner as such a provision could be in an instrument of lease—*Krishna Bai* v. *Hargovind* [1]; *Nagappa* v. *Venkat Kao* [2]; *Lakshmanaswami Naidu* v. *Rangamma* [3]. The reason is that the court being bound to adopt the agreement between the parties as its own adjudication, the interpretation to be placed upon such adjudication ought to be the same as that to be placed on the agreement itself. For the same reason a compromise decree may in some respects have a greater validity than one passed after the contest between the parties, as such a decree has all the force of a compromise, a species of contract which is highly favoured by the courts. Thus, if parties agree to settle their disputes in a certain manner, one of them cannot claim to set it aside merely because he misunderstood the law which would be applicable in a court for the determination of the dispute. The same principle would apparently be applicable to a compromise decree and the rule that estoppel by *res judicata* does not apply to a question of law, will not, we think, apply to decrees passed on compromise. Similarly legal defence to a claim which may be available to a party in a court of law may be waived by him in a compromise, and he would often not be competent to impeach

1. (1906) I. L. R. 31 B. 15. 2. (1900) I.L.R. 24 M. 265.
3. (1902) I. L. R. 26 M. 31.

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a compromise on the ground that his opponent's claim was one which would not be recognised by the courts. The American author whom we have already cited says: "There are certain defences which the debtor has the option of waiving, if he chooses, and he does waive them by confessing judgment, for example, such a judgment is not invalidated by the fact that a part of the claim for which it is given would be barred by the statute of limitations, provided the debt be an honest one. So where a bankrupt, subsequent to his discharge, confesses judgment upon an old debt, the debt is a good consideration for the judgment, and the latter is not affected by the discharge." (S. 69.) Again he says: "A judgment by consent operates as a waiver of any defects in the process of pleadings, or irregularities in the previous proceedings, or grounds of objection which would have constituted errors in the judgment if rendered upon trial, provided they do not go to the jurisdiction." *American Cyclopaedia*, page 729.

In considering the question of estoppel by *res judicata* the nature of a compromise decree, as partaking in large measure of the nature of an agreement of compromise and at the same time possessing the characteristics of a decree of court, has to be borne in mind. S. 13 of the Code of Civil Procedure, which deals with the rule of *res judicata*, is not perhaps strictly applicable to compromise decrees, as it applies in terms only to what has been "heard and finally decided" by a court Explanation I no doubt refers to matter alleged by one party and admitted expressly or impliedly by the other party to a suit. But this refers to some matter admitted by a party in a suit which is itself decided by the court. *Scott* J. held in *Minalal Shadiram* v. *Kharsetji*[1] that S. 13, C. P. C., has no application to compromise decrees—see page 408. What then is the test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise? In our opinion the answer must depend on the answer to the question: "Did the parties decide for themselves the particular matter in dispute by the compromise? And was the matter expressly embodied in the decree of the court passed on the compromise or was it necessarily involved in, or

1. (1906) I.L.R. 30 B. 395.

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was it the basis of, what was embodied in the decree ?" For settling this point it would be legitimate, and sometimes necessary, to look into the pleadings between the parties in the suit terminated by the compromise decree. Even if the compromise was made before the defendant put in his written statement, it would still be proper to look at the allegations in the plaint to understand the terms of the compromise. It is, no doubt, open to the parties to agree to terminate a suit in a particular manner without any questions raised by the plaintiff or put in issue between the parties being determined, but whether a compromise in any particular case proceeds upon such an understanding or is based upon an admission of some or all of the allegations made by either of the parties is a matter of construction in each case, and no hard and fast rule can be laid down applicable to all cases. It is stated in Halsbury's Laws of England, Vol. 13, paragraph No. 496 (page 357)[1] "a defendant who has consented to judgment before delivery of any pleading is not estopped as against the plaintiff from subsequently setting up matters which might have constituted a defence, because they have never been in issue; but it is otherwise with a defendant who has consented to judgment after pleading in his defence the matters which he seeks to set up in the later proceeding." The question really dealt with in the above passage as shown by the cases cited in the footnote relates to what are known as judgments by default and not judgments based upon an agreement arrived at between the parties, which alone constitutes a real compromise decree. The distinction between judgments by default and judgments passed on the mutual agreement of the parties is pointed out by *Holmes*, L. J. in *Irish Land Commision* v. *Ryan*[1] In that case the plaintiff had obtained in the year 1891 a judgment by default against the defendants for a certain sum claimed as due as arrears of the rent charge for 6 years. In 1896 another action instituted for further arrears for 5 years was dismissed on the merits. The plaintiff then in 1899 sued the defendants for 2 years' arrears. The plaintiffs contended that the defendant was estopped by the judgment of 1891 from disputing the plaintiffs' claim to the tithe rent charge and the defendants contended that the dismissal of the

1. (1900) Ir. Rep., Vol: I, p. 565 at p. 584.

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action of 1896 estopped the plaintiffs from claiming the rent-charge. Both contentions were overruled. With respect to the judgment of 1896, the court held that it did not appear from that judgment on what ground it was based, and this absence of certainty made the rule of *res judicata* inapplicable. With respect to the judgment of 1891, the court held that the mere failure of the defendant to plead and the entering of judgment consequent thereon could not estop him from contesting the subsequent claim. He admitted nothing and the court therefore decided nothing. If the defendent did not appear and plead to the claim, the plaintiff was entitled to judgment by default according to the law of Scotland. It must be noted that in India the plaintiff is not entitled to such a judgment on the ground of defendant's failure to appear. He is still bound to prove his claim and judgment will be given for him only if he proves it to the satisfaction of the court, though the suit may be tried *ex parte*. It is pointed out in the judgment of *Holmes*, L. J., that even the lands for which tithe was claimed were only imperfectly described by reference to the parish in which they were situated. The observations of *Holmes*, L. J., with respect to compromise decrees are well worthy of attention. He says: "It is a principle in every system of jurisprudence that there should be finality in litigation. A judgment not appealed from binds the parties and privies for all time by what appears upon its face; and if it can be shown that, in the course of the action that resulted in the judgment, a certain definite and material issue not set forth in the judgment itself was raised by the parties and determined judicially or by consent, it would be contrary to public policy to allow the same parties to re-agitate the same matter in subsequent legal proceedings. Estoppel by matter of record rests on this principle, and although it may be said in one sense to exclude the truth, it is essentially just and righteous." It would seem from the passage already cited from Halsbury that in England if judgment even by default is passed after the defendant has raised his contentions, he will be estopped from raising in a future litigation the contentions so raised by him.

A compromise decree must also be distinguished from a decree passed upon a confession of judgment or an admission made by the defendant that the plaintiff is entitled to a particular

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relief. The effect of such an admission must be judged solely from its terms. A defendant may admit the plaintiff's right to the relief claimed—say a right to a certain sum of money—while denying the particulars of the claim or the causes of action alleged in the plaint, and it would be a proper rule to construe an admission made by the defendant strictly, and not to stretch it beyond its terms. The judgment in such a case is the result of the admission of one of the parties to the suit, the defendant, and not of an agreement between the two parties to it. The principles applicable to the latter class of cases, that is, judgments based upon mutual agreement of the parties are not the same as those which would apply to judgments by default or judgments based on admissions of the defendant. What the court has to do in determining with respect to what matter each of the parties to a compromise decree is estopped, is to find out what it was that the parties agreed to in the previous action; and for this purpose it would not be enough merely to see what was the relief granted in the decree of the court, but it would be necessary also to examine what was the basis on which it was granted. Whatever is necessarily involved in the decree pronounced cannot be re-opened by either party. To this extent there can be no doubt that the principle of Explanation II to S. 13 of the Civil Proceedure Code is applicable to compromise decrees. If the relief granted by a compromise decree would be inconsistent with the allowing of a particular defence, the invalidity of that defence must be taken to be necessarily involved in the grant of the relief and it cannot to allowed to be set up in a subsequent suit. This is the principle laid down in *In re South American and Maxican Company*[1]. There, a previous action by the Bank of England against a company to recover the 2nd instalment of a debt alleged to be due under an agreement which was denied by the company had been settled by compromise. It provided that the particular instalment sued for, the amount of which was £ 100,000 and costs, should be discharged if a sum of £ 60,000 was paid in the manner prescribed by the agreement within the time fixed; but if the amount of £ 60,000 was not so paid, then the Bank "should be at liberty to issue execution for the full amount of the judgment-debt * * *

1. (1895) 1 Ch. 37.

and to enforce the payment of the further instalments claimed by them under the plaintiff's agreement with the defendants, set out in the statement of claim in this action." The court adjudged that in case of default the plaintiffs do recover from the defendants £100,000 and costs and that the defendants' counter-claim be dismissed. The counter-claim had reference to the amount paid by the company on account of the first instalment, and the further instalments mentioned in the compromise referred to a large sum of money which the Bank claimed would be due to them in future, but which was not due at the time they instituted the action before the court. When the further instalments fell due and the Bank instituted an action for them, the company denied its liability and the existence and validity of the agreement on which the claim was based. *Vaughan Williams* J., held that the company was estopped from denying the agreement by the consent decree in the previous action. The learned judge held that the previous suit was for an instalment due *under the agreement* which was *the basis* of the second action; that the compromise showed that it was for an instalment of the debt based on that agreement; that the company could not, therefore, be permitted to deny the existence of the agreement and that the court could not be asked to construe the decree as one merely to pay a sum of money equal in amount to that claimed under the agreement by the Bank and not for an instalment of what the agreement secured to the Bank. Lord *Herschell*, when the case went on appeal, observed: "It is said that, notwithstanding the agreement to give judgment for the claim, it was open to the defendants to make default in paying the £60,000, and then to say as regards all but this one instalment, for which you got judgment, the matter is at large; you have got judgment as for an instalment of a debt in respect of which you sued; but we are to be at liberty now to say there never was a debt at all; we cannot undo this £100,000 but we may dispute our liability to anything further. I do not think that is the meaning fairly to be gathered from the settlement arrived at or the order of the judge."

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Vaughan Williams J., in the Court of First Instance, distinguished the case *Jenkins* v. *Robertson*[1] which was relied on

1. (1886) L. R. I. H. L. Sc. 117.

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by the company as showing that a compromise decree can only conclude the question of the right to the actual relief granted to a party in the previous litigation. That case was one in which the provost, bailees and councillors of a burgh and certain other individuals instituted an action for a declaration on behalf of the inhabitants and the public of a right of way for foot passengers and afterwards compromised the action with the owners of the land, through which the way was claimed, after a verdict had been given in their favour and a new trial granted on application by the defendant. The result of the compromise was that the benefit of the verdict was given up and the plaintiffs agreed to pay the defendant's expenses. Afterwards two persons commenced a fresh action to establish the right of way. The House of Lords held, reversing the decision of the Scotch Courts, that the decree in the former action did not constitute the question of the right of way *res judicata*. But the judgment was based, as explained in *In re South American and Mexican Company* [1], on the ground that persons instituting a suit on behalf of the public had no right to bind the public by a compromise decree, though a decision passed against them on contest would bind the public. Lord *Colonsay* was disposed to think that even a compromise decree might bind other persons represented by the parties to a suit, but held that the compromise decree in the particular case was not binding on the public, because his Lordship came to the conclusion that it was to a certain extent 'purchased.' But no doubt was entertained by the House of Lords that a compromise decree would be as much binding on the actual parties to it and their privies in interest "in just the same way as if it had been a judgment arrived at after the case had been fought out." Lord *Herschell* no doubt thought that in *In re South American and Mexican Company*[1] the compromise decree itself provided for the payment of future instalments also in case the defendants failed to carry out the provision made with respect to the second instalment. But the principle enunciated by his Lordship as well as by *Lindley*, L. J., was that "a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end." The same view was held in *Thomson* v. *Moore*[2].

1. (1895) 1 Ch. 37. 2. (1889) 23 L. R. Ir. 599.

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The consent decree was one granting an injunction restra ning the defendant from infringing the right of a patentee. In a second action for injunction instituted in consequence of a fresh infringement by the defendant, he denied the validity of the patent on the ground that the alleged invention was not a new one. Both *Porter*, M. R. and the Court of Appeal held that the basis of the injunction granted by the compromise decree was that the plaintiff had a valid patent, although the decree made no declaration of its validity, and that therefore the question of validity was *res judicata*. *Porter* M. R., observed : " The effect of the consent and order is absolutely to preclude the defendant from disputing the validity of the plaintiffs' patent, and the only defence he can now raise is that what he has done since is not an infringement." Lord *Ashbourne*, L. C., said: " Other suitors might question these matters, but the defendant cannot." *Fitz-Gibbon*, L. J., observed : " The decree, to which the present defendant submitted on the 18th June, 1885, has put it out of his power to rely upon it, and we must start with the assumption that Sir William Thomson's compass is a well patented invention, of which the patentable characteristics must therefore be discoverable in his specification." On behalf of the appellant the decision in *Goucher* v. *Clayton* [1] was relied on. But that judgment is not in point. That case also related to the infringement of a patent. The defendants in the first action for infringement submitted to a judgment for 40 shillings for damages and costs of the suit. But no pleadings had been entered on either side. The invalidity of the invention was disputed in the second action. In the second action there were other defendants than those who were parties to the first. After the termination of the first action the defendants to it had obtained a license from the plaintiff to work the patent for five years and the license had expired before the second action was brought. It did not appear that the defendants submitted to judgment in the previous action on the footing of the validity of the patent. *Wood* V. C., said : " The defendants might have submitted either to avoid litigation or because they thought it not worth their while to try the question." He went on to say : 'As a perpetual injunction was sought he could not hold that the defendants were estopped

1. (1865) 34 L.J. 239.

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from denying the validity of the patent. In any case, he could not prevent the defendants, who were not parties to the action at law, from setting up this defence." The Vice-Chancellor did not in that case lay down any rule contrary to what was held to be the law in *In re South American Mexican Company*[1].

The judgment of this court in S. A. 1351 of 1909 was also cited in support of the appellant's position. In that case there was an *ex parte* decree for rent in a suit by a landlord against his tenant. The second suit was for the recovery of the property and future instalments of rent and it was held that the defendant was not estopped from denying the plaintiff's title to recover the land or the rent claimed. The judgment proceeds on the ground that it did not appear from the judgment in the first suit that it proceeded on any decision as to the plaintiff's title. The question was not one relating to estoppel by a compromise decree. In S. A. 1957 of 1908, *Hukdar Syed Bacha Saheb* v. *Karuppanna Pillai*[2] on the other hand, cited by Mr. Srinivasa Aiyangar, the principle laid down in *In re South American and Mexican Company*[1] was accepted by *Abdur Rahim* and *Krishnaswami Aiyar*, JJ., although on the facts of the case the learned judges held that the consent decree did not involve an admission by the defendant with respect to the point contested in the second suit. The decision of the Bombay High Court in *Minalal Shadiram* v. *Kharsetji*[3] followed the principle.

Turning now to the facts of the present case, we think there can be no doubt that the compromise and decree in O. S. No. 19 of 1893 proceeded on the acceptance by the Zemindar of the validity of the mortgages executed in favour of Subbi Chetti. It provided for the payment by the Zemindar of a sum of Rs. 4,549 in discharge of the "*plaint amount*, interest and costs." The 'plaint amount' was clearly the amount which the plaintiff claimed on the basis of the provisions in the mortgage-deeds. The decree further went on to provide that the defendant should make further payments for the period between the date of the plaint and the date of the Razinama and for the future " the

1. (1895) 1 Ch. 37. 2. (1910) 21 M.L.J. 449.
3. (1906) I.L.R. 30 B. 395.

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amounts that may become due at the above rates from date of this Razinama until the expiration of the terms of the aforesaid leases." The learned Vakil for the plaintiff was unable to suggest on what other footing than the validity of the mortgages the decree could be taken to have proceeded. We cannot accept his contention that the decree should be taken merely to have directed payment of a certain sum of money without any regard to the title of the plaintiff. We are entitled and bound to look to the Razinama itself, Exhibit IX (*a*), to understand the terms of the decree which was passed in pursuance of it. The parties expressly reserved one point in dispute between them, namely the question relating to the Zemindar's liability to pay road-cess; but they had definitely resolved that the mortgage-deeds themselves should be taken to be valid and binding on the Zemindar. The appellant's contention that, as the validity of the mortgages with reference to S. 257-A of the Civil Procedure Code should be regarded as a question of law and that therefore the plaintiff in this suit is entitled to re-agitate the question, must also be disallowed. In the first place, the question is not purely one of law, but one of mixed fact and law, depending as it does on the point whether as a fact the Zemindar did agree by the mortgage deeds to pay any sum in excess of the amounts due under the decrees in C. S. Nos. 197 and 117. But even were the question purely one of law, we are disposed to think that a decree on a compromise cannot be impeached on the ground that it was erroneous in law, because it is open to parties to decide both questions of law and of fact between themselves by consent in the manner they deem best. In this respect a compromise decree resembles not so much an actual decision of a court after contest as an award by an arbitrator, whose decision cannot be impeached on the mere ground that he committed an error of law. See *Butta* v. *Municipal Committee of Lahore.*[1]

We are also unable to accept the argument that an agreement in contravention of S. 257-A is one opposed to public policy. We do not decide the question whether such an agreement is invalid at all when the parties agree that the decree should no longer be executed, and that the rights under the agreement should supersede the decree and be enforceable only by

1. (1902) I. L. R. 29 C. 854.

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a suit upon the agreement. Such an agreement would more probably be an adjustment of the decree coming within S. 258 of the Civil Procedure Code and not one for the satisfaction of a judgment-debt. We also abstain from deciding the question whether S. 257-A, Cl. (2), prohibits anything more than the recognition of the kind of agreement referred to therein in execution proceedings. Nor is it necessary to consider the exact scope of the rule that the doctrine of estoppel by decision of the courts does not apply to questions of law. But it is clear to our minds that the prohibition in S. 257-A is not based on any rule of public policy rendering such agreements illegal; it is merely unenforceable in execution proceedings, or by a fresh suit as the case may be. The rule is merely enacted for the benefit of the individual judgment-debtor and one reason for the rule was probably that litigant parties should not have the right to interfere with the decrees of courts, a reason which would probably indicate that the rule is applicable only to execution proceedings A judgment-debtor is, in our opinion, entitled to waive the benefit of the rule. The compromise was a lawful compromise and was accepted by the court as lawful and embodied in its decree. We, therefore, hold that the plaintiff in the present suit is estopped from contesting the validity of the mortgages. In the view we have taken on issue No. 4, it is unnecessary to consider the other questions in the case.

In the result the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Ayling.

Rangaswami Iyengar and P. Vaithinatha Iyer .. Appellants*

v.

The District Board of Tanjore .. Respondent.

Landlord and tenant—Ejectment—Madras Estates Land Act, S. 6—"Now in possession"—Refusal to accept patta.

Possession is necessary at the date of the Act to enably a tenant to acquire occupancy right under S. 6 of the Madras Estates Land Act, Refusal to receive patta relieves the landlord from offering draft muchalika

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* S. A. No. 643 of 1909. 10th January, 1911.

for execution or to wait till the expiry of the time fixed in the patta for execution of the Muchilika before suing for ejectment.

Ranga-swami Iyengar v. The District Board of Tanjore.

Second appeal from the decree of the District Court of Tanjore in A. No. 602 of 1908 presented against the order of the Court of the Sub-Collector of Kumbakonam Division in E. A. No. 1 of 1908.

The question in the case was whether a landlord can eject a tenant for non-acceptance of patta and not executing a muchilika after the decree of the Revenue court directing him to do so without showing that he has tendered the patta as amended and also a draft muchilika.

G. S. Ramachandra Aiyar for appellants, relied upon *Shunmuga Mudali* v. *Palneti Kuppu Chetty*[1] for the position that he should.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT.—It is first contended that under S. 6 of the Madras Estates Land Act the appellants have a permanent right of occupancy. There is, however, nothing before us to show that the appellants were in possession when the Act came into force, so that this contention must fail.

It is next contended that the Collector's judgment merely directed the defendants to accept the amended patta, and omitted to direct the defendants to execute a muchilika in accordance with it and that as in fact no muchilika was tendered by the landlord along with the patta, the landlord has not made out his right to evict under S. 10 of Act VIII of 1865. The judgment should no doubt have ordered the execution of a muchilika, but we do not think the omission is material in this case. It is found that an amended patta was tendered and refused and if the defendants refused to accept the patta they would certainly have refused to execute a muchilika. Assuming, for the sake of argument, that it is the duty of the landlord to tender a muchilika for execution, there is no provision of law that patta and muchilika must be tendered together. Patta having been refused, we do not think it was necessary for the landlord to go through the useless formality of tendering a muchilika for execution. It is lastly contended that the patta tendered allowed a month for the execution of the muchilika and that the ejectment proceedings were premature. As the patta was refused there is nothing in this contention. This second appeal is dismissed with costs.

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1. (1902) I.L.R. 25 M, 613.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, Kt., Chief Justice, and Mr. Justice Ayling.

Srimat Paramahamsa Parivrajakacharya Peria Koil Kelu Appan Satagopa Ramanuja Pedda Jiyangar Varu, deceased, Dharmakarta of Tirumalai, Tirupati &c., Devasthanams and others .. Appellants* (*Plaintiff and his legal representatives*)

v.

Prayaga Dossji Varu (disciple and representative of Ramakishore Dossji Varu, Mahant of Sree Hathiramji Mutt and the Vicharanakartha of Tirumalai, Tirupathi, &c., Devasthanums and another .. Respondents (*Defendant and Suppll. Respt.*)

Pedda Jiyangar Varu *v.* Mahant of Tirupathi.

C.P.C., S. 11—*Court of competent jurisdiction—Right and duty to perform a service—Distinction—Relief when to be granted—Fine, power to impose—Onus—Costs.*

A decision between the parties as to whether the plaintiff was entitled to use a seal bearing the inscription "Dharmakarta" by the District Munsif's Court, cannot operate as *res judicata* in respect of the subsequent suit brought in a District Court for a declaration that the plaintiff is Dharmakarta of various temples.

The distinction between rights and duties is in most cases a distinction without a difference. There is such a thing as right to perform a duty; and where a duty is cast upon a man in virtue of his connection with an institution or an abstract personality (as distinguished from a specific individual who might absolve him from performance) and where it is primarily for the benefit of such an institution or personality he may reasonably claim the aid of law to prevent his being obstructed in performance of the same; and where the right has ceased to be beneficial to the institution or personality the relief should be refused.

The right to fine a subordinate should be strictly made out and is by no means to be presumed to attach to the superior office (O. 9, the Vicharanakartaship of the Mahant in the case.)

Where it is difficult to apportion costs between the parties in view of the peculiar nature of the disputes between the parties and the necessarily arbitrary manner in which most of the items had to be valued: *held* that equity will be equally well served by each party being ordered to bear his own costs.

Appeal from the decree of the District Court of North Arcot in O. S. No. 30 of 1908.

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*A. No. 25 of 1904. 27th April, 1911.

P. R. Sundara Aiyar, L. A. Govindaraghava Aiyar and *A. Krishnaswami Aiyar* for appellants. Pedda Jiyangar Varu *v.* Mahant of Tirupathi.

The Advocate-General (*P. S. Sivaswami Aiyar*) and *R. Sadagopachariar* for respondents.

The Court delivered the following

JUDGMENT:—This litigation is in connection with a group of temples situated in the neighbourhood of Tirupati in the North Arcot District, and generally known as the Tirumalai-Tirupati Devasthanams. They are 34 in number, as shewn in plaint Schedule A; but the most important ones are the four mentioned below, which are also the only ones which have any income:—

No. 1. Sri Venkateswaraswami on Tirumalai Hill.

" 2. Sri Govindarajaswami at Tirupati.

" 5. Kothandaramaswamy at Tirupati.

" 7. Padmavatiswamy at Tiruchanur.

The other temples are all dependent on one of these four and are maintained out of funds allotted from the revenues thereof.

The defendant is the Mahant of the Hathiramji Mutt at Tirupati, and, as such, holds the office of Vicharanakartha (Trustee) of all these temples under a *Sannad* granted by Government to the then Mahant in 1843 (*vide* Exhibit XXXIII).

The plaintiff is the head of another Mutt, known as the Pedda Jiyangar's Mutt, he himself being known as the Pedda Jiyangar. This office descends by nomination, each Pedda (big) Jiyangar nominating a disciple as Chinna (small) Jiyangar. The Chinna Jiyangar acts as a sort of *alter ego* of the Pedda Jiyangar during the latter's life-time and succeeds him at his death. Whether this amounts to an unfettered right of appointment is disputed, but it is not denied that as far back as we have any record (certainly for more than a century) the office of Pedda Jiyangar has invariably descended in this manner.

On behalf of the plaintiff it is claimed that from time immemorial the Pedda Jiyangar has been the Dharmakartha of all these 34 temples; and as such entitled to the rights, honors, and emoluments set forth in plaint Schedules B and C. The suit

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is brought for a declaration to the above effect, and for various incidental reliefs which it is unnecessary to recapitulate here.

The defendant's contention is that the plaintiff is merely a hereditary trustee (Udiyam Mirasdar) of five of the plaint temples, and, as such, under the orders of himself (the defendant) as trustee. He denies that the plaintiff is the Dharmakartha of any of the temples; or entitled, as of right, to the various items of Schedules B and C. He alleges that such rights, privileges and emoluments as the plaintiff is entitled to, he enjoys in recognition of the religious duties which, as Pedda Jiyangar, he is bound to perform in certain of the temples.

Before proceeding to discuss the points in dispute, it is well to explain the peculiar circumstances of these temples.

In the first place they are all of them destitute of any endowments in land or money. Such Inam lands as are attached to them are Service Inams held by various temple functionaries in remuneration for their services, and do not contribute to general temple revenues. On the other hand, a very large income (at least three lakhs annually) is derived from the offerings of devotees and pilgrims. These are collected in the most business-like manner. Every service of the deity performed by, or on behalf of, a devotee has to be paid for on a fixed scale. For instance, if a pilgrim wishes a necklace to be used for the decoration of the idol, this will only be allowed on condition of his depositing also the full value of the necklace in cash for credit to the general revenue of the temples. If a pilgrim wishes camphor to be burnt before the shrine a fixed fee has first to be paid by him. The same principle obtains throughout.

The most striking feature has yet to be indicated. Up to 1843, when the defendant's predecessor was appointed trustee of the temples, all the surplus revenues of the temples, after defraying the cost of the temple service, were appropriated by the sovereign power. This practice the British Government inherited from its Mahomedan and Hindu predecessors, and it has prevailed from time immemorial.

The surplus revenues thus appropriated amounted at the beginning of the last century to something like 2 lakhs of rupees annually.

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As a natural consequence, we find record of the most minute superintendence of temple affairs exercised by Government, through the Collector and Tahsildar, up to the time when it severed its connection with the institution by the *Sannad* of 1843. The temples appear to have been treated exactly like a Government Department, every care being taken to cut down unnecessary expense, increase the income, and prevent the possibility of leakage or embezzlement.

One instance of this which bulks largely in the present case is a system of double accounts. Without going into details it may be stated that from the time of assumption of management by the British Government right up to the present day, independent accounts of receipts and disbursements connected with some, if not all, of the temples have been maintained by the Pedda Jiyangar's subordinates on the one hand, and by what we may term the ordinary secular establishment of the temple on the other. There can, we think, be no doubt that the maintenance of this extra set of accounts by the Jiyangar's men was intended as a check on the low-paid subordinates who, headed by a functionary known as the "Parpatyadar", conducted the temple business under the Tahsildar during the period of Government management; while it has since proved of great value in checking and detecting acts of misappropriation on the part of more than one of the defendant's predecessors.

With these preliminary remarks, we proceed to deal with the question at issue in the case. The very voluminous evidence appears to have been most carefully considered by the learned District Judge, who, in his judgment, discusses it in detail not only in connection with each issue, but with special reference to each of the numerous items of plaint Schedule B and C. We may say at once that in our opinion the conclusions at which he has arrived are generally sound, though requiring modification in certain particulars. His judgment and decree entirely rejects the plaintiff's claim to the Dharmakarthaship of any of the temples, and while recognising his claim in a more or less modified form to some of the rights, honors and emoluments sued for, states (issue No. 3) that he is merely a hereditary servant (Paricharaka) of the temple, and that it is merely as such and

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not as Dharmakarta that he is entitled to such rights, honors and emoluments as are allowed. Against this decree, the plaintiff appeals.

The question of the plaintiff's status and with reference to the temples, apart from the consideration of particular rights, honors and emoluments incidental thereto, may be conveniently considered first. It forms the chief subject-matter of issues Nos. 2, 3 and 4. Issue No. 1 relates to the truth of the plaintiff's version of the history of the temples and their connections with his Mutt since the 10th century. Its decision is not necessary to the disposal of the case: and the judge's refusal to record a finding in the absence of more definite and reliable evidence than is forthcoming appears to be justified. The question of whether the plaintiff is a Dharmakartha of all or any of the temples or "only a Paricharaka or hereditary servant" has been most strenuously contested, though, in our opinion, the contest has been largely due to the use of the same term in different meanings. The term "Dharmakarta" as "ordinarily understood in the legal phraseology of religious institutions" (to quote the learned District Judge) practically means *trustee*. There can be no doubt that in this sense the plaintiff is not the Dharmakarta of any one of the suit temples. The office of trustee is in fact held by the defendant under the title of Vicharanakarta and a reference to the sannad (Exhibit III), and to the contemporaneous Government order dated the 21st April 1843, (Exhibit CCCLI) and the Collector's report on which it was based show that the idea of appointing the Pedda Jiyangar as joint trustee was considered, and deliberately rejected. The plaint is, no doubt, ambiguous as regards the meaning to be attached to the term "Dharmakartha," and a written statement filed by the plaintiff in the District Court in the course of the hearing has little or no effect involving ambiguity. The District Judge came to the conclusion that it must be understood in the sense in which it is usually understood (*i. e.*, as trustee) and in that view has entirely rejected the plaintiff's claim to the Dharmakartaship. The learned Vakil for the appellant has, however, in arguing the case before us, been most careful to make it clear that he claims for his client no trusteeship with defendant, or any trusteeship at all. His claim is simply that his client is entitled to the designation of Dharmakartha (the phrase being used in a special

and limited sense); and that with the designation, go certain rights and duties of a kind usually associated with the office of Dharmakartha in its conventional acceptation. That the phrase "Dharmakartha" is susceptible of this interpretation is clearly laid down in the judgment of this court reported in *Sri Sadagopa Ramanuja Jiyangarlu* v. *Sri Mahant Ram Kishore Dossjee.*[1] That was a case between the very same parties in which the present defendant sued in the Court of the District Munsif for an injunction restraining the present plaintiff from using a seal bearing the inscription "Dharmakarta" of the Tirumalai, Tirupati vagiara Devasthanams and the question whether the plaintiff was entitled to be called Dharmakartha of almost all the present suit temples was enquired into and decided. It was held that the plaintiff was the Dharmakarta in a limited and special sense of five temples (Nos. 1, 2, 3, 4, 18 of plaint schedule A.) To quote the judgment of this court: "His rights and duties as such are not so wide as those which often appertain to the office of Dharmakartha in other temples and which appertain to the defendant himself as Dharmakarta of the temple of Tiruchanur. His rights and duties are of a limited character, and he is, in many respects, subordinate to the plaintiff, but by immemorial usage he has the title of Dharmakarta of Tirumalai and Tirupati Devasthanams. By immemorial custom he has also the right, as Dharmakarta, to use a seal in making remittances and doing certain other acts as Dharmakartha of those temples." The plaintiff's right to the Dharmakartaship of the other temples, even in this limited sense, was found against him. The respondent's Vakil urges that the decision in that case operates as *res judicata* in the present suit as regards the contested Dharmakarthaship: a question which is embodied in Issue No. 4, and which the District Judge has decided in his favor. The appellant's Vakil disputes this pointing out, *inter alia*, that the present suit is not cognizable by a District Munsif, and arguing that, on this account alone, the Munsif's decision cannot operate as *res judicata* (*vide* the Privy Council decisions reported in *Gokul Mantar* v. *Pudmanund Singh*[2]). The learned Advocate-General on behalf of the respondent has argued with considerable force that the principles enunciated in the judgment in that case, (which are of the nature of an *obiter dictum*) are not applicable to casesin which an unsuccessful litigant has joined the cause of action sued on in the first suit with other causes of action against the same defendant in a subsequent suit in order

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1. (1898) I. L. R. 22 M. 189. 2. (1904) I.L.R. 29 B. 707.

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to agitate the same question again and obtain a new adjudication. Whether this is so or not and whatever doubts we may feel on the point, it can hardly be said that the present suit falls within the category referred to by the Advocate-General. We should be diposed to hold that the Munsif's decree did *not* operate as *res judicata* in the present case: but the question is really of only academic interest so far as this case is concerned. The evidence now adduced on the question of Dharmakarthaship is substantially the same as that put forward in the suit in the Munsif's Court; and we have no hesitation in arriving at the same conclusion as was then reached by the District Munsif, District judge, and this court in succession. The evidence is sufficient to establish the plaintiff's right to the Dharmakarthaship (in the limited sense above indicated) of the two principal temples of Tirumalai and Tirupati (Nos. 1 and 2) and of the three minor temples (No. 3, 4 and 18); this is the finding of the District Judge (*vide* paragraph 13 of his judgment) and it is not contested in this court by the learned Advocate-General who appears for the respondent. As regards the other temples, we agree with the District Judge in rejecting the plaintiff's claim even to a limited Dharmakarthaship. The question has been argued by the appellant's Vakil only with reference to the Ramasami temple (No. 5), the Trichanur temple (No. 6) and Vedanta Desikar temple (No. 14).

* * *

[Their Lordships after discussing the evidence regarding plaintiff's rights to Dharmakartaship in respect of other temples proceeded as follows:—ED.]

We therefore consider that the plaintiff is entitled to be styled Dharmakarta of the temples shown as Nos. 1 to 4 and 18 in the plaint schedule A and of no others: the term Dharmakarta being understood in a limited and special sense as indicated in *Sri Sadagopa Ramanuja Jiyangarlu* v. *Sri Mahant Ramakrishna Dossjee*[1] and not as entailing the full rights and duties of a trustee. He must be given a declaration to this effect and in view of the learned District Judge's remarks in paragraph 13 above referred to, it is not clear why so much relief was refused him. The refusal was probably due to the interpretation placed by the District Judge on the term "Dharmakarta" as already explained—an interpretation which was not altogether unnatural on the pleadings, but which in the light of the explanation furnished by Mr. Sundara Aiyar need no longer be maintained.

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The exact nature of the rights, honors, and emoluments claimable by the plaintiff in connection with these five temples, as also those of which he is not Dharmakarta, must be dealt with later.

As regards the remaining twenty nine temples, although the plaintiff enjoys a position of more or less importance, nothing has been proved, which would be incompatible with his being styled a Paricharaka.

Before proceeding to a detailed consideration of the various items of rights, honors and emoluments in dispute, issues Nos. 5 and 13 may be briefly dealt with. Issue No. 5 relates to the plaintiff's right to use a seal bearing the inscription "Dharmakarta of the Tirumalai-Tirupati and other (Vagaira) devasthanams". This right was found against him in the litigation of 1894, which was concluded by the Judgment of this court already referred to (*Sri Sadagopa Ramanuja Jiyangarlu* v. *Sri Mahantu Ramakishore Dossjee.*[1]) Whether the Munsif's decision operates as *res judicata* or not (a point on which, as already remarked, we express no final opinion), we have no doubt whatever, on the evidence now before us, that it was perfectly correct. The use by the plaintiff of a seal bearing such an inscription would be calculated to convey a most misleading impression as to his rights over those twenty-nine of the suit temples of which he has been found not to be the Dharmakarta, and the defendant is entitled to object to it.

Issue No. 13 raises the question of the effect of the *rajinama* decree of the North Arcot District Court in O. S. No. 9 of 1868 on its file. This decree is framed in most ambiguous language; but after careful consideration we are not prepared to differ from the construction placed upon it by the learned District Judge. The decree is so indefinite that it may fairly be said to determine nothing at all, and cannot operate as *res judicata* on any of the questions raised in the present suit.

Of the various items above referred to, three have been deemed of sufficient importance to form the subject of distinct issues, *viz.*—

(*a*) The right of keeping the Latchana keys (Issues No. 9 and 10.)

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(*b*) The action of the Mahant in reducing the monthly sum paid to the plaintiff and withholding further payment pending adjustment of the difference (Issue No. 14.)

(*c*) The defendant's right to fine the plaintiff and the propriety of his action in doing so in a specified instance (Issue No. 15.)

The others find place in the Plaint Schedules B and C and the question whether the plaintiff is entitled to each has been considered in great detail by the District Judge under Issue No. 2.

A few preliminary remarks may not be out of place. There appears to have been a great deal of discussion in the District Court, as there was before us, as to whether the performance of certain acts by the plaintiff was a *duty* cast upon him in virtue of his position, (whether as Paricharaka or Dharmakarta), or a *right* enjoyed by him by reason of the said position. The District Judge in many instances, while holding that the *practice* has been for the plaintiff to perform a certain act, has held that its performance was only a *duty* on the plaintiff's part, which the defendant might insist upon, and in no sense a *right* in recognition of which he (the plaintiff) could obtain a legal declaration. The plaintiff's claim for all such items has been disallowed.

In our opinion this distinction between rights and duties is, in most cases, a distinction without a difference. There is such a thing as right to perform a duty: and where a duty is cast upon a man in virtue of his connection with an institution, or an abstract personality (as distinguished from a specific individual who might absolve him from performance),and where it is primarily for the benefit of such an institution or personality, he may reasonably claim the aid of law to prevent his being obstructed in the performance of the same. On the other hand, in conceding such a right, it must be borne in mind that it is granted in the interests of the institution or abstract personality and not of the individual claiming it: and that where the right has ceased to be beneficial to the former, it should be refused. These are the general principles to be borne in mind in dealing with the numerous claims set up by the plaintiff regarding the performance of *specific* acts of a more or less secular nature. His

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claims to enjoy for his own benefit certain honors and emoluments in virtue of his office and to perform certain religious functions stand of course upon a different footing.

* * *

[Their Lordships after dealing with certain questions of fact proceeded as follows:—ED.]

The next question for consideration is that raised in issue No. 16, regarding the Mahant's power to fine the Pedda Jiyangar. In 1896, defendant fined the plaintiff five Rupees for failure to remove from office an Ekangi who was suspected of theft; and this is the solitary incident which has brought the matter to notice. The District Judge has found that there was no justifiable ground for imposing the fine in question: a conclusion in which we have no hesitation in concurring, and against which no arguments have been adduced before us. On the general question, however, he finds (1) that Government had the power of fining the Pedda Jiyangar during the period of Government management; (2) that the same power was transferred to the Mahant, when he was appointed Vicharanakartha, and (3) that the relation of the parties being analogous to that between master and servant, the defendant cannot question the propriety of the fine in a court of law.

It may be stated at once that the learned Advocate General, who appears for the respondent, does not dispute the power of the appellant to call in question in a civil court the propriety of the fine, and if successful to obtain a refund: while he is content to base the power to fine on the right of a master to deduct from the wages of a servant an amount proportionate to the damage, moral and material, caused to himself by the servant's neglect or faulty performance of his duty. Thus viewed, the power to fine is contingent on the receipt of *wages* by the person fined: a condidition which appears to be wanting in the present case. It is not contended that the income derived from the Inam lands attached to the plaintiff's office constitutes wages, and we have already found that the cash allowance drawn by the plaintiff was not his own salary, but a special allowance to enable him to entertain a staff of clerks and other subordinates sufficient for the performance of his secular duties.

We certainly consider that the right to fine a subordinate should be strictly made out and is by no means to be presumed

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to attach to the superior office. In the present case, we find no sufficient evidence to support it. It may be that Government, during the period of its direct management, possessed the right, as they certainly had the power, to fine. As pointed out in the introductory remarks, the powers exercised by Government in the first four decades of the last century were practically unlimited. Looking to the manner in which the temples and their income were managed and applied, it is difficult to say that Government stood in the position of a trustee at all; if it did, the powers possessed and exercised by it were certainly not limited to those ordinarily possessed by a trustee but also included the rights inherent to the sovereign power. Whether the *Sannad* (Exhibit XXXIII) be regarded as establishing a new trust altogether or as transferring to the Mahant such portion of the powers of Government as were exercised in virtue of a pre-existing trusteeship, it is clear that the powers of the Mahant were by no means co-extensive with those previously held by Government and any argument based on the assumption that they were, is fallacious.

As a matter of fact the earlier records make it obvious that during the whole period of Government management the Jiyangar was regarded and treated as a person of considerable sanctity and consequence, though occasionally the zeal, or brusqueness of an individual Collector led to sharp admonition. Exihibit II is a code of departmental instructions drawn up in 1821 for the management of the Tirupati Devasthanam and known as Bruce's Code. It is of particular value in as much as it is admitted to have been based on previous custom. This code certainly recognises the liability of the Pedda Jiyangar to be fined for misconduct; but the power to fine him is carefully reserved to the Governor-in-Council on report from the Collector through the Board of Revenue: and the Pedda Jiyangar is especially exempted from the liability to punishment at the hands of the Collector, which attached to every other office-holder of the temple. During the whole period of Government management there appears to have been only a single instance of the Pedda Jiyangar being fined :

* * *

[After further discussing the evidence on the point, the learned Judges proceeded as follows :—ED.]

The learned District Judge is of opinion that the unrestricted power to fine the Jiyangar, as well as other temple officials, is

absolutely necessary to the due administration of the trust. We cannot agree in this view. In the case of a highly placed and revered official like the plaintiff, the due performance of duty is sufficiently secured not by the power to inflict petty fines, but by removal from office in the case of persistent misconduct.

In our opinion Issue No. 14 should have been decided in the plaintiff's favour and the plaintiff must be given the declaration sued for in this connection as well as a refund of the fine.

The remaining items of the plaintiff's claims are set forth in Plaint Schedules *B* and *C*. The former contains 55 Items of "Mirasi rights." To 25 Items the plaintiff does not press his claim in this court; these are Nos. 9, 17, 18, 22 to 26, 29 to 32 and 34 to 36.

Dealing with the rest in order, there is a certain similarity as regards Items Nos. 1 to 8. In the case of each, the District Judge has found that the various acts referred to have been customarily performed by the plaintiff as alleged by him, but he has refused the declarations sued for on the ground that they are merely duties which he has to perform and not rights which he can enforce. The items must, therefore, be considered in the light of the general principles enunciated above. It may be noted that the admission of many of the claims, in literal pursuance of the schedules, would enable the Jiyangar to paralyse the administration of the temples at his will and pleasure.

* * *

[After dealing with the several items their Lordships proceeded as follows:—ED.]

In our opinion the plaintiff is entitled to a declaration of his right to appoint the Chinna Jiyangar and the Ekangis, and to dismiss the Ekangis.

* * *

[Again after dealing with the other items their Lordships concluded as follows:—ED.]

As regards costs the District Judge has given proportionate costs to both sides on the valuation of the portions of claim allowed and disallowed. It is open to us to follow the same course

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but looking to the peculiar nature of the disputes and the necessarily arbitrary manner in which many of the most important items must be valued, it seems to us that equity will be equally well served by our ordering each party to bear his own costs throughout, and we direct accordingly.

The memorandum of objection filed by the respondent is not pressed, and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

V. S. Muthukrishna Aiyar .. Plaintiff in both* (*Appellant*)

v.

Somalingamuni Nagendrien and others .. Defendants in both (*Respondents*).

Easement—Light and air—Obstruction to ancient lights—Remedy by injunction—Cities and villages—No difference—Defences that are not open.

If a man's ancient lights be interrupted, it is no answer to say there are remedies which he can provide for himself by making changes in his own tenement; nor is it anans wer to say that defendant is willing to provide fresh rights for him in another way.

A party causing an injury to another cannot object to appropriate relief being granted to his opponent on the ground that he would suffer serious injury by being compelled to undo his mischief.

There is no difference in the applicability of the law as regards interference with ancient lights to builders in cities and to builders elsewhere. *Semble*:—There is no difference between the law of England and the law in India with respect to granting relief by way of injunction in cases of obstruction of easement to light and air.

Second appeals from the order and decree of the District Court of Madura in A. S. No. 144 of 1909 presented against the decree of the Court of the Additional District Munsif of Madura in O. S. No. 12 of 1908 (O. S. No. 180 of 1906 on the file of the District Munsif's Court of Madura.)

T. V. Muthukrishna Aiyar for appellant.

C. V. Ananthakrishna Aiyar for respondents.

T. V. Muthuhrishna Aiyar:—My right to light has been obstructed. When that is found, injunction is the proper remedy and not damages as is supposed by the lower court—

* S. A. Nos. 1563 and 1564 of 1909. 27th April, 1911.

Ramanjulu Naidu v. *Aparanji Ammal.*[1] In *Kallian Dass* v. *Tulsi Dass*[2] the injury was slight. The test is whether the injury is slight or substantial and not whether it would be avoided by making other structures such as upstairs. Ss. 28, 33, 35, Easements Act, referred to. *Esa Abbas Sait* v. *Yacoob Haroon Sait* [3] lays down that the above sections will apply and not exactly *Colls* v. *Home and Colonial Stores, Ltd.*[4]; Specific Relief Act, S. 55, Illustration (*a*); *Boyson* v. *Deane* [5].

C. V. Ananthakrisna Aiyar :—S. 56, Cl. (*c*), of the Easements Act says that when an equally efficacious method of proceeding is possible, no injunction can be granted. The damages awarded may be used in constructing an upstairs. Injunction cannot be granted when mere granting it would be more oppressive to the defendant—*Shamnuggur State Jute Factory, Ltd.* v. *Ram Narain Chatterjee.*[6] *Dhunjibhai Cowasjee Ummgar* v. *Lisboa* [7] shows that in big towns where building sites are scarce a certain amount of inconvenience must be endured; *vide* also *Sultan Nawab Jung* v. *Rustomji Nanabhai* [8]. [*Sundara Aiyar* J.—There seems to be no warrant for the proposition that if plaintiff can abate the nuisance in some way injunction cannot be granted.] HALSBURY'S *Laws of England*, Vol. II, p. 333, para. 654; GODDARD, 464-466.

T. V. Muthukrishna Aiyar in reply.—Even if injunction would be oppressive he must submit to it—*Jamnardar* v. *Atmaram* [9]; *Taro* v. *Sana-ullah* [10]; *Shelfer* v. *City of London Electric Company.*[11]

The Court delivered the following

JUDGMENT :—The plaintiff and defendants are occupants of neighbouring houses. The suit is for a mandatory injunction that the defendants do pull down the tiled building recently erected by them on a vacant portion of their premises which, according to the plaintiff, blocked up the passage of light and air passing through four windows on his wall.

1. (1911) 21 M. L. J. 313.
2. (1899) I. L. R. 23 B. 786.
3. (1909) I. L. R. 33 M. 327, 332.
4. (1904) L. R. A. C. 179 at 204.
5. (1898) 13 I. L. R. 22 M. 251.
6. (1886) I. L. R. 14 C. 189.
7. (1888) I. L. R. 13 B. 252.
8. (1896) I. L. R. 20 B. 704.
9. (1877) I. L. R. 2 B. 133.
10. (1897) I. L. R. 19 A. 259.
11. (1895) 1 Ch. 287.

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The defendants deny the plaintiff's right to the passage of light and air through all the windows and his right to the mandatory injunction claimed.

The District Munsif found that the plaintiff's right to the passage of light through the four windows was established, but, curiously enough, he held that the plaintiff was not entitled to the passage of air through them. He said : "I do not think that this tiled portion has inconvenienced the plaintiff by making his house ill-ventilated, although it has darkened it." He refused to grant the mandatory injunction asked for and ordered that "the defendants do open in the roof in the tiled building * * * 4 sky lights * * * 2 ft. long and 1½ ft. broad against the windows 1 to 4, so as to allow enough quantity of light to fall into the plaintiff's house through the said windows."

On appeal, the District Judge was of opinion that the plaintiff had not established the right claimed by him with respect to the windows Nos. 1, 2, and 3, but he was of opinion that a satisfactory case for the issue of an injunction had not been made out. His reasons are "(1) The issue of an injunction will prevent the defendant from using his own land for building on, and building sites are valuable in the locality where the parties reside. (2) The plaintiff can arrange to get light and air to his rooms by the construction of suitable sky-lights and ventilators, or by the construction of rooms upstairs. If the former course is adopted, he will be sufficiently compensated if he is given the cost of the construction of ventilators and sky-lights. If the latter course is adopted, the compensation will be the cost of the construction of the upstair rooms, less the value of the downstair rooms which can still be used as godowns or store-rooms."

After appointing a Commissioner to make a local inquiry and to prepare an estimate as to the cost which would be incurred, the District Judge gave the plaintiff a decree for Rs. 100 damages, the amount of the difference between the cost of the construction of the upstair rooms and the value of the downstair rooms, the plaintiff having objected that the erection of sky-lights and ventilators would prevent his building an upstair room. The plaintiff appeals againt this judgment. He attacks the finding of the judge negativing his right with respect to the window No. 4, and also contends that a mandatory injunction

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should have been granted to him. The defendants have preferred a memorandum of objections in which they deny the plaintiff's right altogether, and their vakil has argued that in case the plaintiff's right be upheld and the course pursued by the District Judge to protect his right be considered inappropriate, the District Munsif's direction that the defendants do put up the sky-lights in their new building should be restored. The learned judge's decision is based on the authority of *Kallian Dass* v. *Tulsi Dass*, [1] where *Parsons* and *Ranade* JJ. upheld the judgment of the lower court in that case, refusing injunction to the plaintiff and awarding only damages, although the plaintiff's right to light and air was obstructed by the defendant's building. The ground on which the refusal of injunction was justified is not, however, elucidated in that case, the learned Judges merely observing: "The District Judge has given good and sufficient reasons for not granting an injunction in the present case." The reason given by the District Judge was that the injury caused by the obstruction was not so "large, material and substantial" as to entitle the plaintiff to an injunction. That judgment is not an authority which can sustain the view taken in the lower appellate court in this case. The *quantum* of injury caused to the plaintiff was taken as the test there. The finding in this case is that the obstruction caused by the defendant's building has darkened the plaintiff's house. The case of *Kallian Dass* v. *Tulsi Dass*[1] is no authority for the position that injunction can be refused on the ground that the plaintiff may remedy the mischief caused by the obstruction by making structural alterations with respect to his own building.

Mr. Ananthakrishna Aiyar, for the respondent, contends that in India injunction is a remedy which can be granted only in exceptional cases and that the award of damages is the relief to which the plaintiff is generally entitled. We are, by no means, prepared to accede to this contention or to agree that there is any difference between the law of England and that in India with respect to the granting of an injunction in cases of obstruction of easement to light and air—see *Boyson* v. *Deane*[2]; *Dhunjibhai Cowasji Ummgar* v. *Lisboa*[3]; *Sultan Nawab Jung* v.

1. (1899) I.L.R. 23 B. 786. 2. (1899) I.L.R. 22 M. 251.
3. (1886) I.L.R. 13 B. 252.

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Rustomji Nanabhai.[1]; *Ramanjulu Naidu* v. *Aparanji Ammal*[2]; and *Esa Abbas Sait* v. *Yacoob Haroon Sait.*[3] But we do not consider it necessary in this case to decide this general question, as it is not contended that the nature of the injury is so immaterial that compensation by award of damages will be an adequate remedy. In our opinion the plaintiff is entitled to an injunction, unless it can be held that, though the injury itself is so serious as to make his building practically useless to the plaintiff in its present condition, still the plaintiff can be required to make alterations which would remove the injury. The character of the obstruction is such that its consequence is to darken the plaintiff's house so as to make it uncomfortable and in fact useless, and therefore damages would not be an adequate compensation. Our attention has not been drawn to any authority for the position that the possibility of making alterations in the plaintiff's building so as to provide fresh sources of light and air would entitle the defendant to resist the granting of an injunction. To permit him to raise such a defence would be to allow him to take advantage of his own wrong and to compel other persons to change their own buildings to suit his convenience. A similar argument was rejected by *Fletcher* J. in *Anantha-nath Deb* v. *Galstaan.* There it was contended that the plaintiff could, by making internal alterations, improve the light coming thereto, and that an injunction should not, therefore, be granted, the learned Judge characterising, the argument as irrelevant and citing the following observations of *Lord Davey* in *Colls* v. *Home Colonial Stores' Limited*[5]:—

" The mode in which he (the plaintiff) finds it convenient to arrange the internal structure of his tenement does not affect the question. In KERR on *Injunctions*, 4th edition, p. 143, it is stated: ' Nor is it any answer to say if a man's ancient lights be interrupted, that there are remedies which he can provide for himself by making changes in his own house.' The alterations required in this case are not so trivial as to justify the supposition that the defendants were entitled to expect that the plaintiff would make them as an act of common

1. (1896) I.L.R. 20 B. 704.
2. (1911) 21 M.L.J. 313.
3. (1909) I.L.R. 33 M. 327. 332.
4. (1908) I.L.R. 35 C. 661.
5. (1904) L. R. A. C. 179 A.L. 204.

neigbourly courtesy or to make the demand of the injunction oppressive on the defendant."

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Mr. Ananthakrishna Aiyar's suggestion that the District Munsif's direction that the defendants might be permitted to put up sky-lights in their own building for the benefit of the plaintiff's house might be adopted is equally objectionable. The plaintiff cannot be asked to give up ancient lights because the defendant is willing to provide fresh lights for him in another way. In *Dent* v. *Austin Mart Company*,[1] Sir *W. Pagewood*, Vice-Chancellor, dealing with a similar argument, observed at p. 251: "Then, lastly, there was the suggestion of glazed tiles—often made and never listened to by the court. A person who wishes to preserve his lights has no power to compel his neighbour to preserve the tiles, or a mirror which might be better, or to keep them clean, nor has he covenants for these purposes who take without notice; and, therefore, it is quite preposterous to say: 'Let us damage you, provided we apply such and such a remedy.' Therefore, the defendant properly stands upon his own right and declines to rely upon the degree of consideration which his neighbour may from time to time shew towards him. The question comes simply back to this: Is there substantially an interference with comfort? Is there a substantial diminution of light for carrying on work?" We might observe, besides, that the Munsif's decree does not provide for the plaintiff's right to air but only to light.

Mr. Ananthakrishna Aiyar further contends that the injunction asked for should not be granted as it would inflict a greater injury on the defendants than the benefit it would confer on the plaintiff. There is nothing to show that this would be so as a fact. But assuming it to be, it is, in our opinion, no answer to the plaintiff's claim. A party causing an injury to another cannot object to appropriate relief being granted to his opponent, on the ground that he would suffer serious injury by being compelled to undo his own mischief. The cases where the relative inconveniences of the parties may be balanced are succinctly stated thus in HUGH on *Injunctions*, S. 865, p. 824:—"When the alleged nuisance consists in a diminution of light and air to plaintiff's building but no serious or irreparable

1. L. R. 2 Eq., p. 238.

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injury is shown, the court may balance the relative inconvenience to the parties which would result from its interference and may refuse the injunction, especially when the plaintiff's only right is as a tenant from year to year and when he has already received notice to quit". The case of the *Shamnaggur State Jute Factory, Limited* v. *Ram Narain Chatterjee*[1], relied on for the respondents, was one between co-owners of the same land, and the rules applicable to an injunction in such a case are not the same as in the present case.

We may observe that we are unable to agree with the Judge that there is any difference in the applicability of the law to intending builders in cities. See KERR on *Injunctions*, p. 142.

We set aside the decrees of the courts below and direct that the defendants do remove the building marked *H G* in the plan attached to the Munsif's decree or so much thereof as obstructs the free passage of light and air to plaintiff's windows Nos. 1, 2 and 3. The plaintiff will have three-fourths of the costs of this litigation in all the courts.

The memorandum of objection is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Spencer.

Govindaswamy Naidu .. Appellant*
.. (*Prisoner*).

Govindaswamy Naidu v. Emperor.

Penal Code, Ss. 419, 511—*Railways Act, S.* 112—*Travelling with a forged Pass.*

A person who travels with a forged Railway pass, but who has not been proved to have shown the pass to a Ticket Examiner or other Railway official before the completion of his journey can only be convicted of an attempt under Ss. 419 & 511, I. P. C.

The conviction under S. 112 of the Railways Act confirmed.

Appeal from the order of the Court of Sessions of the Coimbatore Division in Case No. 125 of the Calendar for 1910.

The appellant was unrepresented.

The Public Prosecutor (*C. F. Napier*) for the Crown.

The Court delivered the following

JUDGMENT:—The appellant has been convicted of cheating by personation (S. 419, I. P. C.) and of an offence under

* Cr. A. 159 of 1911. 17th July, 1911.

1. (1886) I.L.R. 14 C. 189.

S. 112 (a) of the Railways Act. It is not denied that he travelled by the South Indian Railway from Trichinopoly to Podanur without a ticket and that on arrival at Podanur he presented a forged Railway Pass made out in the name of the "Servant of Mr. Brown, Assistant Auditor"—a description which did not apply and never had applied to him. The appellant in his appeal petition admits all this, and merely pleads that he was induced by deceitful friends to buy the Pass for a less sum than the fare would have amounted to. Govindaswamy Naidu. v. Emperor.

In our opinion the conviction under S. 419, I. P. C., must be changed to one of attempt only. There is no evidence to prove that the appellant at any time showed the pass to a Ticket Examiner or other Railway official before the completion of his journey, and his presentation of it, when challenged at Podanur, can only be regarded as a dishonest attempt to induce the Railway Company's servants to omit to collect the fare from him or prosecute him in default. The attempt was not successful. He has been prosecuted and the fare has been ordered to be recovered by the Railway Company out of the fine imposed.

We therefore alter the conviction from one under S. 419, I. P. C., to one under Ss. 419 and 511, I.P. C., and reduce the sentence to six months' rigorous imprisonment.

The conviction and sentence under S. 112 of the Railway Act are confirmed.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM A DECREE OF THE CHIEF COURT OF LOWER BURMA.]

Present:—Lord Atkinson, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Maung Pe .. Appellant*

v.

Ma Lon Ma Gale .. Respondent.

C.P.C. (Act XIV of 1882) Ss. 42, 43—Scope of—Buddhist Law—First suit for divorce—Second suit for partition—No bar.

Ss. 42 and 43 are aimed against a multiplicity of suits in respect of the same cause of action. An objection founded upon the sections should be treated as a preliminary point, and when no notice of the point is given by

* 9th May 1911.

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the defendant either in the defence, or at the trial, or in the grounds of appeal first delivered, she should not be allowed to raise it subsequently except upon terms which would indemnify the plaintiff for the defendant's omission to raise it at the proper time.

A Buddhist husband first sued his wife for divorce on the ground of misconduct. The wife denied the misconduct but eventually consented to a decree for divorce. The husband subsequently brought a suit for the recovery of property which he alleged his wife had fraudulently kept in her possession and for a partition of their joint property. The shares of the respective parties depended according to the Buddhist law very much on the grounds of divorce.

Held:—The second suit was not barred by Ss. 42, 43, C.P.C., the causes of action for divorce and partition being different. The cause of action for the divorce was the misconduct of the wife, but the cause of action for partition was the divorce of the wife founded on that misconduct. If the court should be of opinion that a petitioner has unnecessarily severed his claim for partition from a claim for divorce, it may, of course, punish the plaintiff by the exercise of its discretion as to costs, but such a severance does not come within the mischief aimed at by Ss. 42 43, C.P.C., so as to bar the claim to a partition which may be founded on the decree for divorce itself.

Appeal from a decree of the Chief Court of Lower Burma on its appellate side, reversing a decree of the District Court of Hanthawaddy.

The Judgment of their Lordships was delivered by

Lord Robson:—This is an appeal from a judgment of the Chief Court of Lower Burma on its appellate side, reversing a judgment in favour of the present appellant, who was plaintiff in the action, and directing that his suit be dismissed with costs. The respondent did not appear on this appeal.

The appellant and respondent were Burmese Buddhists, and up to the 6th June, 1907, were husband and wife. Some time prior to that date the husband filed a suit against the respondent for dissolution of the marriage.

The alleged ground of divorce was that the respondent had, by sundry fraudulent devices, stolen certain jewels which were the property of the appellant. The question as to whether or not this is an adequate ground for a divorce according to Burmese Buddhist Law has not been argued either in the courts below or here, and their Lordships express no opinion upon it. It is sufficient to say that the divorce was granted, and its validity is not contested. The present dispute is concerned solely with the claim of the appellant to have the property in which the spouses were interested distributed or dealt with according to Burmese Buddhist Law.

The first point in dispute is whether the divorce was by mutual consent, or was granted on the fault of the wife. The husband filed his claim in January, 1907. In it he set forth the respondent's alleged offence and he prayed for his decree on that ground alone. The respondent thereupon filed her defence, denying the allegations as to her misconduct and asking that the suit be dismissed with costs. Witnesses were summoned, but on the day fixed for hearing the respondent abandoned her defence and, although continuingto deny her guilt, consented to a divorce. Judgment was thereupon given on the 6th June, 1907, for a decree "as prayed for."

Afterwards, in August, 1907, the appellant brought the present action for the recovery of his property which he alleged his divorced wife still fraudulently kept in her possession, and for a partition of their joint property. The shares to which the parties would be respectively entitled under the partition would vary according to whether the divorce had been granted on the ground of a matrimonial offence or had been arranged by consent, and the respondent contended that, under the circumstances above stated, the divorce had been by consent and had not been granted by reason of her fault. The District Judge found in favour of the appellant on this point, but the Chief Court have cast some doubt upon that finding, although in view of their decision on another point in the case, which is dealt with later on, they did not think it necessary to discuss it fully. Their Lordships, however, think it desirable to state that they agree with the judgment of the District Judge on this point. Although the respondent at the last moment abandoned her defence and consented to the decree, she certainly ought not to be put in the position of an innocent wife who has contracted for a divorce on an equal footing with her husband. If she had invited her husband to enter into such an agreement before he began his action, he would have been at liberty to refuse and to have insisted upon a decree establishing her guilt, in order to determine the basis upon which the subsequent partition should take place, and he was certainly placed in no worse position by the fact that he was obliged to bring the action in order to secure relief. The proceedings at law disclose, not an agreement between husband and wife, but a claim by the husband on a specific ground to which the wife in effect submitted.

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The ground on which the Chief Court set aside the decree of the District Judge in the present action, was that the appellant had no right to a partition of property unless he asked for it in the action for divorce.

There has been some conflict of decisions in the Burmese courts upon this point, and the Chief Court held, on this appeal, that the matter being one of procedure must be determined by the Civil Procedure Code, Sections 42 and 43.

Those sections are aimed against a multiplicity of suits in respect of the same cause of action and, shortly stated, they enact that if a plaintiff fails to sue for the whole of his claim or remedy in respect of a particular cause of action, he shall not afterwards sue in respect of the portion so omitted or relinquished.

It is to be observed that the objection founded upon these sections should have been treated as a preliminary point, but no notice of it was given by the respondent in the present action, either in her defence, or at the trial, or in the grounds of appeal as first delivered. Under these circumstances, their Lordships are of opinion that she was too late to raise the point in the Court of Appeal except upon terms which would have indemnified the appellant for her omission to raise it at the proper time.

With regard, however, to the point itself, their Lordships are of opinion that Ss. 42 and 43 of the Civil Procedure Code were not intended to bar an action like the present. The cause of action for the divorce was the misconduct of the wife, but the cause of action for the partition was the divorce of the wife founded on that misconduct. The partition may, no doubt, be treated as relief consequential upon the divorce, and therefore dealt with in the same suit, but the evidence is different, and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can properly arise. There is, therefore, not necessarily any hardship on the defendant in severing the two matters. Indeed it may, and generally would, be the more convenient course finally to settle the question of the divorce and the misconduct before entering upon the enquiry as to partition which would be altogether unnecessary if the decree were refused, or would be put on a different basis if the misconduct were disproved. If the court

should be of opinion that a petitioner has unnecessarily severed his claim for a partition from his claim for a divorce it may, of course, punish the plaintiff by the exercise of its discretion as to costs, but their Lordships are of opinion that such a severance does not come within the mischief aimed at by Sections 42 and 43 of the Civil Procedure Code so as to bar the claim to a partition which may be founded on the decree for divorce itself. Maung Pe v. Ma Lon Ma Gale.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed, the decree of the Chief Court set aside, and that of the District Court restored, with costs in both courts.

The respondent will pay the costs of the appeal.

Bramall and White:—Solicitors for appellant.

The respondent did not appear.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Spencer.

H. M. Abdul Razack Saib .. Petitioner*
(*Accused in C. C. No.* 30731 *of* 1910 *on the file of the Court of the Presidency Magistrate, Georgetown*).

Cr. P. C., Ss. 195, 537—*Want of sanction—Mere irregularity.* Abdul Razack Sahib v. Emperor.

A conviction is not vitiated by the absence of the preliminary sanction required under S. 195 of the Cr. P. C. in the absence of any prejudice to the party even though it be that objection for want of sanction was taken by the accused before the trial.

Petition under Ss. 435 and 439 of the Cr. P. C. praying the High Court to revise the judgment of the Second Presidency Magistrate, Georgetown, Madras, in C. C. No. 30731 of 1910.

On the 5th June 1910 the accused falsely charged one Abdul Razack Saib before the Police of the B Station of the city of Madras with having committed housebreaking by day punishable under S. 454, I. P. C., knowing that there was no just or lawful ground for such charge against the said Abdul Razack—S. 211, I. P. C. On the 14th June 1910 he also filed a

* C. R. C. No. 138 of 1911. 18th July 1911.
C. R. P. No. 107 of 1911.

Abdul. Razack Saib v. Emperor.

complaint in the Presidency Magistrate's Court. The Police investigated the case and came to the conclusion that the complaint was false and struck off the case. The Sub-Inspector referred the case to the Commissioner of Police who ordered that the prosecution of the accused should be considered. The Sub-Inspector obtained the premission of the Presidency Magistrate to investigate the case and as the result of his investigation put in a charge sheet against the accused. The Presidency Magistrate found the accused guilty under the first portion of S. 211, I. P. C., and sentenced him to pay a fine of Rs. 50 and in default to suffer rigorous imprisonment for 3 months.

S. Krishnamachariar for petitioner.

The Crown Prosecutor—contra.

The Court delivered the following

JUDGMENT:—It is argued by the petitioner's vakil that inasmuch as the petitioner preferred a complaint to the Presidency Magistrate after his complaint to the Police had been enquired into, the Presidency Magistrate's sanction for prosecution was necessary under S. 195, Cr. P. C., and its absence vitiates the proceedings.

Assuming for the sake of argument that the Magistrate's sanction was necessary its absence does not entail the reversal of the conviction unless it is shown to have occasioned a failure of justice which has certainly not been proved in the present case. This appears clearly to be the meaning of S. 537, Cr. P. C., and it has been so interpreted in *Perumal Naidu* v. *Emperor*[1]. The petitioner's vakil seeks to distinguish the latter case on the ground that there the objection was not taken when the case under S. 211, I. P. C., first came on for evidence. This is a point to be borne in mind as laid down in the Explanation to S. 537; but it does not by itself indicate that any failure of justice occurred.

On the merits of the case we see no reason to differ from the Magistrate's conclusion.

The petition is dismissed.

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1. (1907) I.L.R. 31 M. 80.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Thota Narayadu v. Emperor.

Present :—Mr. Justice Abdur Rahim.

Thota Narayadu ... Petitioner *
(1st accused).

Village Magistrate—Adjournment of case on the ground of an intended application to High Court for transfer—Practice—Procedure.

A Village Magistrate will be acting illegally in trying an accused without granting an adjournment when the latter applies for an adjournment of the hearing for the purpose of moving the High Court for a transfer from the file of the Village Magistrate.

Petition under Ss. 435 and 439 of the Cr. P. C. praying the High Court to revise the judgment of the Village Magistrate of Kampambadu, Darsi Division, Nellore District, in Case No. 1 of 1910.

One Bhogiam Krishnadu filed a complaint in the Court of the Village Magistrate of Kampambadu, in the Darsi Division of Nellore District, against the two accused, Thota Narayadu and Gopisetti Appayya, accusing both of them with theft of 2 bags of castor oil pod and leaves valued at R. 0-4-0. from the complainant's Chitta Gunta Cheru. The Village Magistrate convicted both the accused and sentenced them to undergo 5 hours' simple imprisonment from 10 o'clock on the noon of 25-8-10 till 2 o'clock. A revision petition was filed in the High Court to set aside the conviction and sentence passed by the Village Magistrate.

V. Visvanatha Sastri for petitioner.

Village Magistrate *unrepresented.*

The Court delivered the following

JUDGMENT:—The Village Magistrate does not appear in these proceedings. The affidavit alleges that the complainant in the case in which the petitioner has been convicted by the Village Magistrate is a servant of the Village Magistrate and that the complaint was instituted at the instance of the latter between whom and the petitioner there has existed enmity for some time. The petitioner applied to the Magistrate for adjournment in order to move the High Court for a transfer, but the application was refused and the petitioner was tried and convicted

* Cr. R. C. No. 52 of 1911. 20th July 1911.
Cr. R. P. 41 of 1911.

Thota Narayadu v. Emperor.

the same day. It does not appear that there was good reason for the refusal of the adjournment, and under the circumstances I must hold that the Village Magistrate was not justified in trying the accused. The Cr. P. C. does not apply to these proceedings, but the facts of the case shew that there have been serious irregularities in the trial. I therefore set aside the conviction and sentence and direct that the accused be tried by the Sub-Magistrate of Darsi.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Ayling.

Rama Aiyar .. Appellant*

v.

A. L. Palaniappa Chetty and others .. Respondents.

Limitation Act, Art. 11—*Effect of order—C.P.C.,* (1882), *S.* 283—*Order adverse to judgment-creditor—Subsequent purchaser from judgment-creditor—Effect of order in claim proceedings on purchaser.*

It may be that subject to certain limitations an auction-purchaser is the representative of the judgment-debtor and not of the decree-holder; but a person who is the assignee of the judgment-creditor-purchaser in court sale is bound by an order against the judgment-creditor in claim proceedings even though the judgment-debtor was no party to the proceedings. The judgment-creditor, if he is the identical party against whom an order is made in claim proceedings, cannot afterwards say that he is not bound by the order by reason of his subsequent purchase of the property.

An order under S. 283, C.P.C., (of 1882) need not be solely an order relating to the right to physical possession of the property but may be with reference to the right to claim the property in dispute.

Appeal from the decree of the District Court of Chingleput in O. S. No. 2 of 1903.

The facts of this case were as follows:—

The suit was for money due on a mortgage. 23rd and 24th defendants obtained a simple money decree against the 1st defendant, the mortgagor. In execution of that decree the properties were brought to sale. Plaintiff, 1st respondent, put in a claim petition setting up a mortgage, and the claim was allowed and the properties sold subject to the mortgage. To this proceedings the mortgagor was not made party. The decree-holders became the purchasers and assigned their rights to the 25th

* A. No. 62 of 1906. 31st August, 1910.

Rama Aiyar v. Palaniappa Chetty.

defendant. The plaintiff brought a suit on his mortgage. The 25th defendant raised the contention that the mortgage was a sham transaction and that it was void with reference to para. 2 of S. 257-A. The plaintiff's suit was dismissed on the preliminary ground that the bond was void with reference to S. 257-A. The High Court on appeal reversed the order and remanded the suit to be disposed of according to law. The District Judge refused to consider the question of consideration on the ground that the order under S. 283 was final. No suit was brought within one year to set aside the order as provided in S. 283. The question was as to the effect of that order. The 25th defendant appealed.

P. R. Sundara Aiyer and *C. V. Ananthakrishna Aiyer* for appellant.

T. R. Ramachandra Aiyer and *M. Narayanasawmi Aiyer* for respondents.

C. V. Ananthakrishna Aiyer :—The mortgagor was no party to the claim proceedings. I am the representative of the mortgagor as I have purchased his rights in the property. S. 283 speaks of the party against whom the order was passed. The order was passed against the money-decree-holders who became purchasers of the mortgagor's interest. The judgment-debtor is not bound by the order. If the judgment-debtor is not estopped by the order, the purchaser of his interest is not; neither the assignee of the purchaser. [*Chief Justice*.—Why not you stand in the shoes of the 23rd and 24th defendants?] The purchaser of the property in court-auction has nothing to do with the decree-holder. The fact that the decree-holder is the auction-purchaser is merely an accident. A judgment-debtor who is not in fact a party to the claim proceedings does not, in the eye of the law, become such by reason solely of his being the judgment-debtor—*Krishnaswami Naidu* v. *Somasundara*[1]. [*C. J.*—How does this help you?] My proposition is that neither the judgment-debtor nor the assignee of his rights is bound by the order. [*C. J.*—Here it is the judgment-creditor.]. I have got the rights of the auction-purchaser and not of the judgment-creditor. The decree-holder may be be estopped by the order. The judgment-debtor is not estopped ; the auction-purchaser also is not. *Krishnasawmi* v. *Somasundara*[1],

1. (1906) I.L.R 30 M. 335 (F.B).

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has been followed in *Vadapalli Narasimham v. Dronam Raju Seetharama Murthi.*[1] In the case of a money-decree the decree-holder has no right to the property. The auction-purchaser purchases new rights and he could not be identified with the decree-holder. The auction-purchaser was held not bound by such orders—*Visvanath Chardu Naik* v. *Subbaraya Shinapa Shelli.*[2] Permission to bid removes all disabilities of the judgment-creditor —*Rukkuie Ballab* v. *Brojonath Sircar*[3]; *Guruva* v. *Subbarayudu*[4]; *Mahomed Mira Ravuthar* v. *Sawasai Vijaya Raghunatha Gopala.*[5] A decree-holder who has obtained leave to bid is in the same position as any other purchaser—*Sheonath Singh* v. *Janki Prasad*[6]; *Izzatunnina Begam* v. *Partab Singh*[7].

A third person would not be bound by personal estoppel. The disabilities are merely personal. Assuming I am estopped, the other side cannot have anything better than what the order itself gives. The order simply says the respondent is entitled to be in possession. It does not say he has a mortgage right. If he has adverse possession for 12 years he can have title. Ss. 279, 281 and 283 referred to.

The order simply says he is entitled to possession. If a person is in possession the court does not inquire what is the right under which he is in possession. [*C. J.*—There is a finding that he is in under a mortgage.] The court has no authority to find that under Ss. 280-283. We should see the scope of the sections. The court is entitled to go into the extent of the mortgage or charge only when the claimant is not in possession—*vide* S. 282. If he is in possession the court simply declares his possession. The object of the sections is that he cannot be turned out in execution. Since the provisions of the section are penal, the section should be construed strictly.

My contention that the mortgage was not supported by consideration is not inconsistent with the order that the respondent is in possession.

The consideration consists of two parts:—(1) the unadjusted decree as to which I am precluded from objecting in consequence

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1. (1907) I.L.R. 31 M. 163.
2. (1890) I.L.L. 15 B. 290.
3. (1879) I. L. R. 5 C. 308.
4. (1890) I.L.R. 13 M. 366.
5. (1899) 23 M. 227 (P.C.)
6. (1888) I.L.R. 16 C. 132.
7. (1909) I.L.R. 36 I.A. 203 s.c. 31 A. 583.

of the decision of the High Court ; (2) another mortgage which, I submit, was non-existent and regarding which my mouth should not be closed by the District Judge. So there is partial failure of consideration.

T. R. Ramachandra Aiyer for the respondents :—The contention of the other side is, the whole is a sham. The present position of one portion being sham is neither in the written statement nor in the memorandum of appeal. The court had the property sold subject to the mortgage. The moment he buys, how can the purchaser become vested with powers not possessed before ? The decree-holder was a party to the claim petition. By becoming the purchaser he cannot have higher rights. *Vishvanath Chardu Naik* v. *Subbaraya Shinapa Shethi*[1] goes to say that the auction purchaser is not the representative of either party the judgment-debtor or the decree-holder under S. 244. It was not necessary to decide the question in that case—*Sandhu Targanar* v. *Hussain Sahib*[2]. The purchaser from a decree-holder who is a purchaser of the property is a representative of the decree-holder under S. 244, C. P.C.—*Krishna Satapasti* v. *Saraswatula Sambasiva Rao*[3]. A decree-holder-purchaser and a purchaser from him are representatives of the decree-holder. A stranger purchaser is not. If the claim is disallowed, can the claimants agitate the matter again after one year ? Mutuality is needed. But on the other hand it has been held in *Nemaganda* v. *Paresha* [4] that the claimant cannot claim after one year. This is the converse of the position. The reverse would be the logical consequence of the contention of the other side—*Krishnabhupati Devu* v. *Vikrama Devu* [5]; *Saratchander Dy. v. Gapalchunder Lala*[6]. As to the second point see S. 283. The absurdity of the position is a trespasser in possession would be confirmed in possession as against the decree-holder because the question of title ought not to be gone into—*Sardhari Lal* v. *Ambika Parshad* [7]; *Punchanun Bundopadya v. Rahiva Bibu*[8]. According to the other side a hypothecation is better than a usufructuary mortgage, though the latter has possession and being in possession is better than being without it.

1. (1890) I.L.R. 15 B. 290.
2. (1904) I.L.R. 28 M. 87.
3. (1908) I.L.R. 31 M. 177.
4. (1897) I.L.R. 22 B. 640.
5. (1894) I.L.R. 18 M. 13.
6. (1892) I.L.R. 19 I.A. 203.
7. (1888) I. L. R. 15 C. 521.
8. (1890) 17 C. 771.

Rama Aiyar *v.* Palaniappa Chetty.

C. V. Ananthakrishna Aiyar in reply:—*Sardhari Lal* v. *Ambika Parshad* [1] was not a case of usufructuary mortgage. It is no answer to my contention based on S. 280. Even in the case of a trespasser, if he puts in a claim, his possession should be left intact. The clear wording of Ss. 280 and 282 cannot be frittered away by S. 283. The existence of a registered deed and all other evidence goes only to show possession. In this case there is no right in the property in the decree-holder, the decree being a money-decree. The purchaser gets only the rights in the property of the judgment-debtor.

The Court delivered the following.

JUDGMENT.—*The Chief Justice*:—The question which we have to decide in this appeal is whether it is open to the appellant to impeach the validity of the mortgage on which the suit is brought. The question arises in this way. The suit is by the mortgagee. The 1st defendant is the mortgagor. Defendants Nos. 23 and 24 held a money-decree against the mortgagor, and they attached the mortgaged property. The mortgagee put in a claim under S. 278 of the Civil Procedure Code. The mortgagor was not a party to those proceedings. On the hearing of that claim the mortgage was attacked by defendants Nos. 23 and 24 on two grounds. It was attacked on the ground that it was invalid because the provisions of S. 257-A of the Code had not been complied with, and on the ground that it was a sham. Notwithstanding that the mortgage was impeached on the grounds I have stated, the claim of the mortgagee was upheld. Defendants Nos. 23 and 24 became the purchasers at the court sale held under the order made in the proceedings under S. 278; they afterwards assigned their rights to the 25th defendant who is the appellant before us. Now the present suit is by the mortgagee, and he seeks to recover the money due to him from the mortgagor by sale of the mortgaged property. The 25th defendant seeks to impeach the validity of the mortgage.

One of the issues raised in the suit was whether the mortgage was bad because the provisions of S. 257-A of the code had not been complied with. The court of first instance held it was. The matter came before this court on appeal, and with regard to this question this court took a different view

1. (1888) I.L.R. 15 C. 521.

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from that of the court of first instance and held that S. 283 barred the rights of defendants Nos. 23, 24 and 25 to raise the question of the validity of the mortgage with reference to the provisions of S. 257-A, because they failed to bring a suit within one year from the order made in the claim proceedings. They held against the 23rd and 24th defendants on the contention which they raised that they were entitled on the ground of minority to escape the operation of this provision of the law of limitation.

Now it is conceded by Mr. Ananthakrishnier, who argued this appeal on behalf of the appellant, that the grounds of the decision of this court, to which I have just referred, are equally applicable to the question which we have to consider here, that is to say, the question whether the appellant is entitled to impeach the mortgage with reference to the provisions of S. 257-A, and on the ground that it is a sham. The parties against whom the order referred to in S. 283 of the Code of Civil Procedure was made were the judgment-creditors of the mortgagor (defendants Nos. 23 and 24), and the 25th defendant derived his title by assignment from them. The contention on behalf of the appellant was that, although the order was made against the parties from whom the 25th defendant derived his title inasmuch as these parties were the purchasers at court auction, the appellant had become relieved of the disability imposed by the provisions of S. 283 of the Civil Procedure Code and clothed himself with all the rights of the judgment-debtor. One of these rights was the right to say : "As I was not a party to the claim proceedings, I am not bound thereby."

Now that is the argument which is advanced by the appellant, and it seems to me it cannot be supported on principle or by authority. The policy of the section is clear It is stated in the case to which Mr. Ramachandra Aiyar referred, *i.e.*, *Sardhari Lal* v. *Ambika Prashad*[1], that the object to be secured was speedy settlement of the questions of title raised in execution. And as regards the policy of the section I fail to see that the circumstances of this case give the appellant any special claim for consideration. It may be that the auction-purchaser is the representative of the judgment-debtor and not the decree-holder, but that

1. (1888) I. L. R. 15 C. 521.

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Chief Justice.

is a proposition which can only be accepted subject to certain limitations. I need only refer to the decisions in *Sandhu Targanar* v. *Hussain Sahib*[1] and *Krishna Satapasti* v. *Saraswatula Sambasiva Rao*[2]. The proposition, as it seems to me even if we accept it, can have no application to a case where the parties against whom the order was made under the claim proceedings are the identical parties who claim to have the benefit of standing in the shoes of the judgment-debtor. They are more or less the parties against whom the order was made because they have the right to say (assuming they have the right) " we stand in the shoes of the judgment-debtor."

Coming to the decision of the Full Bench in *Krisknasawmi Naidu* v. *Somasundaram Chettiar*[3], what was held there (so far as is material to the question we have to consider) was that the judgment-debtor who is not in fact a party to the claim proceedings does not in the eye of the law become such by reason solely of his being the judgment-debtor. That does not help the appellant.

We were also referred to the decision in *Vadapalli Narasimham* v. *Dronam Raju Seetharama Murthi*[4]. There, following the principle of the decision of the Full Bench, it was held that the claim under S. 281 was not conclusive against, or in favour of, the judgment-debtor under S. 283 of the Code unless he was a party to the proceedings in which the order was passed. The other case—*Guruva* v. *Subbarayudu*[5]—certainly does not help the appellant because, as it seems to me, it does not carry him so far as the decision of the Full Bench. Then with regard to the other two cases—*Mahomed Mira Ravuthar* v. *Sawasai Vijaya Ragunatha Gopalar*[6] and *Mahibir Pershad Singh* v. *Macnaghten*[7] —I think neither of these authorities supports the proposition which Mr. Anantakrishnier asked us to accept. So much for the first point.

The second point is this. It is said that, assuming that the appellant is estopped because the defendants Nos. 23 and 24 are estopped, the order on the claim petition is not an adjudication

1. (1904) I. L. R. 28 M. 87.
2. (1908) I. L. R. 31 M. 177.
3. (1906) I. L. R. 30 M. 335.
4. (1907) I.L.R. 31 M. 163.
5. (1890) I. L. R. 13 M. 366.
6. (1899) I. L. R. 23 M. 227.
7. (1889) I.L. R.16 C. 682.

as regards the question of the validity of the mortgage. It is argued that the order in the claim proceedings merely determines the question of physical possession and does not determine, and was never intended by the Legislature to determine, any question of title. Now if we turn to S. 283 of the Civil Procedure Code we find the words "the party against whom an order under S. 280, 281 or 282 of the Civil Procedure Code is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive" Surely that means the order with reference to the right to claim the property in dispute and not the order with reference to the fact as to whether *A* or *B* was in physical possession at the time the order was made. If we turn to the order made by the learned Judge in the claim proceedings, it becomes clear that on one side the title under the mortgage was asserted and on the other side the title under the mortgagor was denied on the ground that the mortgage was fraudulent. And the learned Judge holds—I quote his language—"I must hold, therefore, that Exhibit C has been executed for consideration, notwithstanding that the date of Exhibit C compared with the dates referred by the counter-petitioners' vakil in connection with their suit against Chockalinga Pillai seems to show that Exhibit C was executed in that connection. In holding that Exhibit C is a genuine document I also consider the evidence relating to possession which I am going to refer to." The learned Judge adjudicates upon this very question in his order, although it is true that the actual words of his final order are: "That, however, does not interfere with the finding to which I now come, that Palaniappa Chetty is in possession of the property mortgaged to him by Exhibit C." I think that must be taken as to whether he was in possession as the party entitled to possession, that is to say, in possession by reason of the mortgage which he set up as the basis of his claim. I think, therefore, the points which have been taken fail.

As regards the merits, Mr. Ananthakrishnier did not think it necessary to contest the finding of the lower court.

The result would be that the appeal is dismissed with costs.

Ayling J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Salimamma and another — Appellants* (*Respondents*)

v.

Valli Husanabba Beari — Respondent (*Petitioner*).

Salimamma *v.* Valli Husanabba Beari.

C.P.C., S. 353—Appeal—Statute—Construction—Right of appeal not a matter of procedure.

A right of appeal is not a mere matter of procedure and must be governed by the law in force at the time when the proceedings in the Original Court commenced; and cannot be taken away by a new Procedure Code passed after the institution of the proceedings in the original court.

Appeal from the order of the District Court of South Canara in Insolvency Petition No. 1 of 1902.

Ramanatha Shenai for appellants.

K. Narayana Rao for respondent.

The Court delivered the following

JUDGMENT:—This is an appeal from the order of the District Court of South Canara in the proceedings in the insolvency of one Valli Hussanabba. The insolvent claimed to set off the amount of a decree debt in A. S. No 169 of 1901 of this court due to him from a creditor against a debt due by him to the creditor. The District Judge disallowed the set-off on the ground that the decree in A. S. No. 169 of 1901 was really obtained by the insolvent as trustee for a wakf, while the debt due to the creditor was owed by him personally. On appeal from his order under S. 353 of the Civil Procedure Code preferred by the insolvent, this court set it aside in the following terms:—"It is objected for the respondent that S. 247 of the Civil Procedure Code has no application because the parties do not occupy the same character. There is nothing in the decree to shew this. We, therefore, reverse the order of the District Judge and remand the matter for disposal according to law." On remand the Judge was again of opinion that the decree debt in A. S. No. 169 of 1901 was due to the insolvent, not as his own property, but in his character as trustee, and considering himself not precluded from deciding the question afresh by this court's order of remand, disallowed the set off. The present appeal is from the

*A. A. O. No. 197 of 1909. — 3rd May, 1911.

Salimamma v. Valli Husanabba Beari.

second order of the Judge. Mr. Narayana Rao has raised a preliminary objection to the maintainability of the appeal on the ground that under S. 46 of the Provincial Insolvency Act no appeal lies against an order refusing a set-off except with the leave of the District Court or of the High Court, which has admittedly not been obtained in this case. Mr. Shenai for the appellant contends that as the insolvency proceedings commenced before the present Act came into force the right of appeal must be regulated by S. 353 of the repealed Civil Procedure Code which was in force at the commencement of the proceedings and that this court decided on the former occasion that an appeal lay against the Judge's order under S. 353 of the Civil Procedure Code. We are of opinion that the appellants' contention must be upheld. The point is really concluded by the decision of the Privy Council in *The Colonial Sugar Refining Company, Limited* v. *Irving*[1] where a similar question arose in an appeal from the Supreme Court of Queensland. The Judicial Committee held that a right of appeal is not a mere matter of procedure and must be governed by the law in force at the time when the proceedings in the original court commenced, observing that "to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure." That decision was followed by this court in C. M. S. A. 21 of 1910, *Kalinga Hebbara* v. *Narasimha Hebbara*,[2] when the question arose as to the maintainability of second appeal against an appellate order passed under the section corresponding to S. 310-A of the repealed Procedure Code, the application under S. 310-A having been presented while the latter code was in force. The same principle was applied by the Bombay High Court in *Nana* v. *Shahu*[3] to the converse case of a right of revision not existing under a repealed statute being given by a new one. It is also embodied in S. 6, Clause (*c*), of the General Clauses Act X of 1897 which enacts that "where this Act or any Act of the Governor-General in Council or regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the

1. (1905) A. C., p. 369. 2. (1911) 21 M. L. J. 631.
3. (1908) I. L. R. 32 B. 337.

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appeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed." We must, therefore, overrule the preliminary objection. On the merits we are of opinion that the order of the District Judge cannot be sustained. It is clear to us that this court in its former order decided that the objection to the applicability of S. 247 of the Civil Procedure Code was not valid. The reason given was that the decree in A. S. No. 169 of 1901 did not show that the insolvent did not hold the same character with respect to the debt due to and by him. Mr. Narayana Rao urges that the judgment in A. S. No. 169 of 1901 does show it and that the judgment was unfortunately not before this court when the order was passed. That may be the fact, but the order was not set aside by review or otherwise and is binding on the parties. We must, therefore, hold that the insolvent is entitled to the set-off claimed, and set aside the order of the lower court and remand the case for fresh orders being passed according to law. The costs of this appeal will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar.

Abdul Rahiman .. .. .. Appellant*
(*Prisoner*).

Penal Code, S. 489 (d)—Conviction—Essentials—Onus—" For the purpose of being used", meaning of.

Per *Abdur Rahim* and *Sundara Aiyar* JJ.:—In a prosecution under S. 489 (*d*), I. P. C., where it is alleged that the accused had any instrument or material solely "for the purpose of being used " for counterfeiting any currency note, the onus is on the prosecution to show that the accused had formed in his mind the purpose or intention of counterfeiting currency notes.

Per *Abdur Rahim* J.:—It may be in some cases a mere inspection of the articles would satisfy the court that they are capable of being used in the making of the counterfeit notes. But where this is not the case, the onus is clearly on the Crown to prove the purpose or intention. The resemblance need not be perfect, but it must be sufficient to deceive people of ordinary intelligence who are familiar with currency notes.

Per *Ayling* J.:—The possession of even a single implement would be sufficient for a conviction if the intention of the accused is proved. The intention must in almost every case be a matter of inference dependent on the facts. Where the nature of the articles is such as to render them peculiarly and specially suitable for counterfeiting work, and useless for any other

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*Cr A. No. 653 of 1910, 10th May, 1911.

that can be suggested, the intention to use them for counterfeiting may be fairly inferred, subject to rebutment by the accused. *In re* Abdul Rahiman

Per *Sundara Aiyar* J.:—The Crown should prove that the accused had the objects *for the purpose* of counterfeiting. Mere intention to make oneself able to counterfeit currency notes is not enough for a conviction. The accused should have formed in his mind the purpose of using the articles for counter-feiting. Abdur Rahim J

Appeal from the order of the Court of Session of the Coimbatore Division in Case No. 73 of the Calendar for 1910.

T. R. Ramachandra Aiyar for appellant.

The Public Prosecutor (*C. F. Napier*) *contra.*

The Court delivered the following

JUDGMENT:—*Abdur Rahim* J.:—The appellant, a young man of 19, has been convicted of an offence under S. 489 (*d*), Indian Penal Code, that is, having in his possession instruments and materials for the purpose of being used, or knowing or having reason to believe that they were intended to be used, for forging or counterfeiting currency notes. This section has been introduced into the Penal Code by Act XII of 1899 and was drafted apparently on the lines of S. 235, Indian Penal Code (which relates to coins) though the draftsman has made certain variations in the language—I mean, using the words 'for the purpose of being used' in the place of 'for the purpose of using the same'—which cannot be said to be an improvement. But so far as the questions which we have to decide in this case are concerned, there seems to be no substantial difference between the two enactments.

That the accused, when arrested in the train on a charge of embezzlement which had been laid against him by his employer, was found in possession of the articles exhibited as material objects, I find no sufficient reason for disbelieving.

The question then arises whether the possession of these articles coupled with the suspicious conduct of the accused when seized, namely, an attempt on his part to snatch the articles from the constable, makes him guilty of an offence under S. 489 (*d*) of the Penal Code. No evidence was adduced before the Sessions Judge to prove that the things found or any of them are capable of being used or would be used for forging or counterfeiting a currency note or bank note, and although we adjourned the

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hearing of the appeal for the purpose of such evidence being adduced before us, no such evidence has been given.

Abdur Rahim J.

In order to establish a charge under this section, what the prosecution has to prove in the first place is that the machinery, instrument or material found in the possession of the accused person is such as would be used in the production of a counterfeit note, and if that is proved, the next element which is to be proved is that the accused knew or intended that such article would be used for the purpose of counterfeiting currency notes. It may be that in some cases a mere inspection of the articles would satisfy the court that they are capable of being used in the making of counterfeit notes. But where that is not the case, it is the duty of the Crown to adduce evidence of a competent and qualified witness who would be able to explain to the court the process by which the instruments or materials in question could be used in making a counterfeit note. I have examined the exhibits in this case carefully and I find myself totally unable to say that any of these can be successfully used in counterfeiting a note, understanding the word 'counterfeit' in the sense that the resemblance must be such as may in circulation ordinarily impose upon the world (see RUSSELL on *Crimes*, Vol. I. page 211). It was suggested by the Public Prosecutor that there are many hill tribes in this Presidency who could be easily imposed upon. But the standard of resemblance must not be judged in the light of the intelligence of the most primitive people who may be found in the country. If that were so, any piece of paper with any scrawl on it could, I imagine, be passed among such people as a Government currency note. No doubt the resemblance need not be perfect, but it must be sufficient to deceive people of ordinary intelligence who are familiar with currency notes.

Now as regards the articles found, all that I should be prepared to say without the help of any expert's evidence is that some of the articles may be used in reproducing portions of the designs or writings of a five rupee note on ordinary paper or similar substance either with pencil or ink, and there can be little doubt also that the accused was trying to find out how to make a currency note. But without further evidence I am unable to say that any of these articles are actually of any use in producing a

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counterfeit note. Instruments and materials which may be useful in making correct drawings of the outlines of the designs and figures of a currency note may be of no use whatever in manufacturing counterfeit notes. On looking into ARCHBOLD'S *Criminal Pleadings*, pages 764 to 766, where the English statutes dealing with similar offences are recited, it would appear that the paper is the most important material in the manufacturing of a counterfeit note, and all the papers that were found with the accused in the present case are files of ordinary foolscap or carrara white note paper. It may be that the articles found form the stock-in-trade of a counterfeiter of currency notes as the learned Sessions Judge puts it, but such a finding must be based on evidence and not on conjectures. How necessary it is that a matter like this should be, as it is generally required by the court to be, proved by the evidence of experts will be apparent from a reference to some of the English cases, for instance *Rex* v. *Moore*[1] and *Ridgeley's case*.[2] I certainly do think that the Crown Prosecutor should have been able in this case to adduce proper evidence to prove that the materials found were capable of being used in making a counterfeit note, and his failure to do so necessarily raises a presumption against the case of the Crown.

I would, therefore, set aside the conviction and sentence and order that the prisoner be released from custody.

Ayling J.:—Appellant has been convicted of committing an offence under S. 489 (*d*), I.P.C., by possessing instruments and materials for the purpose of counterfeiting five-rupee currency notes.

From the evidence of prosecution 1st and 2nd witnesses it appears that on the evening of the 28th May, 1910, appellant was arrested in the train between Mettupalaiyam and Coimbatore by prosecution witness No. 2, an Ooty constable, on a charge of embezzlement. On being searched, a number of articles, marked as material objects in the case, were found in his pocket, which are said to be instruments and materials used for counterfeiting Rs. 5 currency notes.

Four other witnesses were examined who speak to having previously seen appellant at Ooty under circumstances tending

1. (1826) 1 Moody, p. 122.   2. (1778) 1 East P. C., 171.

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to suggest that he was actually engaged in the work of counterfeiting or preparation therefor. This evidence is in itself inconclusive on the present charge; it merely tends to strengthen the inference of guilty intention which may be drawn from possession of the articles found, as proved by prosecution witnesses Nos. 1 and 2.

I see no reason to doubt the substantial truth of the evidence of the last mentioned witnesses, as establishing the discovery of the incriminating articles on appellant's person. The rebutting evidence of the two defence witnesses was, in my opinion, rightly discredited by the Sessions Judge.

It is, however, urged by the learned vakil for the appellant that even accepting this evidence, the conviction is not warranted. He argues that the articles found are not sufficient in themselves without the addition of other materials for the preparation of the counterfeit note: and, further, that it has not been proved that, even with such addition, it would be possible to manufacture a note capable of being passed. He relies in support of his contention on the case of *R. v. Tirumal Reddy*,[1] reported in Weir's Criminal Rulings, Vol. I., 219. There is absolutely nothing in S. 489 (*d*), I. P. C., to indicate that the possession of a complete outfit for the manufacture of counterfeit notes is necessary to constitute an offence thereunder. As I read the section, the possession of even a single implement would be sufficient, provided it were shown that such implement was intended to be utilised in the work of counterfeiting. This intention must, in almost every case, be a matter of inference dependent on the facts, particularly on the nature and the number of the articles found—their suitability for counterfeiting work and for innocent purposes. It is always open to the accused person to show (as he has not attempted to do in this case) that he possessed them for innocent purposes; and even if he does not, where the nature of the articles is consistent with innocent as well as guilty purposes, no court would draw an inference adverse to the accused. Where, on the other hand, the nature of the articles is such as to render them peculiarly and specially suitable for counterfeiting work, and useless for

1. (1899) Cr. Ap. No. 153 of 1899.

any other that can be suggested, the intention to use them for counterfeiting may be fairly inferred, subject to rebutment by the accused.

There may, of course, be cases where, though the *ultimate* object of the possessor may clearly be counterfeiting, the particular articles found are of such rude or imperfect nature as to indicate unmistakeably that the work was only in an experimental stage and that they could not be intended for ultilisation in the preparation of the finished counterfeit. The case quoted above was such a case; it was held that no offence was disclosed by the possession of rudimentary dies indicative only of experimental work and incapable of being used to produce a passable counterfeit. The only other proposition laid down therein is that the possession of implements which, though fit for counterfeiting, have been broken or otherwise rendered incapable of further use, does not constitute an offence. Neither of these propositions is, however, of much use to the accused in the present case, or to put it differently, among the numerous articles exhibited, there are some to which neither of them can possibly be applied. Fret saws, and files (material objects 5 and 7) are no doubt susceptible of innocent use; but when, as in the present case, they are found together with articles unmistakeably connected with counterfeiting work, it may be fairly inferred that they are intended to be used in conjunction with the latter. Here we have two admirable tracings on tissue paper of five-rupee notes (material objects 2*a* and 2*b*), together with an abundant supply of spare tissue paper. We also have a sheet of paper (material object No. 12) of a quality closely resembling that on which currency notes are printed with the description "carrara white A. P. and S." noted on it in ink. We have also numerous flat pieces of slate and zinc (material objects Nos. 5 and 8) suitable for use in producing the various impressions on a currency note, on many of which the said impressions have been reproduced. Some of these (material objects No. 8) may represent merely practice work; but among material objects No. 5 are several pieces in various stages of preparation, in which the shaping and filing have been so excellently done, that there is absolutely no reason why they should not be used in preparing a counterfeit note fully capable of deceiving the ordinary public. There is one small zinc figure 5 which could

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hardly be improved upon. There are other pieces on which detailed work has not yet been commenced.

A consideration of the collection as a whole leaves no doubt in my mind that most, if not all, of the articles contained in it were intended to be used in one way or another in the process of counterfeiting a five rupee note, while several of them are of such a degree of excellence as to show that the work had passed the experimental stage. These as well as the unworked materials are capable of being used in conjunction with other tools and materials in the actual preparation of a counterfeit note; and I see no reason to doubt that it was appellant's intention that they should be so used.

The conviction in my opinion is justified and should be upheld. I see no sufficient reason for reducing the sentence.

Abdur Rahim, J.:—As my learned brother holds a different view, the case must be placed before a third Judge for disposal.

This case coming on for hearing again, the Court delivered the following

JUDGMENT:—In this case the accused Abdul Rahiman, a young man of about 19 years of age, was convicted by the Sessions Judge of Coimbatore of the offence of being in possession of instruments and materials for counterfeiting five-rupee Government currency notes under S. 489 (*d*) of the Indian Penal Code. He appealed to this court and the appeal was heard by Justices *Abdur Rahim* and *Ayling*. The former was opinion that the offence charged against the accused had not been established by the evidence tendered by the prosecution, while the latter held that the conviction should be sustained. In consequence of the difference of opinion between the two learned Judges, the case was placed before me for disposal.

The accused was, according to the evidence for the Crown, arrested in the train between Mettupalayam and Coimbatore and on being searched a number of articles, produced before the court, is alleged to have been found in his pockets. It is these articles which are said to be the instruments and materials for counterfeiting five-rupee currency notes. Both the learned judges were of opinion that the accused was arrested with the

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articles in his possession in the train, as alleged by the prosecution. Mr. Ramachandra Aiyar, who has argued the case before me for the appellant, has drawn my attention to some suspicious circumstances relating to the arrest and search, but after full consideration I agree in the view taken by the lower court that the accused was, as a matter of fact, arrested in the train and that the material objects produced were found on him at the search.

The question for decision is whether it has been proved that the accused was in possession of any instrument or materials "for the purpose of being used, or knowing or having reason to believe that it was intended to be used, for forging or counterfeiting any currency note." It is not alleged for the prosecution that the accused was in possession of the objects found on him in the circumstances mentioned in the latter clause, "knowing or having reason to believe that they were intended to be used" by any person other than himself for counterfeiting currency notes. The question is whether he was in possession of any such articles for counterfeiting currency notes. Before the court could come to the conclusion that the accused had the objects in question *for the purpose* of counterfeiting, the Crown should establish that he had formed in his mind the purpose or intention of counterfeiting currency notes. The onus of doing so is on the Crown according to the language of the section—unlike the English Law where in the case of a similar offence with respect to the counterfeiting of Bank of England notes the onus is laid on the accused of proving a lawful excuse "for knowingly having in his custody or possession any plate, stone or other material or any instrument or device for engraving a bank note." (See ROSCOE'S *Criminal Evidence*, p. 472). I may at once state that no evidence whatever has been adduced in this case, either that the material objects in evidence are actually of any use in producing a counterfeit note or that the accused had them in his possession for the purpose of counterfeiting notes. The prosecution chose to leave it to the court to come to a judgment on the former question by means of the knowledge possessed by the presiding judge, and, I take it, it expected the court also to presume the purpose and intention of the accused from the nature of the instruments in his possession. I can find no justification for

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pursuing such a course in this case. The result was that while *Ayling* J. was able, of his own knowledge, to come to the conclusion that "most if not all of the articles contained in it (in the accused's pockets) were intended to be used in one way or another in the process of counterfeiting a five-rupee note while several of them are of such a degree of excellence as to show that the work had passed the experimental stage" and that "these as well as the unworked materials are capable of being used in conjunction with other tools and materials in the actual preparation of a counterfeit note," *Abdur Rahim* J. observed "I am unable to say that any of these articles are actually of any use in producing a counterfeit note. Instruments and materials which may be useful in making correct drawings of the outlines of the designs and figures of a currency note may be of no use whatever in manufacturing counterfeit notes" and "I have examined the Exhibits in this case carefully and I find myself totally unable to say that any of these can be successfully used in counterfeiting a note." An opportunity was given to the prosecution, on appeal, by the learned judges who heard the case to produce evidence to prove that the articles were such as could be successfully used for counterfeiting a note. But for some reason, which does not appear, the Crown did not avail itself of the opportunity. I entirely agree in the opinion of *Abdur Rahim* J. that this is not a case in which a mere inspection of the articles would satisfy the court that they are capable of being used in the making of counterfeit notes.

I shall deal only very briefly with the materials found on the accused. A very small sheet of paper of the description "carrara white A. P. and S" was one of these. This I find is a kind of paper in common use and most easily had in the market. It may bear resemblance in colour and quality to that on which currency notes are printed, but no significance can be attached to this fact as the paper is commonly used for other purposes also. We have then some flat pieces of slate and zinc which, according to the prosecution, are suitable for use in producing various impressions on a currency note and on some of them the said impressions have been produced. There is no evidence to show that the impressions to be found on some of these pieces are really similar to those on a five

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rupee currency note. There is a small zinc figure '5' which, it is said, could hardly be improved upon. But on inspection Dr. Swaminadhan who appeared before me for the Public Prosecutor, had to admit that, although the zinc figure itself is well done, it does not bear any special similarity in its lower part to the figure as we find it in an ordinary five-rupee note. Then it is said that there are two very good tracings on tissue paper of five-rupee notes. The Sessions Judge also refers specially to two pieces of slate on which are cut the wavy design which appears on the notes. This observation appears to be well founded but, after all, the materials discovered do not include those required for a good portion of a five-rupee note. The only portion which strikes me as being at all well done is the wavy design referred to by the Sessions Judge. On the whole, the material objects have produced on me the impression that the accused certainly wanted to be able to counterfeit five-rupee currency notes and was probably studying to fit himself for the work. But the question I have to decide is whether he had the objects *for the purpose of counterfeiting.* Before I could say that he so had them, I must be able to come to the conclusion that the accused had satisfied himself that the materials were fit for that purpose. For, if he had not done so, it is not reasonable to suppose that he intended to use them for counterfeiting, and I have no evidence before me, apart from the nature of the objects themselves, to enable me to arrive at his purpose. In the first place, I find that there is nothing to show that the accused had furnished himself with any means for making up a good portion of a five-rupee note. Secondly, I am unable to say that the impressions in the zinc and the slate plates are similar to those on a currency note. Thirdly, I can attach no importance to the nature of the paper described as "carrara white A. P. and S." Would it be reasonable then on my part to conclude that the accused had the material objects *for the purpose of counterfeiting* a note when the objects do not show either by their nature or by their completeness that he would have considered them good enough to be actually used for counterfeiting a note? It may be he was studying to acquire the art of counterfeiting and to equip himself with objects suitable for the purpose, but that is a very different thing from making up his mind that the identical objects he had were fit for the purpose or his

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being in possession of them for the purpose. I quite agree with the opinion of *Ayling* J., that if the purpose and intention of the accused be proved, it is not necessary that all the articles required for counterfeiting should be found on him to hold him guilty of an offence under the section. (See *Ridgeley's case*[1]). A man may not be able to command all the articles required for the purpose but he may be actually proved to be *in possession* of only some. This would not deter the court from convicting him of an offence under the statute. But here we have no evidence that the accused had counterfeited any notes before or that he had companions who had other objects required for counterfeiting. His purpose and the state of his mind have to be judged solely from the articles produced before the court. The utmost that could be said to be proved against the accused is that he disired to be able to counterfeit notes, was acquiring knowledge for the purpose and trying to equip himself with the required materials. But I can neither find that he regarded himself and the materials found on him as fit to carry out his desire or that, having come to that conclusion, he kept the articles in his possession for the purpose of counterfeiting. The failure of the Crown to produce evidence regarding the nature of the articles, though given an opportunity to do so, throws, in my opinion, much suspicion on the case. In Criminal Appeal No. 153 of 1899, *Subrahmania Aiyar*, Officiating Chief Justice, and *O'Farrell* J. pointed out that it was the duty of the prosecution to produce such evidence, and S. 489 (*d*) throws on it also the burden of proving that the accused had formed the purpose of using the articles for counterfeiting. The accused is not called upon, as under the English Law, to show that he had the articles for an innocent purpose.

I reverse the judgment of the Sessions Judge convicting the accused, Abdul Rahiman. I acquit him and direct that he be discharged from custody.

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1. (1778) 1 East's P. C. p. 171.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Sree Krishna Doss .. Appellant*
v. (*Decree-holder*)
Alumbu Ammal .. Respondent
(*Judgment-debtor*).

Sree Krishna Doss *v.* Alumbu Ammal.

Limitation Act, Art. 182,—"*Not provided for by....*"—*Scope of exception—Transfer of decree—Effect of proviso—C. P.C., S.* 48—*Limitation law how for a law of procedure.*

The exception relating to Art. 182 makes the court which passed the decree the test for determining the limitation for execution and not the court to which the decree is transferred for execution. Although a decree is transferred by the court which passed it to another court for execution, the control of the execution is still in several respects in the hands of the former court. So when a decree of the Presidency Small Cause Court is transferred to the City Civil Court for execution, Art. 182 of the Limitation Act, and not S. 48 C. P. C., governs the case for purposes of limitation.

Obiter:—Limitation is a law of procedure for some purposes; *e. g.*, when questions of private international law have to be decided and a court has to settle the law of which state should be applied in case of conflict.

Appeal from the order of the Madras City Civil Court in E. P. No. 148 of 1910 in S.C S. No. 10481 of 1896 on the file of the Court of Small Causes, Madras.

Joseph Satya Nadar for appellant.

Devasaghayam for respondent.

Joseph Satya Nadar, for appellant, contended that S. 48 did not apply to Small Cause Court decrees and therefore the application was not barred—S. 8, Civil Procedure Code. Under the code, the court that transfers the decree retains control over execution; its orders bind the executing court. The limitation that is applicable, according to the scheme of Limitation Acts in this country, is the limitation that is applicable to the *decrees.* It is S. 31 of the Presidency Small Cause Court Act that gives the City Civil Court power to execute, and the fact that the City Civil Court procedure is applicable does not attract the consequence that the limitation applicable to City Civil Court decrees also is applicable.

Devasaghayam, for respondent, submitted that S. 48 restricted the power of the City Civil Court in executing transferred decrees.

*A. A. O No. 114 of 1910. 3rd May, 1911.

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The Court delivered the following

JUDGMENT:—The question in this case is whether an application for execution of a decree of the Small Cause Court presented to the City Civil Court, to which it had been transmitted for execution, was rightly held by that court to be barred by limitation under S. 48 of the Civil Procedure Code. It is conceded that under Article 182 of the Limitation Act, which is applicable to the Small Cause Court, the application was not barred. S. 48 of the C.P.C. enacts that "where an application to execute a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from the date of the decree sought to be executed." This section is not applicable 'to any suit or proceeding' in the Presidency Small Cause Court. The learned judge of the City Civil Court holds that the law of limitation being a law relating to procedure, S. 48, which is applicable to the City Civil Court, must govern the case, and the application must therefore be held to be barred, and he relies upon the decision of the Privy Council in *Her Highness Ruckmaboye* v. *Lulloo Bhoy Mottichund*[1] in support of his view. In that case the Privy Council held that in 1851, that is before the enactment of the Limitation Act of 1859 in this country, the English statutes of limitation were applicable to suits in the Presidency town of Bombay as they had been long adopted and acted upon there. We do not think that the decision has any real bearing on this case. It is, no doubt, true that for some purposes limitation is a branch of the law of procedure. It would be so when questions of private international law have to be decided and a court has to settle the law of which state should be applied where there is a conflict of law. But for a long time the Indian Legislature has passed a different statute for regulating the manner in which suits and appeals are to be tried and for determining the rules of limitation applicable to them. The question before us must be decided with reference to the statute of limitation. Different rules have been enacted for the execution of decrees passed respectively by the High Court and all other courts, and these are not affected by the court in which execution is actually taken

1. (1852) 5 M. I. A. 234.

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out. Thus in *Tincowri Dasi* v. *Debendra Nath Mookerjee*[1] the Calcutta High Court held that when the execution of a decree of the Calcutta Small Cause Court was transferred to the High Court of Calcutta, the limitation applicable to it was governed by Article 179 and not by Article 180 of Act XV of 1877. *Wilson* J., who decided the case, pointed out that while the old Procedure Code (Act VIII of 1859) provided that the copy of a decree transmitted to a court for execution should have the effect of *a decree of that Court*, Ss. 227 and 228 of Act XIV of 1882 laid down only directions as to the manner of execution and did not make the decree *one passed by* the court to which it is sent for execution. The same view was held by a Full Bench of the same court in *Jogamaya Dass* v. *Thackomani Dass.*[2] In *Sambasiva Mudaliar* v. *Panchanada Pillai*[3] the learned *Chief Justice* and Justice *Miller* held that Article 179 was not applicable to an application for possession by a purchaser of immoveable property at a revenue sale by executing the certificate obtained by him under S. 36 of the Revenue Recovery Act. The learned Judges followed the rulings of the Calcutta High Court referred to above.

Column 1 of Article 182 of the Limitation Act states that it is applicable to " the execution of a decree or order of any civil court not provided for by Article 182 or by S. 48 of the Code of Civil Procedure, 1908 " There can be no doubt that the exception relating to Article 183 makes the court which passed the decree the test for determining the limitation for execution as that article itself shows whichever court may be executing the decree. In our opinion the exception relating to S. 48 of the C.P.C. should also naturally be understood as applicable to decrees passed by the courts to which that section is applicable. Although a decree may be transferred by the court which passed it to another court for execution the control of the execution is still left in several respects in the hands of the former court. Thus every application for execution by an assignee of a decree must be made to the court which passed the decree, and the right to grant execution or to refuse it rests with that Court (O. XXXI, r. 16). An application for execution against the legal represen-

1. (1890) I. L. R. 17 C. 491. 2. (1896) I. L. R. 24 C. 473. 3. (1907) 17 M.L.J. 441.

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tatives of a deceased judgment-debtor has to be made to that court (S. 50.) Orders for the stay of execution can be passed only by the court passing the decree (Order XXI, r. 26) only that court again could, under S. 257-A (now repealed) of the Code of 1882, sanction agreements giving time for the satisfaction of the judgment-debt or providing for the payment of a sum in excess of the sum due under a decree. Order XXI, r. 28, provides that any order of the court by which the decree is passed in relation to the execution of such decree shall be binding upon the courts to which the decree is sent for execution. S. 46 of the present code entitles the court passing a decree to issue a precept to any other court competent to execute the decree to attach any property belonging to the judgment-debtor which the latter court is bound to obey. S. 41 requires a court to which a decree is transferred for execution to certify to the court which passed it "the fact of such execution, or where the former court fails to execute the same, the circumstances attending such failure." These provisions seem clearly to show that though the execution may be actually carried on by a different court, the court passing the decree has a large measure of control over the execution. Besides, to hold that the court executing the decree may apply a rule of limitation differing from that applicable to a decree of the court transmitting it, when the latter itself is executing it, would lead to anomalous consequences. For instance, suppose a decree of a mofussil court is sent up to the Presidency Small Cause Court for execution, but before execution is granted the twelve years period provided for by S. 48 of the C. P. C. expires: would it be reasonable to hold that the decree-holder would acquire extension of the period within which he might obtain execution by getting the execution transferred to the Presidency Small Cause Court? In this very case it would still be open to the Small Cause Court itself to continue the execution of the decree. Further execution might be transferred from the Presidency Small Cause Court to the City Civil Court for reasons other than the absence of assets in the shape of moveable property available to the decree-holder for execution. The result of upholding the view of the lower court would be to hold that execution against moveable property could be had in one court and not in the other. There will also be difficulties in the application of the rule providing execution in case of cross decrees

under order XXI, r. 18. Suppose that *A* and *B* have cross decrees against each other, *A*'s decree being passed by the Small Cause Court and *B*'s by the City Civil Court, and that *B*'s execution would be barred by limitation if S. 48 were applied, the consequence in such a case would be that if both decrees be produced in the Small Cause Court *B* would get the benefit of r. 18, while if both were to be produced in the City Civil Court he would not—a result which would lead to wrangling between the parties for getting the execution into the hands of the court which would be favourable to each of them.

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We are of opinion that under Article 182 of the Limitation Act the execution of the decree in the present case is not barred by limitation. We therefore reverse the order of the City Civil Court and remand the application for execution to it for disposal according to law. The costs of this appeal will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Spencer.

Kurnam Seshayya and another .. Petitioners*
(*Accused*).

Seshayya v Emperor.

I. P. C., S. 446 (a)—" With intent to commit an offence "—Essentials for conviction.

For a conviction under the 1st part of S. 446 (*a*), I. P. C., it is enough if the Magistrate finds that the accused committed trespass with the intention of committing some offence, even though he does not find as to what the offence specifically is. [*Reg.* v. *Samban*[1] foll. *Reg* v. *Durgayya*[2] explained; *Reg.* v. *Rayapadayachi*[3] commented on.]

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of the Joint Magistrate of Nandyal in Cr. A No. 43 of 1910 confirming the conviction and sentence passed on the accused by the Second Class Magistrate of Kalwa in C.C. No. 66 of 1910.

M. B. Doraisawmy Aiyangar for petitioners.

The Public Prosecutor (*C. F. Napier*) for the Crown.

The Court made the following

ORDER:—In this case we are asked to review the order of the Joint Magistrate of Nandyal confirming the conviction and

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*Cr. Rev. C. No. 36 of 1911. 26th July, 1911.
Cr. Rev. P. No. 29 of 1911.

1. (1881) 1 Weir 533. 2. (1882) 1 Weir 524.
3. (1896) I. L. R. 19 M. 240.

Seshayya v. Emperor.

sentence imposed on petitioners by the Sub-Magistrate of Kalwa for an offence under S. 448, Indian Penal Code (house trespass).

The facts of the case are simple. Complainant and his wife who were sleeping in their house, the door of which was open, awoke in the dead of night and discovered that some persons were inside the building. An alarm was raised and these persons were subsequently found to be petitioners. A dagger, which does not belong to the inmates and which, it is inferred, was brought by the petitioners, was found in a corner of the house. 1st petitioner was not on good terms with complainant, and had, on the previous afternoon, taken part in getting his house searched for forest produce. Petitioners did not set up any innocent motive for their presence in the house under the circumstances deposed to by the prosecution witnessess, but attempted to shew that they were dragged into it and confined against their will—a plea which both courts found to be false.

Both courts found that petitioners were found trespassing in the house under the circumstances set forth above; and that that they had entered it with intent to commit an offence of some kind, though it was impossible to say what offence. The findings are practically identical though the Sub-Magistrate thought it probable that the intention of petitioners may have been to introduce forest produce—a suggestion which the Joint Magistrate rejected. The only ground advanced for interference is that the lower courts have not found the existence of any intent on the part of petitioners, such as is necessary under S. 445, Indian Penal Code, to constitute the offence of criminal trespass.

Authorities have been quoted on both sides. The chief reliance of petitioner's vakil is on *Regina* v. *Rayapadayachi*[1], which has been followed in Criminal Revision Petitions Nos. 256 and 349 of 1909 (reported in 6 M.L.T., p. 262) and which itself follows an earlier case: *Regina* v. *Durgayya*.[2] The latter case, as well as a still earlier one cited by the Public Prosecutor, viz., *Regina* v. *Samban*,[3] is reported in Weir's Criminal Rulings, and the Public Prosecutor also relies on the remarks of *Benson* J. in *Sellamuthu* v. *Karuppan*[4] and on the rulings in *Emperor* v.

1. (1896) I.L.R. 19 M. 240.
2. (1882) Weir, Vol. I, 524.
3. (1881) Weir's Cr. Rulings Vol. I, p. 533.
4. (1911) 21 M.L.J., p. 161.

Lakshman Raghunath[1] and *Golap Panday* v. *Boddam*[2]. In considering the question before us it is necessary to remember that the intent required by S.446, Indian Penal Code, may be of two kinds—(*a*) to commit an offence; (*b*) to intimidate, insult or annoy. In the present case the finding of both Magistrates is that the intent was to commit an offence. They have not even discussed the possibility of an intent to intimidiate, insult or annoy, much less found its existence. We shall deal with the case on their findings, to see if they are warranted by the evidence and if they are sufficient to support a conviction.

It has been suggested that the rulings in the two cases reported in Weir (*Regina* v. *Durgayya*[3] and *Regina* v. *Samban*[4]) are irreconcilable and this appears to be the view taken in *Regina* v. *Rayapadayachi*[6]. But, with great deference to the learned Judges who decided the latter case, we do not think there is anything inconsistent in the earlier ruling. In *Samban's case*[4] the *Chief Justice* and *Kindersley* J. laid down that it is sufficient if the evidence leaves no reasonable doubt that the accused intended to commit an offence of some kind and that the court need not be in a position to say what specific offence it was. Nothing contrary to to this is expressed or apprently intended by the Judges in the other case decided nine months later. The salient feature distinguishing *Durgayya's case*[3] is that the Magistrates appear to have recorded no finding at all as to accused's intent. All that the learned Judges seem to say is that intent must be expressly found and not left to inference. The judgment in *Regina* v. *Rayapadayachi*[5] deals with the matter from the point of view of an intent to annoy, not to commit an offence, and lays down that the primary and not the constructive intention of the trespasser is all that has to be considered. This view is followed in 6 M.L.T. 262 and dissented from by *Benson* J. in *Sellamuthu* v. *Karuppan*[6]. The Bombay and Calcutta cases are against it. But in as much as all these cases simply consider an intent to annoy or intimidate, we are not here concerned with them. The fact remains that the ruling in *Regina* v. *Samban*[4] has never

1. (1902) I.L.R. 26 B. 558.
2. (1889) I.L.R. 16 C. 715.
3. (1882) Weir, Vol. I, 524.
4. (1881) Weir's Cr. Rulings, Vol. I, p. 523.
5. (1896) I.L.R. 19 M. 240.
6. (1911) 21 M.L.J. 161.

Seshayya v. Emperor.

been overruled or even dissented from (except under what seems to us to be a misapprehension) and we can find no reason for not following it.

Holding this view we must decline to interfere. The facts in this case are practically identical with those in *Regina* v. *Samban*[1]; indeed the dagger incident makes the present case somewhat the stronger of the two. We cannot say that the lower courts were not justified in finding on the evidence that the accused must have entered the house (with the intention of committing some offence) and this is all that is required.

The petition is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

APPEAL NO. 93 OF 1908.

Thandapaneni Krishnayya & others .. Appellants*

v.

Peddilibotta Subbaya & others .. Respondents.

APPEAL NO. 94 OF 1908.

Thandapaneni Kottaya ... Appellant

v.

Thandapaneni Kistayya & others .. Respondents.

Religious endowments—Hereditary trustee—Scheme suit—Appointment of co-trustee—C. P. C. (1882), *S.* 539—*Scope of—No removal of trustee possible under the section.*

In a suit under S. 539, C.P.C. of 1882, an existing trustee cannot be removed. [*Rangasawmi Naiken* v. *Varadappa Naiken*[2] referred to.]

Where the trusteeship is hereditary, the trustee cannot be appointed from amongst the members of the trustee's family by selection.

Where some of the members were guilty of breach of trust and others of gross carelessness, the court ordered the appointment of a stranger-resident of the village as co-trustee and modified the scheme framed by the lower court in other respects.

Appeals from the decree of the District Court of Guntur in O. S. No. 36 of 1905.

The facts are these:—

There is in the village of Manchicalapudi, a hamlet of Morampudi within the jurisdiction of the Tenali District Munsif's

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* A. Nos. 93 and 94 of 1908. 7th March, 1911.

1. (1881) Weir's Cr. Rulings Vol. I, p. 533.
2. (1894) I. L. R. 17 M. 462 (F.B.)

Court, an ancient Inam bearing D No. 1572 which was granted for the use of and dedicated to the public, and has for over a century been used by the villagers as a *Dharmadayam* or charitable tope. At the Inam settlement, puttah was issued in the names of 1st defendant's grandfather, 2nd defendant's father-in-law and 3rd and 4th defendants' father, and these acted as trustees or Dharmakartas. 1st defendant has been a minor; 2nd defendant's husband is dead, and 3rd and 4th defendants have, during the last 8 or 10 years, cultivated the land, or their portion of it, till 2 years ago, instead of preserving and rearing trees for which purpose the grant was made and the land was reserved. Hence plaintiffs 1 and 2, residents of the village, after obtaining sanction of the Collector under S. 539 of the Civil Procedure Code, instituted this suit on 5-8-1905 for removing defendants from management, appointing new trustees, and settling a scheme and vesting its management in the new trustees. Upon the death of 1st plaintiff, 3rd plaintiff was joined as his representative. Krishnayya v. Subbayya.

The following was the scheme of management framed by the District Judge:—

(1) That a committee of 3 persons do manage and superintend the charity of planting and rearing of trees on the land in question.

(2) That a fence or hedge be raised all round the land and, subject to the channels existing in it and to access thereto, tamarind, mango, wood-apple, cocoanut, palmyra, date and other suitable fruit-bearing trees be planted at no less than 30 per acre, and that the whole area be planted with such trees within 5 years.

(3) That vegetables, creepers, flower-plants, etc., such as may not be injurious to the growth of trees shall be grown, and the income arising therefrom utilized in maintaining a gardener to be appointed by the committee to rear the trees and in incurring incidental expenses.

(4) That regular accounts be kept of the income and expenses, and whatever initial or surplus expenditure may have to be incurred be met from public or private subscriptions, the committee now appointed being recommended to bear the initial expenses during the first year.

Krishnayya v. Subbayya.

(5) That the accounts be open to inspection by a Revenue officer of the taluk not inferior to a Revenue Inspector or be called by the District Court.

(6) That for vacancies in the committee, nominations be then and there submitted to the District Court by the remaining members, and in default of nomination being made in a month, the District Court do proceed to fill up the vacancy.

(7) That the tope be open to the public and the fruits or surplus income be distributed to the landholders of the village.

(8) That in case of difference of opinion in the committee, the opinion of the majority shall prevail, but it will be open to the committee to make a reference to the District Court on a material point of difficulty, and it will be incumbent on them to send yearly reports on the 23rd January of each year beginning with 1909.

Items *C.* & *D*, referred to in the lower court's Judgment, are these:—

C.—That 3rd plaintiff, 1st defendant and one member in the family of Kothandaramiah (father of defendants 3 and 4) do form the committee. Such member to be proposed by plaintiffs and defendants 1, 3 and 4 to court by the 18th January 1908.

D.—That the land in question do rest and remain with the said trustees and their successors for the said purpose.

IN APPEAL NO. 93 OF 1908.

R. Kuppusami Aiyar for appellants.

P. Nagabhushanam for respondents.

IN APPEAL NO. 94 OF 1908.

V. Ramesam for appellant.

P. Nagabhushanam for respondents.

The Court delivered the following

JUDGMENT:—The 3rd and 4th defendants contend that the land in question was not dedicated to the public. But the written statement of the defendants (Exh. *C*) and the other evidence on record completely establish the contrary.

The lower court is wrong in holding that the court could remove any of the existing trustees in a suit under S. 539, Civil

Krishnayya v. Subbayya.

Procedure Code—see *Rangasawmi Naiken* v. *Vardappa Naiken*.[1] The direction in the decree dismissing the 3rd and 4th defendants must be set aside. As the office descends by hereditary succession, the trustee cannot be appointed from amongst the members of the family by selection. The defendants Nos. 1 to 4 are all entitled to be trustees. Having regard to the conduct of the members of the family in the past, some being guilty of breach of trust and others of gross carelessness, we concur with the lower court in holding that it is desirable to associate a respectable resident of the village in the management of the trust. The 3rd plaintiff is therefore appointed a co-trustee with the defendants. The scheme framed by the lower court requires modifications in this and some other respects as indicated below :—

Clause *B* (4).—Substitute "the trustee" for the committee now appointed.

B (5).—Substitute "the Revenue Inspector of the Firka and the Tahsildar of the taluk" for the officer referred to.

B (6).—Substitute "the vacancy caused by the death, removal or retirement of the 3rd plaintiff should be filled up by the District Court, or in case there be a Sub-Court having jurisdiction, by the Subordinate Court on application being made by the parties or any person interested in the charity."

B (7).—The distribution should be amongst the public and the villagers.

B (8).—Should be struck out. *C* and *D* should be struck out. A revised scheme will be drawn up as directed above and embodied in our decree.

The parties and any one interested in the charity will have leave to apply to the District Court or Subordinate Court for further directions. The 3rd and 4th defendants must pay the plaintiffs' costs in Appeal No. 93. There will be no costs in Appeal No. 94.

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1. (1891) I. L.R. 17 M. 462.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[IN ITS ORDINARY ORIGINAL CIVIL JURISDICTION.]

Present.—Mr. Justice Wallis

Corporation of Madras .. Plaintiff*

v.

Masthan Saib .. .. Defendant.

Corporation of Madras *v.* Masthan Saib.

Madras Acts—City Municipal Act, S. 334—Farming out license fees "ultra vires"—Corporation—Levying taxes and farming out not incidental to each other.

The power to farm out is not incident to the power of levying taxes; and the Madras Corporation has no power to farm out license fees due under S. 335 of the Madras Municipal Act.

A. Cowdell, instructed by *Orr, David and Brightwell* for plaintiff.

V. V. Srinivasa Aiyengar for defendant.

The Court delivered the following

JUDGMENT:—This is a suit by the Madras Corporation to recover from the defendant with interest three monthly instalments of a sum of Rs. 16,000 which the defendant agreed to pay to the Corporation for the right of collecting the fees payable under S. 334 of the Madras City Municipal Act, 1904, for licenses to slaughter animals at the Monegar Choultry slaughter-house during the financial year 1907-08. The defendant raised various defences, and, after the settlement of issues, was allowed to raise a further issue "whether the contract referred to in the plaint is *ultra vires* of the Madras Corporation, and, if so, whether the suit is maintainable." According to the evidence of Captain Ross, the Health Officer of the Corporation, which was not contradicted, the practice has been for the Corporation to have the animals intended for slaughter passed by an employee of the Corporation on admission to the slaughter-house and for the defendant or other lessee of the licensees to attend and collect the license fees from the owner of the animals as they are passed into the slaughter-house. In view of this evidence there can be no doubt that this was the right to collect license fees which both parties intended the defendant should collect under his contract, and he so collected them from April 1st to December 31st, 1908,

* C. S. No. 244 of 1907. 7th October, 1909.

Corporation of Madras v Masthan Saib.

when, in consequence of the license fees having been raised without his assent, there was a butchers' strike and for some six weeks no animals were slaughtered at the slaughter-house and, consequently, there were no fees for him to levy. Under S. 335 (1) no person is to slaughter without a license from the President, and under S. 426 (1) every license granted under the Act is to bear the signature of the President, which under S. 442 may be in facsimile. These provisions of the Act requiring a license signed by the President to be granted in the case of each animal were admittedly disregarded, the passing of the animal by the employee of the Corporation being treated by all parties as equivalent to the grant of a license. This is one of the illegalities relied on as an answer to the present suit. If the Corporation could lawfully lease to the defendant the right of collecting fees on licenses regularly made out and signed by the President, I am not prepared to hold that the irregularity of dispensing with written licenses and passing the animals for slaughter and leving the fees without that would afford any answer to this suit. The question then arises—Had the Corporation power to farm out the licensing fees to the defendant?—because, if they had not, the contract with the defendant was an illegal one, and the plaintiff would not be entitled to sue on it. Now it is to be observed that under S. 168 (*b*) the President is expressly authorised to take out tolls on vehicles and animals entering the city, and under S. 337 he is also empowered to farm out market fees. This is certainly some indication that it was not intended to give the Corporation the power to farm out license fees under S. 334. If they have the power to farm out taxes under this section it is not apparent why they might not equally farm out the collection of all the taxes and tolls enumerated in S. 115. If there were any authority for the proposition that when a Corporation is empowered by statute to levy fees of this kind power to farm out such fees passes as incident to the grant, it might be a question whether the fact that the power to farm out as expressly given in some sections of a local Act would be sufficient to negative the implication that the power was expressed in sections where it is not expressly mentioned, but I have not been referred to any authority in support of the proposition that the power to farm out passes as incident to the power to levy, and the case of *The Southampton Dock Co.* v.

Corporation of Madras v. Masthan Saib.

Southampton Harbour and Pier Board[1] is against it. I am, therefore, of opinion that the Corporation had no power to farm out license fees. The other issues I should be disposed to find for the plaintiff, but the finding on the additional issue is fatal and the suit must be dismissed with costs, except that the defendant must pay the taxed costs of the application for the additional issues which were reserved.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Spencer.

The Municipal Council of Kumbakonam .. Petitioner*
v. (*Plaintiff*)
Abbahsaib .. Respondent
(*Defendant*).

Kumbakonam Municipal Council v. Abbahsaib.

Madras Acts — District Municipalities Act, Ss. 191, 92 — *Corporation powers—Farming out and levying taxes—Contract Act, Ss.* 11, 12—*Farming contract 'ultra vires.'*

The power of farming out is not a necessary incident to the right of levying the tax. The powers of Mofussil Municipalities are limited and circumscribed by the District Municipalities Act and extend no further than what are expressly stated therein. A Municipality has no right to farm out its right to collect slaughtering fees, and a farming contract for the collection of slaughtering fees is both *ultra vires* and void. [*Abdulla* v. *Mammod*[2] distinguished. *Corporation of Madras* v. *A. Masthan Saib*[3] followed.]

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court of Kumbakonam in S. C. S. No. 932 of 1906.

This is a suit by the Municipal Council of Kumbakonam for damages (being the balance due by him under a lease) against the defendant who purchased in public auction the right to collect fees on the animals slaughtered in the slaughter-house attached to the Municipality for the official year 1905-06. According to the terms of the sale notification, subject to which the defendant purchased the right, he was bound to deposit two monthly instalments for the due fulfilment of the contract and to execute a muchilika Defendant failed to do this and the Committee cancelled the sale and directed a resale for the unexpired term of the lease from 11th June 1905 to March 1906.

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* C. R. P. 121 of 1910. 26th July 1911.

1. (1872) L. R. 14 Eq. 595. 2. (1902) I. L. R. 26 M. 156.

3. (1911) 21 M. L. J., 788.

The Council made Rs. 900 by the resale. Defendant admitted the purchase and pleaded that the sale fell through owing to the default of the Council to allow him the customary and necessary facilities for enjoying the lease. The suit was dismissed and the plaintiff preferred a civil revision petition and the High Court remanded it. The defendant, on remand, raised a fresh objection that the contract was void on the ground that the District Municipalities Act did not authorize the farming of the slaughter-house fees. The Sub-Judge dismissed the suit on the ground that the Act did not authorize the collection.

Kumbakonam Municipal Council v. Abbahsaib.

K. Ramachandra Aiyar for petitioner.

S. Varadachariar for *T.R. Venkatarama Sastri* for respondent.

K. Ramachandra Aiyar, for petitioner :—The Sub-Judge is wrong in holding that the Municipal Council had no power to farm out the fees in respect of slaughter-houses. The District Municipalities Act does not prohibit the farming out of slaughter-house fees. There are certain sections of the Act which assume or contemplate the farming out of such fees. It is necessary to know what exactly has been assigned by the Municipality. It is not the discretionary power of levying fees at all which cannot be delegated by the Council. The Municipality has itself 'levied' the fees under S. 191 of the Act and the tax having become exigible, the bare right of collecting the amount as it accrues due was let out to a private individual instead of the collection being made by the Municipal servants. There is no rule of public policy against such a course. S. 191 gives the power to levy and collect fees. The power to collect the taxes due in any reasonable manner must be deemed to have been conferred. The Council may collect the fees by Municipal servants or lease out to private persons either by auction or private sale. When a substantive right is given by the Act all powers reasonably necessary for the exercise of such right must be deemed to have been conferred. Ss. 41, 255, Cl. (3), empower the making of bye-laws for the management of slaughter-houses. Certain dues called taxes and the mode of collecting such taxes are dealt with under Ss. 102, 112 of the Act. S. 92, Cl. (1), deals with collection of tolls and empowers the farming out of tolls. From this no negative inference can be drawn that in other cases the farming out is prohibited. There is no express prohibition in such cases.

Kumbakonam Municipal Council v. Abbahsaib.

The principle that authority must be expressly given to a Corporation, otherwise it will be deemed to be prohibited, does not apply to the present case, for here the power in question is only an ancillary one. The theory of special capacity is an exploded one. POLLOCK on *Contracts* says (pp. 118, 119 5th edn.) that the theory of general capacity is well supported on principle to have preponderance of modern authority: *Ashbury Carriage Co.* v. *Riche.*[1] Of course the act done or power exercised must be in furtherance of, and in carrying out, the purposes for which the Corporation was created. So the act of farming out is not *ultra vires* on the part of the Council. The Act has expressly laid down a procedure for the collection of *taxes*. It has also empowered the Council to make bye-laws as regards collection of fees and management of slaughter-houses with the sanction of the Local Government-Municipal Account Audit Code, p. 44, paras 178, 187, *et seq*. The Municipal Councils are authorized to farm out slaughter-houses. Reference may also be made to *Abdulla* v. *Mahmud*,[2] *Bhikkanbai* v. *Hiralal*,[3] *Gauri Shanker* v *Mumtuz Ali Khan* [4] which lay down that an act which is not prohibited may still give rise to obligations between parties though there may not be express authority. The power to farm out is not *ultra vires*. It is not expressly prohibited under the Act. On the contrary it is impliedy granted as shewn by S. 41, S. 255, Cl. (3), S. 92, Cl. (1) and other sections. It is authorised and promulgated in the Municipal Account Code. It is in no way opposed to public policy as the Council retains all the powers of supervision as to sanitation, etc. The power is reasonably necessary and is only ancillary to a substantive power.

S. Varada Chariar, for respondent:—The contract is void. It is opposed to general principles of law and to the provisions of the Act. The contract is *ultra vires*. *Abdulla* v. *Mahomed* [2] explained; *Southampton Dock Co.* v. *Southampton Harbour Pier Board.* [6] A Corporation is prohibited from entering into contracts which it is not specially authorized to enter into—HALSBURY'S *Laws of England*, Vol. VIII, p. 359. The taxing power

1. (1875) L.R. 7 H.L. 653.
2. (1902) I.L. R. 26 M. 156.
3. (1900) I L.R. 24 B. 622.
4. (1879) I.L.R. 2 A. 411.
5. (1902) I.L.R. 26 M. 115.
6. (1872) L.R. 14 Eq. 595.

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cannot be transferred to another. What the statute does not expressly or by necessary implication authorize is to be taken to be prohibited—BRICE on *Ultra Vires*, pp. 482, 484. Corporations cannot transfer their powers of farming—DILLON on *Municipal Corporations*, S. 779, Vol. II, p. 957; MAXWELL, p. 52. The Indian Contract Act does not deal with the capacity of Corporations to enter into contracts. S. 11 and 23 referred to; *The Irravaddy Flotilla Co* v. *Bagbandas*[1]; *Narayanasami Reddi* v. *Usuru Reddi*[2]. Preamble referred to. The Contract Act does not exhaust the law of contracts.

K. Ramachandra Aiyar replied.

The Court delivered the following

JUDGMENT:—The petitioners, the Kumbakonam Municipal Council, sued the respondent on the Small Cause side to recover the balance due by him under a lease which he had taken of the right to collect fees on the slaughter of animals, which the Council are entitled to levy under S. 191 of the District Muncipalities Act (Madras Act IV of 1884.)

The Subordinate Judge dismissed the suit on the ground that the Council was not empowered to lease the right in question and that the contract sued on was illegal and could not be enforced. This is the decree which we are now asked to set aside on revision.

A case of a precisely similar character, though arising in the city of Madras, turning on the legality of a Municipal Council leasing out the right of collecting slaughtering fees has been decided by *Wallis* J. (C.S. No. 244 of 1907)[3] and although it was decided with reference to the provisions of the Madras City Municipal Act III of 1904 and not of the District Muncipalities Act, yet the provisions in the two Acts in this respect run on so nearly identical lines that the reasoning of the learned Judge applies with equal force to the present case. Admittedly the District Municipalities Act does not expressly authorize the leasing or farming out of the right to collect slaughtering fees. Of the several taxes leviable under the Act the only one in respect to which such a provision is to be found is the case of Municipal tolls (S. 94). It is urged that such a power is granted by implication as a necessary incident to the right of levying. But in the first place it cannot be said that the right of farming out is in any way necessary to the exercise of the right of levying: such fees may be naturally and easily collected by Municipal subordinates as has been done for a certain period in this very case. Secondly, the fact that there is an express grant of the power to farm out tolls is difficult to reconcile with the idea that the authorization to levy carries with it an implied power to farm out. The mere fact that the Municipal Account Code contains provisions for

1. (1891) I.L.R. 18 C. 620. 2. (1901) I.L.R. 25 M. 548, (F.B.)

3. (1909) 21 M.L.J. p. 788.

Kumbakonam Municipal Council v. Abbahsaib.

the farming out of slaughtering fees and other taxes besides tolls does not, in our opinion, throw any light on the interpretation of the Act in this respect. We must, therefore, hold that the farming out of the right to collect slaughtering fees is unauthorised by law and is *ultra vires.*

Is the suit contract therefore void and unenforceable? We are forced to the conclusion that it is so, both as infringing the provisions of S. 11 and S. 23 of the Indian Contract Act IX of 1872. The power of a Corporation must be strictly construed and it is hardly too much to say that what is not permitted to such a body is forbidden. To quote from HALSBURY'S *Laws of England,* Part 8, Art. 805:—

"Where a corporation is created by statute, its powers are limited and circumscribed by the statute creating it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation. What the statute does not expressly or impliedly authorise is to be taken to be prohibited. If, for instance, the subject-matter of a contract is beyond the scope of the constitution of the Corporation, it is *ultra vires,* that is, it is beyond the powers of the Corporation to make the contract which is therefore void *ab initio* and cannot be ratified."

The above reasoning exactly covers the present case. It has been suggested that the provisions of the Indian Contract Act are not exhaustive and that S. 11, which deals with the competency to contract, does not contemplate the case of a Corporation. But even if this be so, the matter must be decided in the light of general principles of law as expounded in the passage quoted above, and the result is the same.

It is argued for the petitioner, on the authority of the case reported in *Abdulla* v. *Mahmud,*[1] that nevertheless the contract can be enforced against the defendant. In that case *Bhashyam Aiyangar* J. held that a sub lease by a ferry renter, though prohibited by the terms of his lease and invalid against Government, might be valid as against the sub-lessee. The case is easily distinguishable on the ground that the sub-lessor in that case was a private person, and no question arose of the peculiarly fettered position of a statutory corporation. A contract, which, like the suit contract, is void *ab initio* cannot be enforced. (Compare *Maruda Muthu Pillai* v. *Rangaswami Mooppan.*[2])

We must, therefore, hold that the suit contract was void, and unenforceable, and that the Subordinate Judge was right in dismissing the suit.

The petition is dismissed with costs.

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1. (1902) I. L. R. 26 M. 156. 2. (1900) I. L. R. 24 M. 401.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

In re Kachi Madar Labbai ... Petitioner*
(*Complainant in C. C. No. 119 of 1909 on the File of the Sub-Divisional Magistrate of Tuticorin*).

Cr. P. C., Ss. 476, 195—"*Inquiry*"—"*Judicial proceeding*"—*Order based on what is not legal evidence bad—Evidence in preliminary enquiry under S.* 202, *Cr. P. C.* Kachi Madar Labbai v. Emperor.

Per *Sundara Aiyar* J. (*Ayling* J. dissenting):—An order under S. 476, Cr. P. C., based partly on what is not legal evidence, *e.g.*, on a statement made without oath in the investigation, is bad in law.

Per *Sundara Aiyar* J.:—An order under S. 476 passed by the first court does not cease to be operative *ipso facto* by the order of an appellate court reversing that of the court of first instance.

A preliminary inquiry under S. 202, Cr. P. C., is not a "judicial proceeding." The words "when any civil * * court is of of opinion that there is ground for inquiring" in S. 476, Cr. P. C., mean when there is legal ground for inquiring.

Courts have a heavier responsibility on them while proceeding under S. 476 than while giving sanction under S. 195, Cr. P. C.

A magistrate might not act illegally in ordering prosecution under S. 476 on the sworn statement of the complainant alone, but an order based on it and on the statement of complainant's witnesses not made on oath is illegal.

Per Ayling J.:—Exceptionally strong reasons are required to justify an order under S. 476 in cases where the complainant has not been allowed to adduce the whole of his evidence in support of his complaint.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise and cancel an order passed under S. 476 of the said Code by the 1st Class Sub-Divisional Magistrate of Tuticorin in C. C. No. 119 of 1909 on his file.

Paul Appasami for petitioner.

The Public Prosecutor (*C. F. Napier*) for the Crown.

The Court made the following

ORDER.—*Sundara Aiyar* J.:—This is an application to set aside an order of the Sub-divisional Magistrate of Tuticorin passed under S. 476, Criminal Procedure Code, directing

* Cr. Rev. C. No. 78 of 1911. 4th May, 1911.
Cr. Rev. P. No. 61 of 1911.

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the prosecution of the petitioner for offences under Ss. 182 and 211 of the Indian Penal Code. The circumstances under which the order was passed are briefly as follows. The petitioner laid a complaint before the Sub-divisional Magistrate of extortion and receiving illegal gratification against four persons, two of whom were police officers. The Magistrate, after the examination of the complainant on oath, held a preliminary inquiry under S. 202, Criminal Procedure Code, without issuing process for the appearance of the accused, and after considering the result of the investigation, he dismissed the complaint and directed the prosecution of the complainant as mentioned above on the 22nd November 1909. The complainant applied to the Sessions Judge of Tinnevelly for revision of the order of dismissal of the complaint. His application was successful and the Sessions Judge directed a further enquiry into the case. The Sub-divisional Magistrate issued summonses to the accused. The Sessions Judge, in disposing of the complainant's petition for revision, passed no order with respect to the direction of the Sub-divisional Magistrate for the prosecution of the complainant. Nor did the Sub-divisional Magistrate, after discharging the accused, again pass any fresh order under S. 476, Criminal Procedure Code. The Head-Quarters Deputy Magistrate of Tinnevelly to whom the Sub-divisional Magistrate had forwarded the records under S. 476, Criminal Proceedure Code, passed orders on receiving the Sessions Judge's order that the proceeding abated and he took no action thereon during the pendency of the revision petition before the Sessions Judge and the retrial by the Sub-divisional Magistrate. After the order of discharge by the latter Magistrate the Prosecuting Inspector requested him to proceed with the inquiry. The Deputy Magistrate was of opinion that as he had passed orders that the proceeding abated, "he could not take fresh proceedings without an order from a superior court." The complainant before the Sub-divisional Magistrate asks us in this revision petition to set aside his order dated 22nd November 1909 with a view to prevent the proceedings against him before the Deputy Magistrate being revived. Mr. Appasawmi, who appears for the petitioner, has urged two grounds for our interference: *first*, that the order under S. 476, Criminal Procedure Code, ceased to be operative when the Sessions Judge quashed the Sub-divisional Magistrate's order of dismissal of the complaint; *secondly*,

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that the order being based on the materials placed before the Sub-divisional Magistrate at the preliminary inquiry and that inquiry not being of a judicial character, the order was illegal and made without jurisdiction under S. 476, Criminal Procedure Code. I am unable to agree with him in respect to his first contention. The order under S. 476 of the Criminal Procedure Code was distinct from the order of dismissal. The Sessions Judge, in directing further inquiry, did not decide that the Sub-divisional Magistrate's view as to the falsity of the complaint was incorrect. The order to make further inquiry was, on the other hand, quite consistent with his concurrence with the Magistrate as to the probable nature of the complaint. The case relied on by the learned counsel, *Kanullah* v. *The Emperor*,[1] does not support his contention. That case merely decides that when an appellate court dissents from the opinion of the court of first instance deciding at the hearing of the suit that a statement made by a person was false and reverses the decree of that court, an order under S. 476 of the Criminal Procedure Code passed by the lower court directing the prosecution of the deponent should be quashed. It does not support the contention that the order ceases to be operative without being quashed.

Mr. Appasawmi's second contention is sound in my opinion and should be upheld. S. 476, Criminal Procedure Code, empowers a court to direct a prosecution only when it "is of opinion that there is ground for inquiring into any offence referred to in S. 195 and committed before it or brought under its notice in the course of a judicial proceeding" after making any preliminary inquiry that may be necessary. A preliminary investigation by the court under S. 202, Criminal Procedure Code, is not a judicial proceeding, and it has been held that a person cannot be prosecuted for an offence brought to the notice of the court during such investigation. (See *Queen-Empress* v. *Venkataramana* , *Asmatulla* v. *The Empress*[3] and *In re Chotalal Mathuradas*[4]). The order of the Sub-divisional Magistrate in this case was admittedly based partly at least on what appeared at the preliminary investigation. The Magistrate says: "There are discrepancies which appear in the evidence adduced by the complainant to support his case. It is

1. (1907) 12 C. W. N. 1.
2. (1900) I. L. R. 23 M. 223.
3. (1899) 4 C. W. N. 366.
4. (1898) I. L. R. 22 B. 936.

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very plain that the story is a fabrication. In the original complaint the man who is said to have gone to complainant's house to fetch the money is not the same man who is brought forward to state that he played this part in the affair. There are other discrepancies as to time." The depositions of the witnesses at the investigation were not made on oath. It is clear to my mind that an order under S. 476, Criminal Procedure Code, based on statements which do not constitute legal evidence is illegal. This is, if necessary, rendered clearer by S. 478 of the Criminal Procedure Code which authorises the court acting under S. 476 to "complete the inquiry" and commit the accused person "to take his trial before the High Court or Court of Session as the case may be." It is, of course, impossible to hold that a committal could be made on what is not legal evidence, and I think it is equally clear that an inquiry which is to be completed must be of the same character as the completing portion. The words therefore in S. 476, Criminal Procedure Code, "when any Civil, Criminal, or Revenue Court, is of opinion that there is ground for inquiring into any offence * * " should be construed as meaning "when there is legal ground for inquiring", etc. This is also clear from the fact that the matter should be brought under the notice of the court in the course of a judicial proceeding in which evidence must be taken according to the rules of law. What the section requires is that the court should be of opinion that a *prima facie* case has been made out against the accused justifying an inquiry similar to what is required when a court granting sanction for prosecution under S. 195, Criminal Procedure Code. It has never been doubted that under S. 195, Criminal Procedure Code, sanction can be accorded only on legal evidence. There is no reason for holding a different view with respect to S. 476 of the Criminal Procedure Code. In my opinion the court directing a prosecution under S. 476, Criminal Procedure Code, really takes a heavier responsibility on itself than it does in merely granting sanction to a private party to prosecute. There are various provisions in the Criminal Procedure Code entitling a court to initiate an inquiry on information received or on suspicion, but S. 476, Criminal Procedure Code, does not authorise it to do so. Moreover an order under that section in so far as the court making it is concerned is a final order and not merely one initiating proceedings though the order

is preliminary to proceedings in another court, just as an order of commital to a Court of Session is. I am therefore of opinion that the Sub-divisional Magistrate had no power to pass the order under S. 476, Criminal Procedure Code, on what appeared before him at the preliminary investigation. There may be cases where a Magistrate might come to the conclusion on the sworn statement of the complainant alone that his complaint was false and it may not be illegal to pass an order under S. 476 on what appears in the sworn statement. But here the order is not based on the complainant's statement alone and material reliance was placed by the Sub-divisional Magistrate on the statement of complainant's witnesses not made on oath. If the order were made on the sworn statement only, I should be prepared to hold that the Magistrate did not exercise a sound judicial discretion in passing the order and to set it aside on that ground. It has been held in several cases that it is unfair to direct a prosecution under S. 182 or 211 of the Indian Penal Code without giving complainant an opportunity to adduce all his evidence in support of his complaint. See *Lalje Gopeth* v. *Giridhari Chaudhari* [1] and *Queen-Empress* v. *Shamlal* [2]. It was open to the Sub-divisional Magistrate in this case to pass fresh orders under S. 476 of the Criminal Procedure Code after the discharge of the accused if the evidence taken on oath justified such an order in his opinion. He has not, however, done so, and this court is concerned only with the order passed on the 22nd November 1909. I would set aside that order.

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Ayling J. :—With great deference to my learned brother whose judgment I have had the advantage of reading I am unable to concur in his view that an order under S. 476 of the Criminal Procedure Code must necessarily be set aside, because it proceeds (wholly or partly) on a consideration of the result of a preliminary enquiry under S. 202 of the Criminal Procedure Code. The wording of S. 476 (when any Civil, Criminal, or Revenue Court is of opinion that there is *ground for enquiry* into any offence, etc.) is wide enough, in my opinion, to cover the consideration of other than strictly legal evidence already on record. The result of an enquiry under S. 202 has to be taken into consideration by the Magistrate in deciding whether to dismiss the complaint or

1. (1901) 5 C. W. N. 103.
2. (1887) I. L. R. 14 C. 77.

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proceed with the case (*vide* S. 203) and I cannot see why it may not be legitimately considered before passing an order under S. 476.

I do not propose to deal with the question in detail, because I nevertheless, concur in the order proposed by my learned brother. I quite agree that exceptionally strong reasons are required to justify an order under S. 476 in cases where the complainant has not been allowed to adduce the whole of his evidence in support of his complaint. In the present case, only three of petitioner's nine witnesses were examined by Stodart, his vakil's prayer for the production and consideration of certain police records was disregarded and the Magistrate's order now sought to be revised while containing sufficient ground for dismissing the complaint gives reasons which I should certainly not regard as adequate ground for ordering prosecution. It is an order passed somewhat hastily and after very imperfect enquiry and which, in my opinion, cannot be upheld on its merits. I therefore concur that the order of the Joint Magistrate under S. 476 of the Criminal Procedure Code, dated the 22nd November 1909, should be set aside.

In the result the order of the Sub-divisional Magistrate dated 22nd November 1909 is set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Munro.

Subbiar .. Plaintiff*
v. (*Appellant*)
Maniem Subramania Aiyar and others .. Defendants
(*Respondents*).

Vendor and purchaser — Consideration — Promise to maintain vendor— Failure— Vendor's remedy.

Where a sale deed has been registered and possession has been given, the vendor is not entitled to get the sale deed set aside on the ground that there has been failure of consideration, even though the consideration is alleged to be a promise to maintain the vendor for the rest of his life. The vendor's remedy is to recover the consideration or its value. [*Sagaji* v. *Namdev*[1], *Baijnath Singh* v. *Palta*[2], *Govindammal* v. *Gopalachariar*[3] referred to and followed.]

1. (1899) I.L.R. 23 B. 525. 2. (1908) I.L.R. 30 A. 125.
3. (1906) 16 M. L. J. 524.

* S. A. No. 1231 of 1909. 27th April 1911.

Second appeal from the decree of the District Court of North Arcot in A. S. No. 335 of 1907, presented against the decree of the Court of the District Munsif of Arni in O. S. No. 47 of 1906.

Subbiar v. Subramania Aiyar.

C. P. Ramasami Aiyar and *C. K. Mahadeva Aiyar* for appellant.

V. Ryru Nambiyar for 1st respondent.

I. V. Ramanuja Row for 3rd and 6th respondents.

C. K. Mahadeva Aiyar for appellant:—There having been a failure of consideration, the plaintiff was entitled to cancel the sale—POMEROY *Equitable Remedies* Vol. II, S. 686; BANERJEA, "Specific Relief"; *Subba Rao* v. *Devu Shetty*[1]; *Govindsami Pillai* v. *Ramasami Pillai*[2]; *Ramalinga Mudali* v. *Aiyadurai Nainar.*[3] *Govindammal* v. *Gopalachariar* [4] leaves the question open.

V. Ryru Nambiar for respondent—relied upon *Ponnayya Goundan* v. *Muthu Goundan*[5]; *Sagaji* v. *Namdev*[6]; *Baijnath Singh* v. *Palta*[7].

The Court delivered the following

JUDGMENT.—*Chief Justice.*—In this suit the plaintiff asked that a certain deed of sale might be set aside. The deed of sale (Exhibit *I*) was executed between the plaintiff and the first defendant's husband. The second defendant is the purchaser from the first defendant and is now in possession of the land in question. Now, the deed was registered, delivery of the deed was given to the first defendant's husband, and, as I have said, the second defendant is now in possession under his purchase from the first defendant. The consideration recited in the deed is Rs. 300.

The case for the plaintiff is that the real consideration for the deed was a promise by the first defendant's husband that he would maintain the plaintiff, who we are told, was an old man when the deed was executed, for the rest of his life.

The learned District Judge considered the question whether under S. 92 of the Indian Evidence Act oral evidence was admissible for the purpose of showing what was the real consideration

1. (1894) I.L.R. 18 M. 126.
2. (1908) I.L.R. 32 M. 72.
3. (1905) I.L.R. 28 M. 125.
4. (1906) 16 M.L.J. 524.
5. (1893) I.L.R. 17 M. 146.
6. (1899) I.L.R. 23 B. 525.
7. (1908) I.L.R. 30 A. 125.

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for this deed of sale. The learned Judge came to the conclusion that such evidence was not admissible. For the purpose of considering the question whether the plaintiff is entitled to get this deed set aside I assume that it is open to the plaintiff to show by oral evidence that the real consideration for the deed of sale was not the consideration stated in the deed itself but the promise to maintain the plaintiff. I am of opinion that the plaintiff is not entitled to have this deed set aside. It is not found or alleged that there was coercion or undue influence, fraud or misrepresentation of any kind at the time when the deed of sale was registered and possession taken thereunder. That being so, the title to the property in question under S. 54 of the Transfer of Property Act passed to the party to whom the conveyance was executed. I do not know that is contested. If it is necessary to cite authorities in support of that proposition I might refer to the decision in *Sagagi v. Namdev* [1], *Baijnath Singh* v. *Palta* [2] and the decision of this court in *Govindammal* v. *Gopalachariar.*[3] As regards the case last mentioned, the learned Judges did not decide the first point whether a suit would lie in the circumstances of that case by the party who executed the sale-deed to get it set aside. But it is an authority that the transfer of ownership of land by sale is effected on the execution and registration of the conveyance even though the price be not paid. So I think I may say that where the title passes, on failure of consideration or on failure to pay the agreed purchase money, the remedy of the vendor is not to have the deed of sale set aside but to recover the purchase money.

Then the question is, are we to apply a different principle to a case of this character when the real consideration, as we assume for the purpose of this judgment, is not payment of money but maintenance of the party conveying, for his life.

The learned vakil for the appellant has been unable to call our attention to any English or Indian authority in which this distinction has received recognition. He has, however, called our attention to the law in America which is to be found laid down

1. (1899) I. L. R. 23 B. 525. 2. (1908) I. L. R. 30 A. 125.

3. (1906) 16. M. L. J. 524.

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n Pomeroy's Equity Jurisprudence Vol. VI (Equitable Remedies, Vol. II.) paragraph 686. The learned author there, after referring to the general rule that the mere failure by a grantee to perform a promise which formed the whole or part of the whole consideration inducing an executed conveyance, gives rise to no right of rescission in the grantor," he says: "This rule has been found to work a great hardship in the frequent cases where an aged person has conveyed all his property to a son or other relatives on the consideration, often oral, that the grantee shall support and care for the grantor during the remainder of the grantor's life, and the grantee, while retaining the land, has abandoned the performance of his obligation." No doubt the special equity in these special circumstances has been recognised by the Courts of America. I know of no English cases where this special equity has been recognised and I know of no Indian cases; and in the complete absence of authority I do not think that we ought to import into the law of this country this very special rule of equity which certain American courts have applied. I think we must apply the law as laid down by the decisions of our own courts and applying that law, though possibly the case may be a hard one, I think it is not possible to come to any other conclusion. Then the suit was rightly dismissed. It is not necessary to discuss the other points raised and I think we must dismiss the appeal with costs of this appeal.

Munro J. :—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Bhadrayya v. Bapayya.

Gullapalli Bhadrayya	..	Appellant*
v.		(*Defendant*)
Puttagunta Bapayya & others	..	Respondent
		(*Plaintiff*)

Inam in a Zemindari—Presumption as to the nature of inam—Occupancy right—Proof—Ejectment.

The presumption in the case of an inamdar in a Zemindari is that what was given as inam was only the melwaram right. [*S. A* 705 of 1909. foll: *Marapa Tharalu Telukula Neelakanta Behara*[1] dist.]

The fact that the tenants have not proved that their predecessors were always in occupation or that ryots whose connection with them

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*S. A. No. 1543 to 1546 of 1908. 1. (1907) I. L. R. 30 M. 502,

Bhadrayya v. Bapayya.

was not proved were cultivating in a few stray years is not evidence that the inamdar exercised the right of ejecting the cultivators and giving the land to new cultivators. The fact that the rent paid has not been uniform is not evidence that the defendants have no occupancy right in the absence of evidence that money rents had been fixed for the land.

Second appeals from the decrees of the District Court of Kistna at Masulipatam in A. Ss. Nos. 474, 475, 476 and 477 of 1907, presented against the decree of the Court of the District Munsif of Gudivada in O. S. Nos. 33, 34, 35 and 36 of 1906.

The Court delivered the following

JUDGMENT :—The plaintiff is an inamdar and sues to eject the defendants who are the cultivating ryots. We accept the law as laid down in S. A. No. 705 of 1909 that when an inam is carved out of a zemindari the presumption is that what was given as inam was only the melvaram right as the zamindar himself was presumably the owner only of that right. The decision in *Marapa Tharalu* v. *Telukula Neelakanta Behara*[1] is not an authority to the contrary as that case only laid down that an inamdar who is the owner of both varams in the land will not be presumed when he lets a ryot into occupation to give over the *kudivaram* right to him though such a presumption would be made in the case of a zemindar transferring land in the zemindari to a ryot for cultivation. It must, therefore, be presumed in this case that as inamdars plaintiff's predecessors in interest obtained only the melvaram right from the Zemindar of Nuzvid. There is no evidence that they were the owners of the kudivaram in any right. We can find no legal evidence on record that the plaintiff or his predecessors ever let any of the cultivators into possession of the land. The fact that the defendants have not proved that their predecessors were always in occupation or that ryots whose connection with the defendants is not proved were cultivating in a few stray years is not evidence that the inamdar exercised the right of ejecting the cultivators and giving the land to new cultivators. The fact that in the case of some other inamdars the ryots admitted the inamdar's kudivaram right is no evidence against the defendants; nor can the fact that the holders of two acres out of the plaintiff's inam

1. (1907) I. L. R. 30 M. 502.

admitted his right to eject in 1905 be admissible in evidence against them. The fact that the rent paid has not been uniform is not evidence that the defendants have no occupancy right in the absence of evidence that money rents had been fixed for the land. The result is that the plaintiff has not proved his ownership of the occupancy right or his right to eject the defendants. The decrees of the courts below are reversed and the suits dismissed with costs throughout. Bhadrayya v. Bapayya.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Golla Hanamappa and others ... Appellants*

(*Prisoners Nos.* 1 *to* 4 *and* 6).

Hanamappa v. Emperor.

Cr.P.C., Ss. 423, *Cl.* 1 (*b*), 237, 238—*Relation inter se—"Alter a finding"—Scope of S.* 423, *Cl.* 1 (*b*)—*Penal Code, S.* 147—*Common object after commencement of fight, enough.*

The existence of a common object *before* the commencement of a sudden fight is not necessary for the conviction of rioting.

The finding which an appellate court may alter under S. 423, Cl. 1 (*b*), may relate either to an offence with which the accused was separately charged in the lower court or to one of which he might be convicted without a distinct charge. In cases not falling within Ss. 237 and 238, Cr. P. C., the appellate court cannot convict a person of an offence with which he was not charged in the first court, but where he has been charged with a particular offence, and the first court has recorded a finding on that charge, the appellate court can alter the finding.

Appeal from the conviction and sentence passed upon the appellants by the Court of Session of the Bellary Division in Case No. 72 of the Calendar for 1910.

S. Swaminatha for appellants.

The Public Prosecutor (*C. F. Napier*) for the Crown.

The Court delivered the following

JUDGMENT:—The accused in this case were all charged with the offence of rioting under S. 148, Indian Penal Code. The second accused was further charged with culpable homicide amounting to murder under S. 302, and the sixth and fourth accused with causing grievous hurt with a dangerous weapon under S. 326. The accused against whom there was no charge of murder or causing grievous hurt as the immediate perpetrators of these offences were, however, charged with the commission of the offences constructively under S. 149 of the Code.

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* Cr. A. No. 22 of 1911. 25th April 1911.

Hanumappa v. Emperor.

The facts of the case are clearly set forth in the judgment of the Sessions Judge and we consider it unnecessary to repeat them. The cause of the rioting was an encounter between prosecution witnesses No. 1, 3 and 4 and probably also 5 on the one side and one Narasakka the mother of accused Nos. 6 to 8 on the other side. A case of abduction of one Narasamma against accused Nos. 2, 3, and 6 initiated by the prosecution fifth witness, her husband, was pending at the time of the encounter. Narasakka, according to the prosecution, was helping the prosecution fifth witness in the abduction case. The prosecution witnesses referred to above were going from their village for sowing their fields on the morning of the day of the offence. The encounter with Narasakka took place just on one side of the village. Abusive words and a quarrel ensued between the prosecution party and Narasakka. According to the prosecution all the eight accused went up to the place where the quarrel was going on. A fight ensued between them and the prosecution party in which very serious injuries were inflicted on Narasakka who died in consequence. Prosecution witnesses Nos. 3 and 4 also sustained serious injuries and prosecution first witness was also injured. Some of the accused also received some injuries. The lower court acquitted all the accused of murder. It also acquitted them of rioting, holding that "what happened was a sudden fight"—that is to say apparently that it was not proved that the accused acted in pursuance of a common object and were therefore not members of an unlawful assembly. But the Judge found that the evidence established that all the accused were guilty of causing hurt and accused Nos. 2 and 6 of causing grievous hurt. His judgment does not shew what injuries each of the accused inflicted and on which of the prosecution witnesses except with respect to the sixth accused. According to him it is not certain who dealt the fatal blow which killed Narasakka: He proceeds:—"Though it is not certain that the second accused dealt the fatal blow he certainly took a leading part in the fight. I think there is no reasonable doubt too that the sixth accused was particularly active and that he caused grievous hurt to prosecution third witness." He convicted all the accused under S. 325, Indian Penal Code, and the second and the sixth accused under S. 326, Indian Penal Code, also. Accused Nos. 1 to 3, 4 and 6 have preferred this appeal. The evidence as to the details

of the fight and as to the accused who inflicted the fatal blow on the deceased Narasakka or caused grievous hurt to prosecution witness No. 3 is extremely discrepant and some of the witnesses for the prosecution gave different accounts on different occasions before the trial of the case in the Sessions Court. We are unable to confirm the Sessions Judge's finding that it was the sixth accused that caused grievous hurt to the third accused. Nor are we able to decide on the evidence whose act caused the death of Narasakka. We are, however, of opinion differing from the Sessions Judge that the evidence is sufficient to prove that all the accused were members of an unlawful assembly and were guilty of rioting and that they were all responsible for the injuries inflicted on the several prosecution witnesses in the course of the fight. The cause of the quarrel, as already mentioned, was the deceased Narasakka's helping the prosecution fifth witness in the abduction case and acting against accused Nos. 6, 2 and 3 who were the accused in that case. All the accused espoused their cause and joined in the quarrel. We are quite unable to accept the argument of the learned counsel for the appellants that the existence of a common object before the fight began is necessary to justify the conviction of the accused of rioting. It is quite enough that accused Nos. 1, 3, to 5, 7 and 8 adopted the common object of accused Nos. 2, 3 and 6 to cause hurt to the prosecution party for helping Narasakka. It is also immaterial that the idea of injuring them was conceived suddenly after the accused went to the scene of offence where Narasakka had already encountered the prosecution party. We agree with the Sessions Judge that the accused Nos. 1 to 3 and 6 are proved to have been present and to have taken part in the fight. We also agree that the second and sixth accused took the most prominent part in it.

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[Their Lordships dealt with the case of the 4th accused on the facts :—Ed.]

Dr. Swáminathan contends that it is incompetent to us to convict the accused of being members of an unlawful assembly or rioting or to hold them constructively guilty of the offences of causing hurt as they were acquitted of those offences by the lower court. But in our opinion this contention is not sound.

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Under S. 423 1 (*b*) of the Code of Criminal Procedure an appellate court has the power to alter the finding of the lower court maintaining the sentence. It is urged that this provision entitles the court to convict an accused of an offence of which he is acquitted only in cases falling under Ss. 237 and 238 of the Code of Criminal Procedure. We see no reason to adopt the qualification of the plain words of S. 423. Ss. 237 and 238 of the Code of Criminal Procedure provide that in cases to which they apply an accused person may be convicted of an offence with which he is not charged. The finding which an appellate court may alter under S. 423, Cl. 1 (*b*), may relate either to an offence with which the accused was separately charged in the lower court or to one of which he might be convicted without a distinct charge. In cases not falling under Ss. 237 and 238 of the Code of Criminal Procedure, no doubt the appellate court cannot convict a person of an offence with which he was not charged in the first court, but where he has been charged and the first court has recorded a finding on the charge there is no reason for holding that the appellate court cannot alter the finding. There is obviously no injustice in doing so. Our view is in accordance with the opinion of the Calcutta High Court in *Satischandra Das Bose* v. *Queen-Empress*[1] and *Queen-Empress* v. *Jabunulla*[2]. In the result we acquit the fourth accused and direct that he be discharged and set at liberty. We alter the conviction of the other appellants by finding them guilty of an offence under S. 147 and under Ss. 325 and 326 read with S. 119 of the Penal Code and confirm the sentences.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Ayling.

Krishna Bai .. .. .. Appellant*

v.

The Collector & Government Agent, Tanjore, and others .. .. .. Respondents.

C. P. C., (1882) *S.* 191—"*Concluded the trial*"—*Remand—Trial before another Judge—De novo trial.*

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* S. A. 341 of 1908. ... 10th January 1911.

1 (1889) I. L. R. 27 C. 172. 2 (1896) I. L. R. 23. C. 975.

Krishna Bai v. Collector of Tanjore.

*The trial of a suit was concluded by the Judge; on appeal the appellate court remanded the suit to the court of first instance for disposal according to law on the substitution of fresh parties on the record, and in the meanwhile the Judge who first concluded the trial had been succeeded in office by another. *Held*:—That there should be a *de novo* trial, and that S. 191 of the Code of 1882 did not apply.

Second appeal from the decree of the Subordinate Judge's Court, Tanjore, in A. S. No. 569 of 1907, presented against the decree of the Court of the District Munsif of Tanjore in O. S No. 358 of 1903

The suit was instituted by the Collector of Tanjore for possession of certain properties belonging to Mangalavilas ladies. The defendant raised the objection that the Collector had no right of suit and the Mangalavilas ladies ought to have instituted the suit. The District Munsif overruled the plea and gave a decree in favour of the Collector (plaintiff). On appeal the Sub-Judge held that the Collector had no right of suit and ordered the Mangalavilas ladies to be made parties. On the Mangalavilas ladies being made parties he reversed the decree and remanded the suit for disposal according to law. The defendant preferred an appeal against this order of remand and the High Court held that the suit was instituted in the name of a wrong person under a *bona fide* mistake and the court had power to substitute the names of the right persons as plaintiffs—vide *Krishna Bai* v. *The Collector and Government Agent Tanjore*[1]. The District Munsif on remand disposed of the case on the evidence originally recorded without giving an opportunity to the defendant to file an additional written statement and adduce fresh evidence. On appeal, the Sub Judge confirmed the decision. Against this, this appeal was preferred.

P. R. Sundara Aiyar and *C. V. Ananthakrishnier* for appellant.

The Advocate-General (*P. S. Sivaswami Aiyar*) for respondents.

P. R. Sundara Aiyar.—The lower courts ought to have allowed the defendant to file a new written statement and adduce fresh evidence. The parties are now different. There was no legal evidence. The question of prejudice is immaterial. The sub-court in the first instance ordered a "fresh disposal." That means fresh trial and letting in new evidence.

1. (1907) I. L. R. 30 M. 419.

Krishna Bai v. Collector of Tanjore.

The Advocate General.—The suit lands were given by the late Rajah to the ladies of his harem. The estates are managed by the Collector. As manager of the estate the collector brought the suit. If the collector brought the suit on behalf of some third person the objection would be well founded. The suit was brought asserting the title of the Mangalavilas ladies. Now there has been no change of title. There is no new cause of action. The defendant did not plead that the property did not belong to the Mangalavilas ladies. The defendant pleaded only adverse possession as against the ladies. The substitution was merely to supply a defect, namely that the collector as manager had no title to sue. Here it is not the newly added parties that complain of a want of an opportunity to plead their cause.

P. R. Sundara Iyer replied, and referred to S. 33 of the Evidence Act, Cl. (*a*) to proviso; Order 41, Rule 21 (S. 562, C.P.C.,) S. 191 C.P.C.

The Court delivered the following

JUDGMENT :—In this case a plaint was, in the first instance, put in by the Collector of Tanjore as Manager of the Mangalavilas Estate asking for the ejectment of the 1st defendant from certain property. The 1st defendant alleged *inter alia* that the Collector had no authority to sue on behalf of the estate. This plea failed before the District Munsif, but was allowed on appeal, the appellate court directing that the members of the Mangalavilas should be placed on record as plaintiffs in substitution for the Collector and sending the case back to the court of the District Munsif for fresh disposal. Against the order, there was an appeal to the High Court, and owing to the non-receipt of the records from that court, the suit had to be adjourned to 14th May. The case was taken up on 17th May and on that day the defendants' pleader put in a fresh written statement and asked for a *de novo* trial. This the District Munsif, who was not the same District Munsif as disposed of the suit as originally framed, refused and his refusal was upheld in appeal. We think the prayer of the defendants' vakil should have been granted. It may, we think, be doubted whether S. 191 of the Civil Procedure Code (Act XIV of 1882) would apply to a case like the present, in as much as the first District Munsif did in fact conclude the trial of the suit that came before him. If S. 91 does not apply, no other provision of law has been indicated to us under which the new

then, the District Munsif could deal with the evidence taken by his predecessor. We observe that the Collector's name has not been struck out of the record as it should have been. We, therefore, allow the appeal, set aside the decrees of the courts below, and remand the suit to the court of the District Munsif for disposal according to law. Costs will abide the event.

Krishna Bai v. The Collector of Tanjore.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Munro.

Yellapadi Mahalakshmammal .. .. Appellant*

v.

Sriman Madhva Siddantha Oonahini Nidhi, Limited, and others .. .. Respondents.

Mortgage—Priority—Novation, if and when—Extinguishment of security.

The law imputes to a person the intention to act according to his own interest. This rule is not affected by the general principle laid down in *Bank of Tasmania* v. *Jones*[1]; that a party, though not a party to the contract, may be entitled to the benefit of a contract which operates as a novation.

Held, that a person who held an equitable mortgage over certain property, obtained a decree for sale and had some balance due to him in respect of the mortgage did not lose his priority by subsequently taking a regular mortgage for the amount so due under the decree and for an additional amount, in favor of a puisne mortgagee before the decree.

On appeal from the judgment of Mr. Justice *Sankaran Nair* passed in the exercise of the ordinary original civil jurisdiction of this court in C. S. No. 49 of 1909.

The facts of the case appear from the judgment of Mr. Justice *Sankaran Nair* which was as follows.

Sankaran Nair J.—This is a suit to recover the amount due under a mortgage bond dated 4th August, 1903. The 4th defendant claims that he has a prior charge on items 1 and 2 under his document of 1899.

The 2nd and 3rd issues raise the question whether item No. 2 is included in the plaintiffs' and 4th defendant's instruments of mortgage respecti[vely.]

These issues were not argued before me. I find that item 2 was mortgaged to the plaintiff and also to the 4th defendant.

The plaintiff was a mortgagee by deposit of title deeds in 1895 He obtained a mortgage-decree in C. S. No. 261 of 1899 on the 13th February 1900 (*H*). On the 11th August 1903, he

* O. S. A. No. 23 of 1910. 25th April 1911.

1. (1893) A. C. 313.

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took the plaint-mortgage (*O*) for Rs. 2,700 of which Rs. 1,086-0-8 was the amount found due under the decree and the balance money then paid to the mortgagor.

The 4th defendant took a mortgage of the equity of redemption in January 1899 stated in terms to be subject to the plaintiff's mortgage. He obtained a decree for sale (*R*) in C.C. 210 of 1900 on the 28th September 1900. The sale was to be subject to the claim of the plaintiff as mortgagee and in his application for execution the plaintiff's rights were reserved (*G*). But in the proclamation of sale it was stated that the plaintiff's claim was extinguished by the subsequent mortgage, though the plaintiff contends otherwise. The property was sold and purchased by the 4th defendant himself.

On these facts, the question raised by the first issue: "Is plaintiff entitled to priority in respect of his mortgage over the 4th defendant" has to be determined. As to the amount paid to the mortgagor at the time of execution of (*O*) in 1903, I fail to see how the plaintiff can claim the rights of a prior mortgagee.

The next question is whether the new mortgage (*O*) operated to extinguish the plaintiff's rights under his prior mortgage and decree against the 4th defendant. In many decided cases it is said that this depends on the intention of the parties to the contract.

The law imputes to a person an intention to act according to his interest. That presumption is made even when the mortgagee, as in this case, may not have been aware of the circumstances indicating what course of conduct would be for his interest. If so, the statement in (*O*) made without the knowledge of the 4th defendant's encumbrance that the charge and the decree debt is extinguished is not material and has no greater effect than the provision in S. 89 of the Transfer of Property Act that the security becomes extinguished on the passing of an order absolute for sale. In the latter case it is quite clear that even after such order the security subsists as against a subsequent encumbrancer. An intention to give up his charge against a puisne encumbrancer cannot be imputed in the absence of any knowledge on his part of that encumbrance.

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The true principle is that stated in S. 101 of the Transfer of Property Act, though that section does not apply to this case. When the continuance of a charge is for a person's benefit, then it is not extinguished in such cases; but it subsists. I am therefore of opinion that for the sum of Rs. 1,086-0-8 and interest thereon and proportionate cost the plaintiff has a first charge.

The 4th defendant's mortgage comes next in order of priority. The plaintiff's claim for the balance under (*O*) with interest and proportionate costs comes next. I do not see why the amount of Rs. 400/- should be deducted out of the sum of Rs. 1,086-0-8. The plaintiff is therefore entitled to the usual decree for sale as first mortgagee; and if the property is sold the proceeds will be distributed in the above order.

If the property is not sold, but the 4th defendant pays the first charge to the plaintiff, then the 4th defendant will be declared to have a charge for the amount he has paid in addition to his own mortgage debt and it will be open to the plaintiff as mortgagee for the balance under (*O*) to redeem him.

Against the representatives of the mortgagor as such there will be a decree for the recovery of the amount with interest at 6 per cent and costs out of the assets of the deceased.

As between the plaintiff and the 4th defendant, each party will pay and receive proportionate costs.

K. Srinivasa Aiyangar, for appellant:—A mortgage is extinguished by the taking of another mortgage instrument which states clearly that it is to be in satisfaction of the prior mortgage especially if additional amount is borrowed or the terms are varied—*Venkatasubramania Aiyar* v. *Koran Kannan Ahmad.* [1] This will especially be so when the second mortgage is taken after knowing that an intermediate mortgage had been created—*Ramkrishna Sadashiv* v. *Choth Mal.* [2] The question in each case is one of intention, and intention can be clearly gathered from the language of the document. Satisfaction of the decree on the first mortgage was entered in the face of my notice of the intervening mortgage. The first mortgage bond is merged in the decree. *Chief Justice.*—How can you suppose that the first mortgagee intended to prejudice himself? You were no party to it. I am

1. (1902) I.L.R. 26 M. 19. 2. (1888) I.L.R. 13 B. 348.

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sure that in this case there was a blunder in the office of the first mortgagee.] On extinguishment I refer also to *Commercial Bank of Tasmania* v. *Jones*.[1] Oral evidence in the face of express language of extinguishment is inadmissible—*Mercantile Bank of Sydney* v. *Taylor*.[2] In the following case it was held that the debt was extinguished even when there was no knowledge—*Shan Maun Mull* v. *Madras Building Company*.[3] In this last case the words were "free of all mortgages" as in the present case. S. 101 of T. P. Act, would not apply to this case in terms, but its principle applies—*Lomba Gomaji* v. *Vishwanath*[4]. Secondly, even supposing the first mortgagee has priority in respect of the amount of the first mortgagee in as much as I, as second mortgagee, have obtained a decree for sale, the third mortgage which was created thereafter will be affected by *lis pendens* and if I sell and buy the equity of redemption, the third mortgagee cannot redeem me at all—*Kunhi Umah* v. *Ahmed*[5], *Venkatesh Govind* v. *Maruthi*[6], *Pursotam Narain* v. *Chedda Lal*[7], *Har Shankar* v. *Sheo Gobinda Sahoo*[8]; Gour's Notes on S. 52, T.P. Act, in p. 436. A decree for redemption in favour of the original mortgagors under the circumstances is altogether wrong.

K. R. Subramania Sastri and *C. Balarama Row*, for respondents:—By the new mortgage I simply extinguished the decree and the agreement and not the debt. The debt could be extinguished only by payment. The appellant though he had knowledge of the existence of the first mortgage did not make that mortgagee a party. There was no intention to give up the security as is apparent from the wording of the new mortgage. [*Court*.—What is the effect of satisfaction of the decree ? Has not the debt merged in the decree ?] I cannot execute the decree as a decree. The debt is not merged in the decree. The debt still subsists. I can get the amount in other ways; my remedy may be barred but my right has not gone—*Bhawani Koer* v. *Mathura Prasad*[9]; *Economic Life Assurance Society*, *Usborne*[10]; *Inre Jennings estate*[11]; *Purnamal Chand* v. *Venkatasubbarayulu*[12] Compare the last clause

1. (1893) A. C. 313.
2. (1893) A. C. 317.
3. (1891) I.L.R. 15 M. 268.
4. (1193) I.L.R. 18 B. 86.
5. (1891) I.L.R. 14 M. 491.
6. (1887) I.L.R. 12 B. 217.
7. (1906) I.L.R. 29 A. 76.
8. (1899) I.L.R. 16 C. 966.
9. (1907) 7 C. L. J. 1 at 30.
10. (1902) A. C. 147.
11. (1885) Ir. R. 277, 278, 863.
12. (1897) I.L. R. 20 M. 486.

of S. 89 of T.P. Act. Security will not be extinguished until actual payment—*Bibijan Bibi* v. *Sachi Bemah*[1]. The form of the new mortgage is due to the decision in *Venkatasubramania Aiyar* v. *Koran Kannan Ahmad*[2]. I refer also to *Gopal Chunder Srimony* v. *Herembo Chunder Haldar*[3]. *Gudhar Das* v. *Ram Antai Singh*[4] is a case of new parties and new terms, and yet it was held that the first mortgage was not extinguished. The language is we have liquidated the said debt; *i.e.*, the debt has been paid off—GHOSE on *Mortgages*, p. 475. If it is for one's benefit to keep alive an earlier lien it must be presumed that it was intended to keep the lien alive. All the cases quoted by the other side are cases of novation. The title deeds are with me. Mahalakshmammal v. Oonahini Nidhi, Ltd.

The mortgage deed expressly mentions the existence of the first mortgage and says that it is subject to it. The suit and decree on the 2nd mortgage and the court sale are also expressly subject to my first mortgage. In such a case the buyer could not claim anything more than what was sold. The question of *lis pendens* was not raised in the lower court.

C. P. Ramasawmi Aiyar in reply referred to *Iyaat-un-nisa-Begum* v. *Pertab Singh*[5]. Satisfaction need not be by payment alone. After judgment the security is merged *Economic Life Assurance Society* v. *Usborne*[6]. The new document carries higher interest. The court cannot say that even if the parties say that they do not want the first mortgage to exist still the law presumes that it will exist. There is no evidence that the other side has the title-deeds. The title-deeds have to be deposited in court when the suit on the deeds is filed until the time of entering up of satisfaction. I merely mentioned the existence of the earlier mortgage but as soon as that was done I mentioned in the sale proclamation that the other side had given up the right of prior mortgage. No question of presumption or intention to keep alive the security can arise when the other side has expressly given up the right in unambiguous language.

The Court delivered the follwing

JUDGMENT :—*Chief Justice*.—The facts are stated in the judgment of *Sankaran Nair* J.* The learned Judge held that the

1. (1904) I I. L. R. 31 C. (F. B.)
2. (1902) I. L. R. 26 M. 19.
3. (1889) I. L. R. 16 C. 523, 529.
4. (1904) 8 C. W. N. 690, 693.
5. (1909) I.L.R. 31 A. 538 P.C.
6. (1902) A. C. at 149, 151.

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plaintiff (I refer to the plaintiff-company as the plaintiff) could not claim priority as regards the sum of Rs. 1,600 odd, the amount of the further advance made by the plaintiff at the time of the execution of the mortgage of August 1903, (Ex. *O*) This finding was not contested by the plaintiff (the respondent). The question for us is: Was the learned Judge right in holding that as regards the sum of Rs.1,080 odd, the amount remaining due from the mortgagor to the plaintiff at the time of the mortgage of August 1903, the plaintiff had priority over the fourth defendant —in other words, did the mortgage of August 1903 operate so as to extinguish the plaintiff's mortgage rights under the decree obtained by him in February 1900, (Ex. H.) in the suit brought on his equitable mortgage of 1895? In September, 1900, *i. e.*, after the plaintiff had got his decree on his equitable mortgage of 1895, the fourth defendant obtained a decree for sale (Ex. *B*) on a mortgage of the equity of redemption of the property in question which had been executed in June, 1899. This decree was executed by the fourth defendant who bought the property in execution. The sale was subject to the plaintiff's rights as mortgagee and in the fourth defendant's application for execution the plaintiff's rights were reserved.

There can be no question that before (Ex. *O*) was executed the plaintiff had priority over the fourth defendant as regards any balance remaining due to him under his equitable mortgage of 1895. Is (Ex. *O*) to be construed as a surrender of his mortgage rights as against the puisne encumbrancer (the fourth defendant), so as to convert the fourth defendant into a first mortgagee by virtue of his mortgage of June 1899, and relegate the plaintiff to the position of second mortgagee?

A document dated 11th March 1902 (Ex. *I*) is in evidence, which is a notice given to the plaintiff on behalf of the fourth defendant of the decree obtained by the fourth defendant in September 1900 (Ex. *B*). The case for the plaintiff was that no notice which was legally binding on the plaintiff had been received. It does not seem to me to be very material whether the notice was received or not. If the plaintiff had no knowledge of an encumbrance, it is difficult to say that he intended to give

* See p. 811.

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that encumbrance priority over an earlier subsisting encumbrance in his favor. On the other hand the fact that notice had been received (if it was received) would render it unlikely that the plaintiff should have been content to surrender his mortgage rights as against the fourth defendant without consideration, or for a consideration which seems inadequate. The terms of the mortgage of 1903 may have been as between the mortgagor and the plaintiff more advantageous than those of the equitable mortgage of 1895. But this would not have compensated the plaintiff for the loss of his mortgage rights as against the fourth defendant. What the plaintiff purports to give up (by Ex. *O*) as against his mortgagor is all his rights under his mortgage decree of February 1900 (Ex. *H*) and under an agreement. The agreement is recited in the instrument as an agreement which had been sanctioned by the court, under which the sale under the plaintiff's decree was postponed on certain terms. The instrument contains a covenant by the mortgagor that he has power to convey free from encumbrances.

With regard to this question of intention I think the view taken by *Sankaran Nair* J. was right. The plaintiff gave up his right to sue on his mortgage of 1895, but he did not give up his rights as a secured creditor in respect of the unpaid balance which would of course include the right to set up his security as against the puisne encumbrancer. I do not think we ought to hold, as we were asked by the appellant to hold, that the rights of the parties were the same as if the mortgagor had paid off the plaintiff. It may be that, as suggested on behalf of the respondent, the form in which Ex. (*O*) was drawn was intended to meet the decision in *Venkata Subramania Iyer* v. *Koran Kannan Ahmad.*[1] However this may be, the effect of Ex. (*O*) was unquestionably to put an end to the plaintiff's subsisting judgment-debt against his mortgagor, but the fact that the debt was extinguished leaves open the question whether the security was put an end to. The law is thus stated in *Bawani Koer* v. *Mathura Prasad*[2]: "As laid down by their Lordships of the Judicial Committee in *Gokul Das* v. *Rambox*[3], *Mohesh Lal* v. *Bawan Dass*[4] and *Dinobundo* v. *Jamaya*[5], and by the House of Lords in *Thorne* v. *Cann*[6], and *Liquidation Estates Purchase Company* v. *Willoughby*[7], the question whether a mortgage which

1. (1902) I. L. R. 26 M. 19. 2. (1907) 7 C. L. J. 1 at page 31.
3. (1884) L. R. 11 I. A. 126. 4. (1883) L. R. 10 I.A. 62.
5. (1901) L. R. 29 I. A. 9. 6. (1895) A. C. 11.
7. (1898) A. C. 321.

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has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is simply a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. The principle upon which this doctrine is founded is that, although ordinarily when the interests of the mortgagor and the mortgagee are united in the same person it is not necessary for him to keep them distinct equity will keep them distinct, where from the intentions of the party either express or implied, it is for his benefit that they should be so kept. It depends upon the intention, actual or presumed, of the person in whom the interests are united, and this person will be presumed to intend that which is most to his advantage. Consequently, where the mortgagee institutes an action to enforce his security, proceeds to judgment, sells the premises, and purchases them himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption." This principle was recognized in *In re Jenning's Estate*[1] where it was held that where an equitable mortgagee by deposit of title deeds took a bond to secure the same debt and entered up judgment thereon he did not thereby forfeit his security or defeat its priority. I may also refer to the judgment of this court in *Purnamal Chand* v. *Venkatasubbarayalu*[2] and the judgment of the Calcutta High Court in *Gopal Chander Sreemony* v. *Herembo Chundar Haldar*[3]. See too GHOSE on *Mortgages*, Vol. I, p. 475 4th Edn.

The decision in *Ramakrishna Sadasiv* v. *Choth Mal*[4] is no doubt in point and is an authority in the appellant's favour. But in the case before us I am not prepared to hold that it was the intention of the plaintiff to give up his mortgage rights as against the fourth defendant. The judgment in *Commercial Bank of Tasmania* v. *Jones*[5] no doubt lays down the general principle that a party may be entitled to the benefit of a contract which operates as a novation though he was no party to the contract. This, however, does not affect the rule that the law imputes to a person the intention to act according to his interest.

I think the learned Judge was wrong in holding that the plaintiff was entitled to redeem the fourth defendant in respect of the fresh advance made under Ex. (*O*) since this advance was made after the fourth defendant had obtained his decree for

1. (1885) 15 Ir. R. 277.
2. (1897) I. L. R. 20 M. 486.
3. (1889) I. L. R. 16 C. 523.
4. (1888) I. L. R. 13 B. 348.
5. (1893) A. C. 313.

sale. Except as regards this, the appeal is dismissed. Plaintiff and fourth defendant will pay and receive proportionate costs.

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Three months from this date will be allowed for redemption.

Munro J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Sri Maharajah of Vizianagram .. Appellant* (*Plaintiff*)

v.

Kota Veeranna and others .. Respondents (*Defendants*).

Maharaja of Vizianagram v. Veeranna.

Provincial Small Cause Courts Act, Sch. II, Art. 13—Suit for recovery of land cess by zamindar from inamdar.

A suit for recovery of land cess by the zamindar from the inamdar does not fall within Art. 13 of the Provincial Small Cause Courts Act.

The cesses and dues contemplated in Art. 13 are payments which a person is entitled to as representing his interest in certain immoveable property and not because he possesses some interest in immoveable property. [*Zemindar of Tarla* v. *Latchiah* [1] ref. to.]

Second appeal from the decree of the Temporary Subordinate Judge's Court of Vizagapatam in A. S. No. 412 of 1908 presented against the decree of the Court of the District Munsif of Chodavaram in O. S. No. 728 of 1907.

S. Srinivasa Aiyangar for appellant.

P. Naghabhushanam for respondents.

P. Nagabhushanam, for the respondents, took a preliminary objection that the suit was of a small cause nature and therefore no second appeal lay, and cited in support of the position *Zamindar of Tarla* v. *Latchiah* [1]; *The Secretary of State* v. *Venkatachela Perumal Pillai* [2]; *Venkatagiri Raja* v. *Venkat Rau* [3]; *Karimdad Khan* v. *Mustagiri Khan* [4].

S. Srinivasa Aiyangar, for appellant:—This was also cess leviable. "On account of" in Cl. (13) of the Provincial Small Cause Courts Act would mean "by reason of." There was no

* S. A. 680 of 1910. 31st July, 1911.

1. (1902) 13 M.L.J. 211.
2. (1900) 11 M.L.J. 117.
3. (1897) I.L.R. 21 M. 243.
4. (1903) I. L.R. 26 A. 5.

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warrant for holding that those words meant "representing" or "being the whole of." He cited *Muhammad Abdul Hai* v. *Nathu*[1] where cess is defined as "a payment, not for the benefit of the landlord but a payment for some purpose of public convenience, such as sanitation, police or the like." He submitted that *Zamindar of Tarla* v. *Latchiah*[2] as well as *The Secretary of State* v. *Venkatachela Perumal Pillai*[3] proceeded upon the view that the cess had either been incorporated with rent, or, having been claimed along with rent, must be so treated.

The Court delivered the following

JUDGMENT :—The preliminary objection has been taken that no second appeal lies in this case as the suit is of a small cause nature. The question is whether a suit for recovery of land cess by the zemindar from the inamdar can be said to fall within Article 13 of the Provincial Small Cause Courts Act. That article is in these words: "A suit to enforce payment of the allowance or fees respectively called *malikana* and *haqq*, or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immoveable property or in an hereditary office, or in a shrine or other religious institution."

Now can it be said that the land cess is payable to the zamindar by the inamdar *by reason of* the former's interest in immoveable property? We think not. The land cess is a tax levied by the Government and the landlord who in the first instance has paid to the Government is entitled to recover it from an intermediate tenure-holder because the latter as between himself and the landlord is the person who ought to bear the burden of the tax. The cesses and dues contemplated in Article 13 are payments which a person is entitled to as representing his interest in certain immoveable property and not because he possesses some interest in immoveable property. We are fortified in this conclusion by the ruling in *Zemindar of Tarla* v. *Latchiah*[4] and in S. A. No 10 of 1907.

The preliminary objection prevailing, this second appeal is dismissed with costs.

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1. (1904) I.L.R. 27 A. 183.
2. (1902) 13 M.L.J. 211.
3. (1900) 11 M. L. J. 117.
4. (1902) 13 M.L.J. 211.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Spencer.

Sivagnanathammal	.. Appellant* (*1st Counter-Petitioner: 1st Defendant.*)
v.	
Arunachellum Pillai and others	.. Respondents (*Petitioners: Plaintiffs.*)

Sivagnanathammal v. Arunachellum Pillai.

C. P. C. O. XLI, r. 1 — Receiver, ad interim—Just and convenient—Suit against Hindu widow—No allegation of specific waste.

A *bona fide* possessor should not ordinarily be displaced from any of the just rights attached to his title unless there be some equitable ground for interference.

To justify the appointment of an *ad interim* receiver in a suit against a Hindu widow who is in *bona fide* possession of the property, in virtue of her legal title to it, and which possession she would be admittedly entitled to for her life even if plaintiff succeed in the suit (the suit being one for declaring an alleged will of the last male owner a forgery) there should be some equitable ground for such appointment, and a court will be acting wrongly in appointing a receiver on bare grounds of expediency in the absence of specific proof of waste, etc.

Appeal from the Order of the Subordinates Judge's Court of Tuticorin in C. M. P. No. 281 of 1910 in O.S. No. 23 of 1910.

K. Srinivasa Aiyangar and *S. Srinivasa Aiyar* for appellant.

The Advocate General (*P. S. Sivaswami Aiyar*) for respondent.

The Court delivered the following

JUDGMENT:—This is an appeal against the order of the Subordinate Judge of Tuticorin appointing a receiver *pendente lite* in a suit in which the reliefs asked for by the plaintiffs-reversioners are the appointment of a receiver and the issue of an injunction restraining waste and mismanagement on the part of a mother and her deceased son's sister's son. The 2nd defendant sets up a will under which he (the deceased's nephew) is to get a moiety

* A. A. O. No 188 of 1910. 26th July, 1911.

Sivagnanathammal v. Arunachellum Pillai.

of the property during the mother's lifetime and is to take the whole estate absolutely on her death. The 1st defendant supports this will and the plaintiff impugns it. The language of Order XLI, Rule 1, of the Code of Civil Procedure of 1908, which governs the present case, differs slightly from the language of S. 503 of the Code of 1882 by the introduction of the words "just and convenient." The latest decision in which the alteration is considered is *Sreemati Mathurai Debya* v. *Shib Dayal Singh Hazari*[1], and we are disposed to agree with the learned judges who decided that case in thinking that "the courts in India have the fullest jurisdiction to appoint as well as to remove a receiver in the exercise of a sound judicial discretion." Each case has to be decided on its own merits, and we may at once say that ordinarily in a case where a court of first instance has fairly taken into consideration all the attendant circumstances and appears to have made a sound use of its discretion in the matter, we should hesitate to interfere with an order of this kind.

The prominent features of the present case are that (1) in the event of the will being invalidated the first defendant will have what is conveniently described as a widow's estate; (2) that in the affidavits filed on the respondents' side there are no specific allegations of actual waste or mismanagement; (3) that the only definite allegation relates to a sum of Rs. 6,000 which one of the partners of the deceased Subramania Pillai is alleged to have paid to the 1st defendant out of the partnership assets, and that there is a specific denial of this payment in the 1st defendant's affidavit of December 12th, 1910; (4) that the 1st defendant has expressed her willingness in para 15 of her counter-affidavit of 30th August, 1910, to give any undertaking which the court may consider necessary or desirable so as to ensure the safety and proper management of the properties of her deceased son; (5) that the lower court refused, in its order of November 5th, 1910, to issue an injunction restraining the defendants from collecting the outstandings of Subramania Pillai's estate but granted, in its order dated the same day, the prayer for the appointment of a receiver, though the latter remedy requires a stronger case to be made out—vide *Chandidat Jha* v. *Padmanand Singh Bahadur*.[2] When a distinction is drawn

1. (1909) 14 C.W.N. 252. 2. (1895) I.L.R. 22 C. 459.

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between the two remedies, namely that while, in either case, it must be shown that the property should be preserved from waste or alienation, for an injunction it would be sufficient to show that the plaintiff has a fair question to raise as to the existence of the right alleged, but, for a receiver's appointment a good *prima facie* title has to be made out. In the case reported in the Calcutta Weekly Notes to which we have already made reference, the learned Judges who heard the appeal (*Caspersz* J. and *Doss* J.) lay down the principle that a receiver should not be appointed in supersession of a *bona fide* possessor of the property in controversy unless there is some substantial ground for interference. In pronouncing this opinion they refer to the leading case on the point in the Calcutta Law Reports which is *Siddeswari Debi* v. *Abhoyeswari Debi* [2]. This principle of not displacing a *bona fide* possessor from any of the just rights attached to his title unless there be some equitable ground for interference has been followed in *Srimati Prosonomoyi Debi* v. *Beni Madhub Rai* [1] and we do not consider the circumstances of the present case justify a departure from it. In paras 4 and 5 of his order the Sub-Judge recognises the fact that an appointment of a receiver *ad interim* for an estate where there is a Hindu widow in possession without proving acts of spoliation would be without precedent.

On respondents' behalf a number of authorities have been cited, but as each case must be disposed of on its merits, and as the circumstances of the present case are distinguishable, a brief notice will be sufficient to dispose of them. In *Sia Ram Das* v. *Mohabir Das* [3] and in *Ram Sunder Das* v. *Kamal Jha* alias *Kamal Das* [4] it was found that distinct acts of waste had already been committed and in the latter case the defendant's title was based on the will or deed of gift alone. In *Durga Nath Pramanik* v. *Chintamani Dasi* [5] a preliminary decree for partition had already been passed. *Gopinath Mookerji* v. *Kally Doss Mullick* [6] was a case of an injunction being continued until certain charges of fraud and collusion on the part of a Hindu widow had been investigated by oral evidence. *Goluk Chunder Gooho* v. *Mohim Chunder Ghose* [7] was a suit to recover a specific sum of money

1. (1888) I. L. R. 15 C. 818.
2. (1899) I. L. R. 27 C. 279.
3. (1903) I. L. R. 31 C. 214.
4. (1883) I. L. R. 5 A. 556.
5. (1905) I. L. R. 32 C. 741.
6. (1883) I. L. R. 10 C. 225.
7. (1870) 13 Weekly Reporter 95 (Civil).

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which, if released from attachment, the defendant intended to invest in trade.

Finally a suggestion has been thrown out that if the appointment of a receiver at the present stage is disapproved of, an injunction against waste may be ordered to issue. In this connection we observe that the Subordinate Judge declined in a separate order to issue temporary injunction, and the question has not come up on appeal from that order.

The words that occur at the conclusion of *Srimati Mathurai Debya* v. *Shib Dayal Singh Hajari* [1] seem to apply fully to the circumstances of this case and to be a sound reason for allowing this appeal. They are these:—"As observed in one of the English cases, the plaintiffs are the masters of the litigation. If in addition to that advantage, we were to anticipate their success in the present action, we should be placing the defendant in a position in which the circumstances of this case do not justify us in placing her."

We direct the order appointing a receiver be discharged. Respondents to bear the appellants' costs of the proceedings in both courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar.

V. S. Ramakrishna Aiyar .. Petitioner*

v.

Nagammal & others .. Respondents.

Ramakrishna Aiyar v. Nagammal.

Succession Certificate Act, S. 7, Cl. (3)—Discretion—Judicial discretion—Appellate court, powers of—High Court—Revisional powers of.

An appellate court has the same power as the first court to exercise the discretion given by Cl. (3) of S. 7 of the Succession Certificate Act. The discretion vested in courts under Cl. (3) is a judicial discretion. An appellate court could hold that a question considered by the lower court to be intricate is not intricate and *vice versa*.

The High Court cannot interfere in revision under S. 115, C. P. C., with an order of the District Judge arrived at by him on the ground that the question is intricate or otherwise; *Obiter*: but it may interfere if the District Judge on appeal had not come to any decision on the question of the rights of parties and had also declined to act under Cl. (3) of S. 7.

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* C. R. P. No. 248 of 1910. 28th July, 1911.

1. (1909) 14 C. W. N. 252.

Petition, under S. 115 of Act V of 1908, praying the High Court to revise the decision of the District Court of Madura in C. M. A. No. 49 of 1909 presented against the order of the Court of the Subordinate Judge, Madura, in O. P. No. 50 of 1909. Rama Krishna Aiyar v. Nagammal.

S. Srinivasa Iyengar and *T. Narasimha Iyengar* for petitioner.

C. V. Ananthakrishnaiyar for respondents.

S. Srinivasa Iyengar—contended that the District Judge failed to exercise a jurisdiction vested in him by law. He refused to decide the question whether the will was genuine or not. The 1st court having held an enquiry, it is not open to the appellate court to say that the matter is too intricate. He must record findings on the evidence taken and decide the question. The reasons given are unsound. The following cases were cited: *Shivamma* v. *Subhamma* [1], *Janki* v. *Kallu Mal* [2], *Balamukund* v. *Kundan* [3], *Basanta Lal* v. *Parbati* [4]. The discretion exercised under S 7, Cl. (3) of the Succession Certificate Act was wrong and illegal.

C. V. Ananthakrishnaiyar was not called upon.

The Court delivered the following

JUDGMENT.—This is an application under S. 115 of the Civil Procedure Code for revision of an order of the District Judge of Madura, revoking the succession certificate granted to the petitioner here and granting a certificate to the respondents.

The petitioner here claimed the certificate as legatee under a will made by a deceased Hindu. His application was opposed by the respondents, the widows of the deceased. The Subordinate Judge, to whom the application was made, took evidence on the question of the genuineness of the will. His conclusion, to set it out in his own words, was as follows:—"I find that for purposes of this petition the will is proved. This decision will not affect the right of the respondents to have the will declared void or to have it set aside." It is not quite clear to me whether the Subordinate Judge meant that on the evidence he

1. (1894) I. L. R. 17 M. 477. 2. (1908) I. L. R. 31 A. 236.
3. (1905) I. L. R. 27 A. 452. 4. (1903) I. L. R. 31 C. 133.

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came to the conclusion that the will was genuine, but that his opinion would not constitute the matter *res judicata* in any proceedings which the respondents might take to declare the will not genuine, or whether he meant merely that the petitioner had adduced sufficient evidence to enable the Sub-Judge to arrive at a *prima facie* conclusion in favour of the genuineness of the will.

The respondent appealed to the District Court against the Sub-Judge's order.

Mr. Srinivasa Aiyangar's contention here is that the District Judge has not really decided the question whether the will was genuine or not. He put it even more strongly, that the District Judge refused to decide the question and failed to exercise a jurisdiction vested in him.

I am unable to agree with the contention that the District Judge refused to decide the question—at any rate in the sense that he came to no conclusion at all on it. He observes :—" No *prima facie* case has been made out in favour of the petitioner in the lower court." And again, after stating that two attesting witnesses testified in support of the will, while two others denied its genuineness, he says :—" I can see no sufficient reason for crediting one set of witnesses rather than the other. The evidence can only be said to be evenly balanced." Later on he observes :—" There is no such clear and overwhelming evidence," etc It appears to me that the District Judge's finding substantially is that he was not proposed to hold, on the conflicting evidence before him, that the will was proved. He goes on to observe :— " The case is not a simple or clear one. It is one which should be fully enquired into in a probate suit." I understand this to mean that on the evidence before him he was not prepared to hold the will proved, but he considered it better to act under the provisions of Clause (3) of S. 7 of the Succession Certificate Act. That is, he considered the question of the genuineness of the will too intricate for determination in the certificate proceedings, and, as the petitioner had no *prima facie* right to the certificate, in case the will was not proved, he refused to grant him the certificate. The Judge has, in fact, expressly stated that he intended to apply Cl. (3) of S. 7.

Mr. Srinivasa Aiyangar contends that the Judge was wrong in applying Clause (3) to this case. He argues, first, that it is only the court to which the application for certificate is made

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in the first instance that has got the right to exercise the discretion conferred by that clause. I am unable to agree with him. The functions and powers of a court of appeal invested with plenary jurisdiction to decide a question which the court of first instance had to decide are in substance the same as those of the first court itself. The appellate court had to decide whether the petitioner should be granted the certificate he asked for or not; it had to adjudicate on the question who was entitled to the certificate to collect the debts of the deceased; and I can see no reason for holding that it had not the same power to exercise the discretion vested in the court of first instance by Clause (3) as that court had.

It is next argued that the discretion must be exercised in a reasonable manner, and that the question whether a will was in fact executed or not would seldom be an intricate question and was not so in this case. I think the contention is sound to this extent: that the discretion exercised by a court under Clause (3) is a judicial discretion liable to the control of the appellate court. An appellate court could hold that a question considered to be an intricate one by the court of first instance is not really an intricate one, and that it should be decided in the certificate proceedings just as, as already pointed out, an appellate court could hold a question not regarded as intricate by the first court to be in reality an intricate one and not fit for decision in the certificate proceedings.

Then it is urged that it is open to this court in revision to say that the District Judge acted illegally or with irregularity in acting under Clause (3). I am unable to agree. Putting it at the highest, it cannot be said that the District Judge was guilty of anything more than an error in law or in fact in considering the question to be an intricate one, and in neither case could I interfere under S. 115.

Several cases have been cited by Mr. Srinivasa Aiyangar. But, in my opinion, none of them really helps him in this case. The cases of *Sivamma* v. *Subbamma*[1] and *Balamukünd* v. *Kundan Kunwar*[2] lay down that where the decision of a question is necessary to adjudicate on the question of the title to a certificate,

1. (1894) I. L. R. 17 M. 477. 2. (1905) I. L. R. 27 A. 452.

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the court is bound to hold some enquiry, or, to use the language in the former case, the opinion that the question is an intricate one must be arrived at as the result of the inquiry and not without any inquiry whatsoever. In the case of *Janki* v. *Kallu Mal*[1] the first court fully investigated a certain question and came to a conclusion as to the person entitled to the certificate as the result of the inquiry. The appellate court refused to accede to the request that the question which had been already inquired into should not have been decided and that the certificate should not have been granted to the party to whom it was given by the first court. The case is an authority only for the position that a court is not bound to refuse to enquire into a question which is an intricate one. The case of *Basanta Lal* v. *Parbati Koer* [2] does not lay down any definite rules which could be revoked in favour of the petitioner before me.

The result is that, in my opinion, whether I regard the District Judge as having come to the conclusion that he could not act on the evidence offered in favor of the will, or that he acted under the provisions of Clause (3) of S. 7, there is no question of jurisdiction which arises for decision by this court in a petition under S. 115 of the Civil Procedure Code. If he had not applied Cl. (3) of S. 7 of the Succession Certificate Act and at the same time refused to come to a conclusion on the question of the genuineness of the will, then the appellant might have grounds to ask this court to interfere in revision. But as I am unable to take this view of the judgment of the District Judge I am bound to dismiss this petition. I do so with costs.

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1. (1908) I. L. R. 31 A. 236. 2. (1903) I. L. R. 31 C. 133.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Krishnaswami Aiyar and Mr. Justice Munro.

Bellary Press Company, Limited, by their Agent Mathura Dass .. .. Petitioner*

v.

K. Venkat Rao & others .. .. Respondents.

Mathura Dass *v.* Venkat Rao.

C. P. C., O. 39, r. 2, Cl. (3)—"Court granting the injunction"—Meaning—Not the court to which the suit has been transferred for trial—C. P. C., S. 24—Notice—Want of—Irregularity.

An application under Cl. (3) of rule 2 of O. 39, C. P. C., cannot be transferred to a court to which the suit itself has been transferred for trial subsequent to the passing of the *ad interim* injunction. "The court granting the injunction" does not include the court to which the suit has been transferred subsequent to the passing of the *ad interim* injunction.

Semble:—The *ad interim* injunction itself would probably be enforceable by the court to which the suit has been transferred. Transfer of a suit without notice to parties, as required by S. 24, C. P. C., when the transfer is at the instance of parties, is a material irregularity; but their Lordships did not interfere in the case as the District Court could have effected the transfer *suo motu* without notice.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Bellary, dated the 14th July 1910, in O. P. No. 179 of 1910, O. S. No. 155 of 1910, on the file of the District Munsif's Court of Bellary.

T. Richmond, for petitioner:—In C. R. P. 436 of 1910: The transfer of the suit being without notice to us, is *ultra vires* and therefore ought to be set aside. No doubt it was brought to the notice of the Judge that he could transfer *suo motu*; and yet he does not purport to do it in the exercise of that power—manifestly because circumstances that would justify a transfer by the court *suo motu* do not exist. [*Krishnaswami Aiyar* J.—It is a mere irregularity not to have issued notice in a case like this where the Judge, if he was so minded, could have transferred *suo motu*.]

In C.M.P. 1585 of 1910: his contention was that an *ad interim* injunction could be made absolute only by the court that made the order. In support of this position, he cited C. M. P. 238 of 1910 where a sanction petition was held to be not transferable. The disobedience also can be punished only by the court which granted injunction—Order xxxix, r. 3; cited

* C. M. P. 1585 of 1910. C. R. P. 436 of 1910. 20th September, 1910.

Mathura Dass v. Venkat Rao.

Korsappa v. *Sachi* [1] to show that the court has no inherent power to commit for contempt.

Dr. *Swaminathan*, for respondent, relied upon S. 36. [*Krishnaswami Aiyar* J. drew attention to the fact that the section does not prohibit any other court from passing a similar order.] He relied upon *Korsappa* v. *Sachi* [1] to show that the imprisonment under Order XXXIX, r. 3, is only one in execution of the order and not in contempt or punishment. He also referred to S. 24, Cl. (2); Order XXI, r. 32, Cl. (1).

The Court delivered the following

JUDGMENT:—This is an application under S. 115 of the Code of Civil Procedure to revise the order of transfer made by the District Judge of Bellary in O. S. Nos. 155 and 78 of 1910, and of Interlocutory Applications Nos. 486, 538 and 612 of 1910, on the file of the District Munsif of Bellary. We think there is no ground for interfering with the order of transfer as regards suits Nos. 155 and 78 and Applications Nos. 486 and 612. It is argued that the order was bad in as much as no notice was given to the plaintiff as required by S. 24. That section empowers the District Court to make a transfer on the application of a party after notice to all, or of its own motion without such notice. The order in these cases was made on the application of the defendant. Notice to all parties should have been given by the District Judge before making the order. Not giving the notice we may, therefore, assume, was an irregularity. We should have been inclined to regard it also as a material irregularity justifying our interference under S. 115 but for the fact that the District Judge had power to make the transfer by his own motion without notice, and his attention was specially called to that provision and he was invited to make the order in the exercise of that power. The irregularity is a mere defect of form and we are not, therefore, prepared to interfere. The petition, in so far as it is against the order of transfer of O. S. Nos. 155 and 78 of 1910 and Interlocutory Applications No. 486 and 612 of 1910, is dismissed. With reference, however, to the order transferring Interlocutory Application 538 of 1910, the matter stands on a different footing. That was an application to the

1. (1902) I.L.R. 26 M. 494.

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District Munsif under Clause (3), Rule 2, of Order XXXIX, to punish the defendant for disobedience of the *ad interim* injunction granted by the District Munsif. Under that clause the court granting the injunction has power to attach the property of the person guilty of disobedience or to detain him in the civil prison. The language of this clause giving the power to the court granting the injunction is a modification of Clause (3) of S. 493 of the old Code. It must be presumed that the change was intentional. The power to transfer under S. 24 is no doubt very wide. But Sub-clause (2) of Clause (*a*) of Sub-section (1) of S. 24 authorises a transfer to a subordinate court competent to try or dispose of the same. We must, therefore, hold that the transfer of the Interlocutory Application No. 538 was bad. It is true that Clause (3) of Rule 2 of Order XXXIX is only an enabling provision conferring an authority on the court granting the injunction and does not preclude an application to the court to which a suit is transferred subsquent to the *ad interim* injunction for dealing with any disobedience of it. Indeed the *ad interim* injunction would probably be enforceable under S. 36 read with Rule 32 of Order XXI by the Bellary Subordinate Judge's Court to which the suit has been transferred. But that is a very different thing from the power conferred by Clause (3) of Rule 2 of Order XXXIX on the court granting the injunction. It was held under S. 257 (*a*) of the old Code by this court (*Paramananda Das* v. *Mahabir Dossji* [1]) that the only court which could sanction an agreement falling under that section was the court which passed the decree. It could hardly be contended that the District Court could transfer an application for sanction under that section to another court. Order XLVII, Rule 1, like S. 623 of the old Code, authorises an application to review to the court which passed the decree or order. It seems to us that such an application cannot be transferred by the District Court or the High Court to any other court. These are cases which appear to be analogous to the application under Cl. (3) of Rule 2 of Order XXXIX. We must set aside the order of the District Judge transferring Interlocutory Application No. 538 of 1910 from the file of the District Munsif of Bellary. We make no order as to costs.

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1. (1896) I.L.R. 20 M. 378.

In re Venkat Rao.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Munro and Mr. Justice Sankaran Nair.

IN THE MATTER OF K. VENKAT RAO, FIRST GRADE PLEADER PRACTISING IN THE DISTRICT OF BELLARY.

On Motion made by the Advocate-General.

Contempt of court—Contempt of inferior court—Jurisdiction of the High Court—Common Law jurisdiction inherent.—Charter Act, S. 15.

The High Court has the Common Law jurisdiction to deal with contempt of an inferior court, but not under S. 15 of the Charter Act.

Rule calling upon Mr. K. Venkat Rao to show cause why he should not be dealt with according to law for contempt of court in sending a letter dated 9th November 1910 to the District Munsif of Bellary during the pendency of an enquiry by the Munsif into a charge against him for disobedience to an injunction order.

The facts are shortly these. An injunction order was passed by the District Munsif of Bellary against K. Venkat Rao, a pleader, in a pending suit. While proceedings were pending against him for disobedience to the injunction order, the Munsif was served with notice of suit for damages in respect of the injunction proceedings. The notice dated 9-11-10 runs in these terms:—

" 1. I beg to give you notice under S. 80, Civil Procedure Code (Act V of 1908), though such notice is not required as the acts which I complain of against you were not done by you in your official capacity but done maliciously and without reasonable cause and in furtherance of the ill-will you bore against me for reasons set forth in the printed explanatory statement sent herewith.

2. Hereunder I give the particulars required in the above section :—

(*a*) *Name.*—Kolachellum Venkat Rao.

(*b*) *Cause of action* :—(i) Maliciously and without reasonable cause taking steps between 25-5-10 and 14-7-10 to punish me for an alleged disobedience of your injunction order though there was no disobedience at all. (ii) Maliciously and without reasonable cause insulting me on 13-7-10 by calling me 'impudent' and my statements 'falsehoods.' (iii) Threatening on 13-7-10 to

send me to civil jail for alleged disobedience of an injunction order of 5-4-10, though there was no legal injunction order issued, and though there was no disobedience of any sort. *In re* Venkat Rao.

3. *Relief claimed.*—Damages for a sum not exceeding Rs. 5,000 unless full amends are made for your conduct or an unconditional apology is tendered for the same."

On report of the abovementioned proceedings to the High Court the Hon'ble Advocate-General moved for a rule calling upon K. Venkat Rao to show cause why he should not be dealt with for contempt of court and a rule was accordingly issued by the High Court. The following affidavit was put in by Mr. K. Venkat Rao at the hearing.

"(1) That I, Kolachellum Venkat Rao, have been served with a notice issued by this Honourable Court on 16-2-11 calling upon me to show cause * * *.

(2) That before entering into any manner of explanation as regards my conduct in sending the said letter I humbly desire to express my sincere regret for the conduct with which I am charged and my assurance that I had not the least intention of impeding in any way the true course of justice in the Court of the District Munsif and I hereby tender to your Lordships my humble apology for having sent the letter in question.

(3) That the Bellary Press Co. instituted O.S. No. 155 of 1910 in the District Munsif's Court of Bellary to establish *inter alia* its right to take water from a well * * * situated in my garden. Pending the disposal of the suit the plaintiff applied for a temporary injunction and the District Munsif on the 5th April 1910 made an order * * *.

(4) That on the strength of the *ex parte* order, plaintiff's agents * * trespassed on my land * * * and attempted to construct an aqueduct by digging therein and doing various acts of mischief. On my application the Police * * * intervened and prevented. Thereupon the plaintiff applied to the District Munsif for an order to amend the interim order of 5-4-10 so as to empower the plaintiff to trespass on my land and construct an aqueduct * * *.

(5) That before the final disposal of the said interlocutory application, the District Judge of Bellary, by his order dated

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14-7-10, transferred the said interlocutory application and various other matters from the file of the District Munsif to that of the Subordinate Judge of Bellary.

* * * *

(7) That a civil revision petition was filed in this Honourable Court by the plaintiff to revise the order of the District Judge dated 14-7-10 and this court by its order dated 20-9-10 confirmed the order of the District Judge except in so far as the transfer of the interlocutory application alone was concerned.

(8) That the said interlocutory application was again taken up by the Munsif on 10-10-10, when I applied for process for the examination of certain witnesses on my behalf under O. XVI, Rule 7, C.P.C. But the Munsif on 14-10-10 dismissed my application for processes to my witnesses. An application was made to this court in C.R.P. No. 612 of 1910 to revise the said order of the Munsif refusing to examine my witnesses, and this court, by its order dated 17-10 10, stayed further proceedings in the Munsif's Court and set aside the Munsif's order by its order dated 3-11-10 and ordered the case to be disposed of according to law * * *

(9) That this court in its order dated 3-11-10, transferred the Munsif from Bellary to Cuddalore, and the said order was received by the Munsif on 7-11-10 and was published in the *Fort St. George Gazette* of 8-11-10.

(10) That on 9-11-10 the Munsif, though he came to the court, did not come on the bench nor take up any of the cases posted for the day. The bench clerk who attended to the original cases and to execution cases gave out that the Munsif had received orders of transfer and that he was engaged in his chambers preparing to hand over charge, and that the cases posted for the day would not be taken up. I believe that this will be borne out by the '*A*' diary of the court of 9-11-10. That in the afternoon of 9-11-10 imvitations were issued to many of the vakils, pleaders, and some officials inviting them to attend the next day a garden party in honour of the Munsif at the bungalow of a pleader practising in the Munsif's court. The garden party was actually given on the 10th. The Munsif left Bellary on 11-11-10 and I then learnt that he did not deliver over charge on the 9th and 10th owing to illness.

(11) Under the *bona fide* impression that the District Munsif had already handed over charge and ceased to be Munsif

of Bellary I sent the notice in question on the evening of 9-11-10 at 7 P. M. to the house of the Munsif.

(12) That in sending the notice and the letter I had not the slightest intention of impeding in any way the true course of justice and I was only taking a step prescribed by law, and the letter did not contain anything but the bare particulars required by law * * * and the notice was sent under the *bona fide* belief that the Munsif was no longer seized of the interlocutory application to which I was a party and that he had ceased to be Munsif.

(13) That a perusal of the report made by the Munsif * * * will be enough to satisfy your Lordships that the Munsif bore ill-will against me. To an old man like me, who, after having risen to the responsible position of a Magistrate, had subsequently been in practice for over 31 years as a First Grade Pleader, and who had won the good opinion of successive District Judges as well as the confidence of the public and had filled several positions such as Municipal Councillor and Chairman of the Bellary Municipality, Additional Member of the Madras Legislative Council * * * it was highly galling to me to be branded as being impudent and as being a liar in the face of the public whose respect and good opinion I had won. Having regard to the official position of the Munsif, who thus cast upon my character serious aspersions, I patiently suffered long, and it was only when I heard that he ceased to be Munsif of Bellary I sent him a sealed letter, smarting under the sense of insult and injury heaped upon me.

(14) That the sole object of the notice was to clear my character both as a public man and as a lawyer from the imputations * * *.

(15) * * * I humbly submit that I had not the least intention of interfering with the course of justice but was actuated solely to clear my character as an officer of the court, and I hereby express my deep and humble regret * * and tender to your Lordships my humble apology as a token of deep penitence and of the high regard and respect which I have always entertained towards the courts of all grades constituted in this land in the name of His Majesty."

At the final hearing of the rule *Dr. Swaminathan*, to show cause,—read portions of the affidavit and tendered an unqualified

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apology on behalf of his client and said he was not going to argue the question of jurisdiction of the High Conrt.

The Advocate-General, in support of the rule :—

(i) Contempt of court consists in an attempt to influence the course of justice. The fact that unreserved apology is tendered is no ground for exempting one from liability. The question therefore remains whether the Munsif ceased to be the District Munsif of Bellary; for it is not an offence towards the person of the court, but an offence towards the public in that it tries to influence the course of justice—*vide* OSWALD on *Contempt* (3rd Edn.) p. 48 ; HALSBURY'S *Laws of England*, Vol. VII, pp. 284, 285. If an attack is publicly made even after a judge ceases to be the judge of the court, there also it may be contempt. But if the letter is sent privately to the Munsif after he ceased to be Munsif, it would not be contempt. My contention is that the Munsif did not cease to be Munsif of Bellary, but the vakil says that he believed that the Munsif handed over charge. He was Munsif in as much as he has signed the diary for two days after the letter was received. It is immaterial that the order of transfer was published in the official gazette a day or two before the letter was sent.

(ii) *On the question of jurisdiction* of the High Court to punish contempt before inferior courts : though it was once doubted, the jurisdiction was affirmed recently on the ground that the High Court has an inherent power of control and superintendence over inferior courts—*King* v. *Davies*[1]; *King* v. *Parke.*[2] S. 15 of the Charter Act gives the power of superintendence over inferior courts. [*S. Nair* J.—I suppose you deal with the Vakil as a suitor ?] Yes. [*S. Nair* J.—How has the contempt been committed ?] The court's privilege has been infringed. It is the duty of this court to protect the inferior courts as it is the duty of the High Conrt to prevent inferior courts from usurping powers which they do not possess. It follows from this that it should protect inferior courts against unlawful attacks and interferences with their independence on the part of others. The High Court is a Court of Record. The inferior conrts are not courts of record. All courts of record have the power to punish contempt: [*Chief Justice.*—Is there any case

1. (1906) I. K. B. 34 at 43. 48. 2. (1903) I. K. B. 432, 440.

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where the English Supreme Courts of Common Law deal with contempts before inferior courts. There is a dearth of precedents as is said in the case of *King* v. *Davies*[1]. [*C. J.*—Is there any case in India?] No. HALSBURY'S *Laws of England*, Vol. VII, pp. 296, 297. If the principle is clear as regards contempts before inferior courts in the cases referred (one was an inferior criminal court) the same rule must apply as regards civil courts. I refer also to *Panda Ghazi* v. *Jenmuddi*[2]; *In re Sundranath Banerjee*[3].

Dr. Swaminathan as *amicus curiæ* argued the question of jurisdiction. The Supreme Court had jurisdiction to punish for contempts. It was a Court of Record. The Suddar Adawlat was not a court of record. The High Court succeeded to the powers of both the courts. The Supreme Court had jurisdiction over the City of Madras and over European British subjects throughout the Presidency. The question is whether the power of the High Court is limited in the exercise of its powers as the old Supreme Court. If so the High Court has no power. OSWALD thinks (at p. 13 of his book, 3rd Edn.) that the jurisdiction is confined to the criminal courts—*King* v. *Davies*[1]; *King* v. *Parke*[4]; *In re Kelkar*[5]. The court may have jurisdiction. *Hassanbhoy* v. *Cowasjee Jehangir Jassarwallah*[6] suggests that the power of punishing contempts against inferior courts exists because inferior courts have not got the power of punishing contempts of this kind. [*S. Nair* J.—referred to the case of *Harvestfield*. The court was of opinion that the High Court had jurisdiction, though no judgment was delivered]. RAPALJEE'S *Law of Contempt*, Art. 13.

The Court delivered the following

JUDGMENT:—*The Chief Justice.*—In this case a notice was sent to Mr. Venkat Rao, Pleader, calling upon him to show cause why he should not be dealt with by this court for contempt of court in sending to the District Munsif of Bellary, during the pendency of an inquiry by him into a charge against Mr. Venkat Rao of disobedience to an injunction order, a certain letter charging the Munsif with malicious and improper conduct in connection with the inquiry and giving notice to him of a suit

1. (1906) I. K.B. 34 at 43, 48.
2. (1878) I.L.R. 4 C. 665.
3. (1883) I.L.R. 10 C. 109.
4. (1903) II. K. B. 434.
5. (1908) I. L. R. 33 B. 240.
6. (1881) I. L. R. 7 B. 1, p. 3.

In re Venkat Rao. — Chief Justice.

for damages on that account. The proceedings raise the very important question whether this court has jurisdiction to deal with contempt of an inferior court. The case, as I have said, is of great importance and it is one of first impression, but as we have made up our minds with regard to it we do not think any useful purpose will be served by further consideration. Now Dr. Swaminathan, who appeared for the Pleader, not only refrained from raising the question of jurisdiction on behalf of his client, but he expressly declined to argue it as counsel for Mr. Venkata Rao. He expressed his readiness, however, to show cause against the rule, on the ground of want of jurisdiction as *amicus curiae*. We have accordingly had the benefit of his argument as well as that of the Advocate-General. It seems to me that there are two questions for us to consider: First, have we inherent Common Law jurisdiction in the matter? And, secondly, have we statutory jurisdiction under the powers conferred on this court by S. 15 of the High Courts Act? I take the first point. There can, I think, be no question that as regards contempts of court committed before this court we have the jurisdiction of the old Court of King's Bench. In *Surendranath Banerjee's case* [1] the law is thus enunciated by Sir *Barnes Peacock*. He says, p. 131: "Such an offence—that is, libel published out of court when the court was not sitting—is something more than mere defamation and is of a different character. It is an offence which by the Common Law of England is punishable by the High Court in a summary manner with fine, or imprisonment, or both. That part of the Common Law of England was introduced in the Presidency towns when the late Supreme Courts were respectively established by the Charters of Justice. The High Courts in the Presidencies are Superior Courts of Records and the offence of contempt and the powers of the High Court for punishing it are the same there (that is in India) as in this country (that is in England), not by virtue of the Penal Code for British India and the Code of Criminal Procedure, but by virtue of the Common Law of England."

The next question is, what is the Common Law of England with regard to the power of the King's Bench Division of the High Court in England, with reference to contempts committed

1. (1883) I. L. R. 10 C. 109.

In re Venkat Rao — Chief Justice.

before an inferior court? Curiously enough, this question does not seem to have been considered fully until a comparatively recent date. But we have two recent cases, one decided in 1903 and the other in 1906, in which there are two very interesting and instructive judgments delivered by Mr. Justice *Wills* on behalf of the Division Court. In *King* v. *Parke*[1] a person was charged at Petty Sessions with an indictable offence triable only at Assizes. Matter was published in a newspaper tending to interfere with a fair trial. It was held that the High Court had jurisdiction to deal with the publisher for contempt of court, notwithstanding that at the time of the publication the person charged had not yet been committed for trial. In that case the question which we have to consider today did not arise, although there are some observations of the learned Judge with reference to it. On page 436 the Judges observe: "It may be conceded that the jurisdiction to commit for contempt of court is confined to contempt of the court exercising the jurisdiction. Upon the wider and more general question whether this court will treat in this fashion inroads upon the independence of inferior courts we propose to say a few words towards the close of this judgment."

In the later case, to which I shall have to refer in a moment, the case of *King* v. *Davies*,[2] their Lordships apparently did not consider whether contempt of an inferior court should be regarded as contempt of the court which exercises jurisdiction in dealing with the contempt. This, really, is only a matter of academical interest. If there is jurisdiction in this court to deal with contempt of an inferior court, it does not much matter if the jurisdiction is exercised on the ground that the contempt of the inferior court amounts to a contempt of the court exercising the jurisdiction. In the judgment in *King* v. *Parke*[1] we find (page 442):—"This court exercises a vigilant watch over the proceedings of inferior courts, and successfully prevents them from usurping powers which they do not possess or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interferences with their independence on the part of others." The judgment in *King* v. *Parke*[1] proceeded on the ground that the court of a Commissioner of

1. (1903) 2 K. B. 432.

2. (1906) 1 K. B. 32.

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Assizes was a branch of the High Court and the actual question we have to decide was not expressly dealt with by the learned Judges in that case. In the later case of *King* v. *Davies*[1] a person was charged at Petty Sessions with an indictable offence which was triable either at Quarter Sessions or at Assizes. Matter was published in a newspaper tending to interfere with the fair trial of the charge. It was held that the King's Bench Division had jurisdiction to attach the publisher of the matter which constituted the contempt of court, notwithstanding that at the time of the publication it was uncertain whether the person charged, if committed at all, would be committed to the Assizes or to the Quarter Sessions. The learned Judges, in dealing with the case, and for the purpose of adjudicating upon the question of jurisdiction, treated the case as if a committal had actually taken place to the Quarter Sessions, *i.e.* to a tribunal which is not a branch of the High Court. The learned Judges deal with this question on p. 37. They point out that "the present King's Bench Division of the High Court stands in the place of the three ancient Superior Courts of Common Law, and, besides representing the powers and exercising the authority of the Court of Common Pleas and Exchequer, inherits all the jurisdiction and powers of the Court of King's Bench." The learned Judges also point out that from the most ancient times that court exercised functions which belonged to no other court in the kingdom. Later on in the judgment I find, after citing a passage from "Willmot's Opinions", at p. 42:—"If it (that is, the independence of inferior courts) is to be secured at all in the case of the inferior courts, it can only be secured by the action of this court, for they have not the power to protect themselves; and if it be true that the King's Bench is, in any sense the *custos morum* of the kingdom, then it must be its function to apply, with the necessary adaptations to the altered circumstances of the present day the same great principles which it has always upheld." Then the learned Judges cite the words of Lord *Coleridge*: "Though the principles of law remain unchanged, yet (and it is one of the advantages of the Common Law) their application is to be changed with the changing circumstances of the time." Then the learned judges proceed to consider the authorities bearing on the subject, and the conclusion at which

1. (1906) I. K. B. 32.

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they arrive is that "the state of the authorities, such as they are, is such as to leave the question entirely open for our decision." At the end of the judgment we find this passage: "The reason why the Court of King's Bench did not concern itself with contempts of the other superior courts was that they possessed ample means and occasions for protecting themselves. Inferior courts have not such powers, although some of them, Quarter Sessions for example, try many more cases than are tried at Assizes, and have a very extended and important jurisdiction. The danger is perhaps greater to them than it is to the superior courts of having their efficiency impaired by publications such as those which have given rise to the present proceedings. Thinking as we do that the application now before us asks for nothing more than the legitimate application to the new circumstances of the old principles of the Common Law, we have come to the conclusion that we ought to grant the remedy invoked." This is a pronouncement on the Common Law of England with regard to the power of the King's Bench Division to punish for contempt of an inferior court.

The decision of the Privy Council is a decision to the effect that we have the inherent Common Law powers in connection with matters of contempt which were exercised by the old Court of King's Bench and now by the King's Bench Division.

It occurred to me in the course of the argument, there might possibly be some distinction between civil and criminal courts. No doubt the English cases were cases in which the contempt of court was the contempt of an inferior criminal court. But I do not find any suggestion in either of these judgments that such a distinction can be made. At page 37, *King* v. *Davies*,[1] Dr. Swaminathan pointed out that the court treated the case as one where a committal had actually taken place to the Quarter Sessions. But that observation was with reference to the argument that there would be jurisdiction if the contempt of court was a contempt of a court which was a branch of the High Court, but not otherwise. On principle there seems no reason why there should be a distinction between cases of contempt of an inferior civil court and contempt of an inferior criminal court.

1. (1906) I. K. B. 34.

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Dr. Swaminathan called our attention to a passage in Oswald's book, at p. 13, which contains the learned author's comment on the recent cases. The King's Bench Division has general superintendence over all crimes whatsoever, to watch the proceedings of inferior criminal courts, to prevent them from acting contrary to law, and also to prevent persons from interfering with the course of such justice in such courts. I think the word "crimes" is used with reference to criminal offence of contempt of court. Dr. Swaminathan called our attention to an observation made by Mr. Justice *West* in the case *Hassanbhoy* v. *Cowasjee Jehanghir Jassarwallah*[1]. In that case it was held that "as regards the Indian High Courts the remedies provided by S. 136 of the Code of Civil Procedure, 1877 (corresponding to Order XI, Rule 21, of the present Code) in cases of disobedience to an order of court were cumulative and that they subjected the offender to particular liabilities for his contumacy, but did not extinguish the court's power of constraining him to obedience." On page 4 there is this passage :—"Such a power," the learned judge says, "must indeed exist somewhere in order to secure the administration of the law, and it can be safely restricted in the case of the lower courts only because it is held and exercised by those to which they are subordinate." It may be the learned judge had not the question in his mind, but the observation suggests that it did not matter if the powers of the lower courts were restricted by statute since the High Court had jurisdiction in the matter.

I am not prepared to hold we have jurisdiction under S. 15 of the Indian High Courts Act which gives us powers of superintendence with regard to subordinate courts. As regards this question of jurisdiction, I confess, when I first had occasion to consider the matter, I was inclined to take the view that we had no jurisdiction.

On further consideration, however, and having had the benefit of hearing the point argued, I have come to the conclusion that we have. I indicated on Friday what would be the order we should be prepared to make if we had jurisdiction. I think it is very much to be regretted that a pleader of Mr. Venkat Rao's experience should have written the letter which he wrote.

1. (1881) I. L. R. 7 B. 1.

In the circumstances of the case, his counsel, I think, adopted a wise course in declining to argue the question of jurisdiction. Mr. Venkat Rao, both in his affidavit and by the mouth of his counsel, offered an unqualified apology. We have no doubt that a serious contempt of court was committed, but having regard to the unqualified apology which has been tendered, we do not think it necessary to take further action.

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Munro J.—I concur.

Sankaran Nair J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Philips.

Marigounda & another	..	Petitioners*
v.		*(Accused)*
Srinivasa Ragavachar	..	Complainant.

Penal Code, S. 429—"Maiming"—Cutting off the ears of a horse.

Cutting of the ears of a horse amounts to maiming within the meaning of S. 429, I.P.C., Cr. Rev. Case, 583 of 1910 not followed.

Meanings of the words "maiming" and "wounding" considered.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the judgment of the Sub-Divisional First Class Magistrate of Kollegal in Cr. A. No. 27 of 1910 confirming the conviction and sentence passed on the petitioners by the Taluk and Second Class Magistrate of Kollegal in C. C. No. 135 of 1910.

S. Swaminathan for petitioners.

The Public Prosecutor (C. F. Napier) for the Crown.

The Court made the following

ORDER:—The question is whether cutting off the ears of a horse amounts to "maiming" within the meaning of S. 429, I. P. C. In Criminal Revision Case 583 of 1910, *Munro* J. was of opinion that the cutting off the ear and tail of a buffalo did not amount to maiming but he gives no reasons. With all due deference, I am unable to accede to this view, if it can be said that the facts here are the same as in that case. Maiming is not defined in the Indian Penal Code, but the definition given in Webster's

*Cr. R. C, No. 196 of 1911. 15th August, 1911.
Cr. R. P. No. 150 of 1911.

Marigounda v. Srinivasa Ragavachar.

Dictionary is "The privation of the use of a limb or member of the body by which one is rendered less able to defend himself or annoy his adversary. The privation of any necessary part—crippling, mutilation, injury, deprivation of something essential." In Gour's Penal Law of India, p. 1769, we find: "maiming" is a term of well known import in English Law and is the same as "mayhem" which meant the deprivation of a member proper for defence in fight. It has, however, since acquired a wider significance, and now means the privation of the use of a limb or member and implies a permanent injury. It does not then mean wounding, but wounding is otherwise injuring so as to entail a permanent injury. In *Regina* v. *Richard Jeans* [1] removing the end of a horse's tongue was held not to be maiming on the ground that no permanent injury was inflicted —the horse being able to eat and drink but unable to eat quite so fast as before. The blinding of a mare's eye by pouring nitrous acid into it was held to be maiming—*R.* v. *Owen.* [2] Cutting off the ears does not mean the removal of the whole organ of hearing, but it is, I think, a permanent injury to one of the members of the body in that it must permanently affect the sense of hearing, and it is certainly a mutilation which is also one of the definitions in Webester's Dictionary. Stress is laid on the permanency of the injury in the two English cases cited, *vide* also RUSSEL on *Crimes*, Vol. II, p. 976. I therefore hold that the cutting off the ears of a horse amounts to maiming. The petition is accordingly dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Spencer.

Subramania Pillai	..	Complainant* in C. C. No. 22 of 1911 on the file of the Jt. Magistrate of Tuticorin.
v.		
Pakia Nadachi.	..	Accused in Do.

Cr. P. C., S. 250—"The person upon whose complaint or accusation the accusation was made."

A person was ordered to be prosecuted by the Assistant Superintendent of Police under S. 211, I.P.C. The Station House Officer preferred a charge sheet and

1. (1844) 1 Carrington & Kirwan, 539. 2. (1828) M. C. C. R. 205

presented it to the Magistrate who tried and discharged the woman and passed an order for compensation against the S. H. O.

Held that the S.H.O. was not a person upon whose complaint or information the accusation was made within the meaning of S. 250, Cr. P. C. *In re Kesav Lakshman*[1] ref. to.

Subramania Pillai v. Pakia Nadachi.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the Sessions Judge of Tinnevelly.

The Court made the following

ORDER:—The Assistant Superintendent of Police sanctioned the prosecution, for an offence under S. 211, I. P. C., of a Shanar woman who made a complaint to the Village Munsif of her village of robbing by five men.

The Station House officer concerned prepared a charge sheet and it was presented to the Joint Magistrate, Tuticorin, by a constable.

The Magistrate tried the case and discharged the woman and at the same time made an order under S. 250, Criminal Procedure Code, against the constable directing him to pay her Rs. 10 as compensation for making a vexatious complaint against her, or in default to suffer simple imprisonment for 4 days.

We are clearly of opinion that the constable was not in such circumstances "the person upon whose complaint or information the accusation was made." Cf. *In re Kesav Lakshman*[1].

The order is illegal and is hereby set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Veeranan Ambalam & others .. Appellants*
in S. A. 1471 of 1909
(*1st & 2nd Defendants*).

Peria Kampalam Ambalam & others .. Appellants
in S. A. 1472 of 1909
(*Defendants* 1 *to* 7).

v.

Annasawmi Aiyar by his mother and next friend Subba Lakshmammal and another .. Respondents
in both the suits.

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*S. A. Nos. 1471 and 1472 of 1909. 2nd August 1911.

1. (1876) I. L. R. 1 B. 175.

Veeranan Ambalam Peria Kampalam Ambalam *v.* Annasawmi Aiyar.

Landlord and tenant—Ejectment Suit—Presumption as to nature of tenancy in Ryotwari land—T. P. A., S. 106.

It cannot be laid down that in all cases of ryotwari lands, the cultivating tenant cannot have in any case a right of occupancy in the land.

A person suing in ejectment must in the first instance prove that the defendant came into possession under a contract of tenancy, before he could claim to eject the latter.

Whether a presumption of tenancy from year to year will be drawn in any particular case will depend on the length of possession of the tenant, the presence or absence of variation in the rate of rent, the manner in which the tenant has been dealing with the land and the other circumstances of the case.

The presumption referred to in S. 106, T. P. A., is inapplicable to agricultural tenancies ; and the mere fact of payment of a share of the produce by the cultivating ryot to the pattadar is not sufficient to prove that the cultivator is the pattadar's tenant in the strict legal acceptation of that term.

Second appeal from the decrees of the District Court of Madura in A. S. Nos. 184 and 185 of 1909, presented against the decrees of the Additional District Munsif's Court of Madura in O. S. Nos. 31 and 32 of 1908.

K. N. Aiya for appellant.

Sitaramayya for respondent.

K. N. Aiya, for appellant:—On the finding of the court below that the defendants have been in possession from time out of memory, coupled with the fact that it is not shown that the plaintiff let them into possession, and seeing also that the defendants do not admit that they are tenants, it is for the plaintiff to show that he is entitled to eject the defendants—*Venkatacharlu* v. *Kandappa*[1].

Sitaramayya for respondents relied upon *Nangali* v. *Raman*[2] ; *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*[3].

The Court delivered the following

JUDGMENT :—The suit out of which this second appeal arises was instituted by the plaintiff for ejecting the first and second defendants from certain lands of which they were in possession. The plaintiff alleges that the defendants are tenants at will or tenants from year to year, and that the tenancy was determined by notice to quit. The lands are held on ryotwari tenure under Government, and the plaintiff is admittedly the pattadar. On the other hand it is admitted that the defendants and their predecessors have been in possession for a very long time—about 100 years. The plaintiff produced no evidence to show that he let the defendants into possession of the lands, or any other evidence of a contract of tenancy entered into at any

1. (1891) I.L.R. 15 M. 95. 2. (1883) I.L.R. 7 M. 226.
3. (1897) I.L.R. 20 M. 299.

particular time. His case is that he is the *kudivaramdar* of the lands and that the defendants are his tenants.

Veeranan Ambalam Peria Kampalam Ambalam v. Annasawmi Aiyar.

The defendants allege, on the other hand, in their written statement, that they are persons entitled to hold the lands permanently; that they have been in enjoyment for a long time, and that they are the kudivaramdars, the plaintiff being entitled only to *melwaram*.

The District Munsif dismissed the suit. He held that the plaintiff must be taken to be the kudivaramdar as the Government patta was in his name. But he was of opinion that the plaintiff had not proved any right to eject the defendants who, in his opinion, must be taken to be permanent lessees of the lands.

On appeal the District Judge reversed the judgment and passed a decree ejecting the defendants from the lands excepting a small portion. The judgment of the lower appellate court proceeds entirely on the ground that the plaintiff being the pattadar was the owner of the kudivaram suit, and such being the case, it must be presumed that the defendants are tenants from year to year and therefore liable to be ejected. He says :—"In Government ryotwari villages the State is in the position of melwaramdar and the pattadar in that of kudivaramdar." He does not find that the defendants' predecessors ever entered into occupation of the land under the plaintiff's predecessors. The position taken up by him practically is that any ryot cultivating ryotwari lands of which he is not the pattadar and paying a portion of the produce of the land to the pattadar must be held to be a tenant from year to year, unless he proves a contract entitling him to any higher status, even though the pattadar is unable to show on what terms the ryot entered on possession.

We are of opinion that such a broad proposition cannot be supported. It may be assumed that the pattadar is the owner of the kudivaram right, as opposed to the melwaram right which is vested in Government. But there is no foundation for the assumption that a ryot who is not the kudivaramdar in the technical sense of that word, cannot be a person having a right of occupancy over the land. The District Judge infers from Exs. *A* and *A* that the defendant's possession began subsequent to 1805 as the land was entered as waste in those documents. Assuming the inference to be correct there is no evidence that the defendant's

Veeranan Ambalam Peria Kampalam Ambalam v. Annasawmi Aiyar.

possession commenced under the plaintiff. The earliest patta produced by the plaintiff is dated 1855. There is no evidence to show that defendants' possession was subsequent to that year. It was held by this court in *Venkata Charlu* v. *Kandappa* [1] where the ryots had been in occupation for about fifty years and there was no evidence as to the terms of their holding, that the plaintiff in that suit was not entitled to a decree for ejectment. A person suing in ejectment must, at any rate, prove, in the first instance, that the defendant came into possession under a contract of tenancy, before he could claim to eject the latter. Even where a tenancy is proved, the court is not bound to presume that it is one from year to year and to throw the onus of disproving it on the tenant. As pointed out in *Checkata Zemindar* v. *Ranasoor Dhora* [2] by *Sheppard* J. at page 321: "The Legislature has been careful to save tenancies for agricultural purposes from the immediate operation of S. 106 of the Transfer of Property Act." Whether a presumption of tenancy from year to year will be drawn in any particular case will depend on the length of possession of the tenant, the presence or absence of variation in the rate of rent, the manner in which the tenant has been dealing with the land and other circumstances in the case. The defendants in this case have admittedly been in possession for a long time. It is not stated that the rent paid has been uniform, but the District Judge expresses no opinion on the question. The documentary evidence on the defendants' side shows that they have been dealing with the land as their own. The District Judge having made the presumption that the defendants are tenants from year to year observes that these documents are not sufficient to rebut that presumption. But if the presumption referred to in S. 106 of the Transfer of Property Act is inapplicable these dealings might be quite sufficient to induce the court not to make any presumption of tenancy from year to year. Having regard to the fact that the right in land is often shared in this country among several persons, the mere fact of the payment of a share of the produce by the cultivating ryot to the puttadar is not sufficient to prove that the defendant is the pattadar's tenant in the strict legal acceptation of that term.

1. (1891) I.L.R. 15 M. 95. 2. (1899) I.L.R. 23 M. 318.

Veeranam Ambalam Peria Kampalam Ambalam v. Annasawmi Aiyar.

We are of opinion that the judgment of the District Judge is vitiated by legal misconceptions. This observation would equally apply to the judgment of the Munsif who speaks of the defendants as permanent lessees. There is some evidence on record of ejectment of other ryots in the same village by plaintiff, but the District Judge does not refer to it and it does not appear whether any facts have been proved which would render that circumstance admissible in evidence against defendants.

We must set aside the judgment of the District Judge and remand the appeal to him for fresh disposal with reference to the above observations. In the circumstances we think that both parties should be at liberty to adduce fresh evidence if so advised. The costs of this appeal will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Karuppiah Pillai .. Appellant*
v. (*2nd Defendant*).
T. R. Hari Row & another .. Respondents
(*Plaintiff* & *1st Defendant*).

T. P. A., S. 55—Contract to the contrary—No presumption of intention to relinquish lien by taking personal security from a third person.

There is no presumption that a vendor intends to relinquish his lien by taking a pro-note from a person other than the purchaser.

Second appeal from the decree and judgment of the Court of the District Judge of Madura in A. S. No. 319 of 1909 presented against the decree of the Court of the District Munsif of Mana Madura in O. S. No. 245 of 1907.

The facts appear sufficiently in the judgment.

C. S. Venkatachariar for appellant.

S. Srinivasa Aiyangar for respondent.

C. S. Venkatachariar, for appellant—contended that the lien was lost by accepting the pro-note from the agent who is a stranger. He relied upon *Abdulla Beary* v. *Mammali Beary*[1]; *Webb* v. *Macpherson*[2]; *Muir* v. *Jolly*[3]; *T. Cood* v. *M. B. Cood and Pollard*[4]; *White* v. *Wakefire*[5].

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* S. A. No. 1102 of 1910. .. 7th August, 1910.

1. (1910) I. L. R. 33 M. 446.
2. (1903) 30 I.A. 238.
3. (1858) 53 E R. 851.
4. (1822) 10 Price 109.
5. (1835) 58 E.R. 891.

Karuppiah Pillai v. T. R. Hari Row.

S. Srinivasa Aiyangar, for respondent, was not called upon.

The Court delivered the following

JUDGMENT :—The plaintiff had the vendor's lien in the property in the hands of the 2nd defendant, the purchaser, and it is contended that because the plaintiff accepted a pro-note for a portion of the purchase-money from the 1st defendant, the plaintiff must be held to have lost his lien to that extent. There is no authority which can be said to deal with the exact point raised, *viz.*, whether the acceptance of a personal security by the holder of a lien from a person other than the purchaser destroys the lien. It is conceded that if the purchaser himself had given the pro-note that would not have *ipso facto* deprived the vendor of his lien. The question is really one of intention, whether the vendor intended to forego his lien or not. We do not see, in the absence of any circumstances pointing to that conclusion, why there should be a presumption in favor of abandonment of the lien. Section 55 of the Transfer of Property Act deals with vendor's lien, and it lays down that there should be such a lien *in the absence of a contract to the contrary.*

There is nothing in this case from which such a contract can be inferred, and we think the lower courts have rightly decreed the plaintiff's claim. We may mention that the learned pleader for the 2nd defendant or appellant relied upon the rulings reported in *Muir* v. *Jolly*[1]; *White* v. *Wakefield*[2]; *T. Cood* v. *M. D. Cood & Pollard*[3]; *Abdulla Behary* v. *Mammali Behary*[4], but none of these cases bear out his contention. The second appeal is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Manja Pillai & others .. .. Appellant*
v. (*Defendants* 1 *to* 3).
Sivabagyathachi & others .. Respondents
(*4th Defendant* & *Plaintiff*).

Hindu Law—Stridhan—Inheritance—Priority—Step-daughter and husband's great-grandfather's great-grandson.

As between a woman's step-daughter and the woman' husband's great-grandfather's great-grandson, the former is the preferential heir to her stridhan.

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*S. A. 194 of 1909. 3rd August 1911.

1. (1858) 53 E. R. 851. 2. (1835) 58 E. R. 891.
3. (1822) 10 Price 109. 4 (1910) I.L.R. 33 M. 446.

Manja Pillai v. Sivabagyathachi.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 357 of 1908 presented against the decree of the Court of the District Munsif of Negapatam in O. S. No. 267 of 1907.

In this case, the question was as to who was the preferential heir to the *stridhanam* of a woman, the step-daughter, or the husband's great-grandfather's great-great-grandson. Both the courts below held that the step-daughter was the preferential heir.

C. S. Venkatachari, for appellant:—The rule of inheritance in such cases is laid down in the *Mitakshara*, Chap. II, S. xi, Placitum 9—" in default of issue, to the husband and his nearest sapindas." A step-daughter is not a sapinda for the purpose of inheritance. She is expressly mentioned as heir in a particular case, *i.e.*, when she is the daughter of a co-wife of a higher class—Ch. II, S. xi, pl. 22. A step-son comes in as a sapinda, not so a step-daughter. Daughters come in, in the ordinary rule of succession, only by reason of the special text (not for the reason of their coming under Manu's comprehensive rule) "to the nearest sapinda, inheritance belongs"—Ch. II, S. i, pl. 2; Mayne, para 519. It is one of the cardinal rules of inheritance in the Hindu Law that agnates exclude cognates and that males are preferred to females (Mayne, paras 512 & 539). *Vyavahara Mayukha* is no authority here. *Smritichandrika* relies upon Brihaspati's text which has been brushed aside by the Privy Council. *Smritichandrika*, moreover, has not been followed in this Presidency in the case of *stridhanam* inheritance.

Yanghi Bai v. *Jehite Appaji*[1] applies the rules of succession applicable to males. As to who are sapindas see SARVADHIKARI, p. 572. Here in Southern India, the rule of *Baudhayana* is given effect to so as to postpone females to males and a sister, for instance, comes in as a bandhu and not as a sapinda. *Lakshmammal* v. *Thiruvengada.*[2]—In *Mari* v. *Chinnammal*[3] it has been held that a step-mother is not entitled to come in at all. In Mayne, p. 815, (para 669, seventh edition) it is stated generally that step-children cannot inherit, but this has been held to be erroneous so far as step-sons are concerned—*Brahmappa* v. *Papanna*[4]. Sir Gurudas Banerjee in his *Stridhan*, at p. 371, follows Kamalakara's text, and applies the ordinary rules of inheritance to the husband after husband's death. Kamalakara is no authority this side of

1. (1908) I. L. R. 32 B. 409. 2. (1882) I. L. R. 5 M. 241 at 250.
3. (1884) I. L. R. 8. M. 107. 4. (1889) I. L. R. 13 M. 138.

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India. His *Nirnaya Sindhu* is authority in Western India—Mayne, para 27. This rule of Kamalakara is discussed by West & Buhler at p. 518 and is considered wrong, though followed in Bombay. In Bombay, women are treated more favourably than elsewhere—see Mayne, p. 715. Daughter has been dealt with as bandhu in *Venkatasubrahmanyam* v. *Thayarammal.* [1] The decision of *Telang* J in *Gojabai* v. *Shahaji Rao* [2] is no doubt against the view propounded by me, but it proceeds upon the Bombay view of the *Mitakshara.*

S. Srinivasa Aiyangar for respondent—cited Trevelyan on *Inheritance* as to the authority of *Nirnaya Sindhu.* The Mitakshara defines sapindas so as to include both *sagotrajas* and *bhinnagotrajas.* The preference to sagotrajas is due to the text of Yajnavalkya commented upon in Ch. II, Sec. II, pl. 2, Mitakshara, *et seq.* No such limitation appears in *stridhana* succession where, on the other hand, women are given special preference. The special mention of step-daughter is to give her a preference in certain cases, *i.e.*, before the husband. It has nothing to do with succession after the husband. The proper construction of the rule of Mitakshara is that he adopts the rule of succession to husband wholesale or it is not conceivable how such a logician as Vignaneswara should not have indicated some rule of preference or exclusion amongst sapindas. There are two possible views to take on this text. First, the rule of succession to the husband. The other is, male or female in the ascending line or descending line, to go by degrees: relations of equal degrees taking together as suggested by West & Buhler which, however, they reject. The daughter is a sapinda and she is preferred on grounds of propinquity because she comes out of the loins of her father. The rule of succession contended for is accepted by Bhattacharya, 2nd Edn., p. 580; Sircar, 3rd Edn., p. 412; Banerjea, 2nd Edn., pp. 359-364; *Venkatasubrahmanyam* v. *Thyarammal*[1]; *Raju Gramany* v. *Ammani*[3]; *Bai Kissorbai* v. *Hunsraj Morarji*[4]; *Gojabai* v. *Shahaji Rao*[2]; *Krishnabai* v. *Sripati*[5]. He also cited *Appandi Vathiyar* v. *Bagubali Mudaliyar*[6] where the mother's sister's son is preferred to mother's brother's son, showing that the rule of preference between agnates and cognates males and females, is a rule or generalisation deduced from the

1. (1898) I. L. R. 21 M. 263.
2. (1892) I. L. R. 17 B. 114.
3. (1906) I. L. R. 29 M. 358.
4. (1906) I. L. R. 30 B. 431.
5. (1905) I. L. R. 33 B. 333.
6. (1910) I. L. R. 33 M. 439.

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text of Yajnavalkya and Mitakshara's commentary thereon and not an inflexible rule. He submitted that the rules of preference can be adopted only if the rule of succession laid down in the case of males can be adopted. The Bombay decisions cited above are decisions that proceed upon the construction of Mitakshara and not of any peculiarity of the *Mayukha*.

The Court delivered the following

JUDGMENT :—*Abdur Rahim* J.—The contention of the appellants in the second appeal is that the plaintiff who is the daughter of a co-wife of one Parvathathachi is not entitled to succeed to the latter's *stridhanam* property, and it is argued that there are collateral sapindas of Parvathathachi's husband, for instance the 4th defendant, who is his father's brother's son, who would have preferential claim to the succession. Parvathathachi, it is found by the District Judge, was married in an approved form. There is no express authority which covers the exact point, but there can be very little doubt as to how the question raised by the appellant should be answered.

The text of the *Mitakshara* bearing on the matter is Placitum 11 of Section XI, Chapter II, which is in these words :—"Of a woman dying without issue as before stated and who had become a wife by any of the four modes of marriage denominated Brahma, Arsha, Prajapatya and Gandharva the (whole) property as before described belongs in the first place to her husband. On failure of him it goes to his nearest kinsmen (sapindas) allied by funeral oblations." As has long been pointed out Colebrook's translation of the term "sapinda" in these connections as "kinsman allied by funeral oblations" is not correct but should be kinsman allied by affinity, or, to put it literally, persons allied to each other by possession of particles of the same body. The meaning of the above text is plain ; it means that the stridhanam property of a woman married according to an orthodox form who has left no issue will devolve on her husband and on failure of the husband the property will go to his sapindas in the order laid down in the *Mitakshara* with reference to succession to the property of a male. That is to say, we have to ascertain the person who would succeed to the property as the nearest sapinda of the husband if the property belongs to him. And that is the interpretation which has been placed upon the text whenever it had

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to be considered—see *Venkatasubramaniam Chetti* v. *Thayarammal*[1] per *Subrahmanya Aiyar* and *Davies* JJ. where the daughters of the brother of a deceased Hindu widow's husband were held entitled to succeed to the deceased's stridhanam in preference to the claims of the adopted son of the deceased's sister's daughter, of the maternal uncle's adopted son and of the widow of the deceased's brother; *Gojabhai* v. *Srimahant Seshagiri Row Malaji Rajah Cherla*[2], per *Jardine* and *Telang* JJ., where the grandson of a co-widow was preferred to a nephew and a co-widow; *Jagarnath Prasad Gupta* v. *Ranjit Singh*[3], per *Maclean* C. J. and *Banerji* J., where the contest was between the kinsmen of the deceased's husband and the kinsmen of her father and the former were held to be entitled to the succession; *Krishnabai* v. *Sripati*[4], in which the right of the surviving co-widow who was in that case the nearest sapinda of the deceased's husband was recognised; *Bai Kissorbai* v. *Hunsraj Morarji*[5], where a co-widow was held entitled to succeed in preference to the husband's brother or husband's brother's son; *Mussammat Thakur Debia* v. *Rai Bulak Ram*[6], where the rights of the collateral heir of the husband were confirmed, and *Champat* v. *Shiba*[7], where the rights of a collateral relation who was the nearest sapinda of the deceased's husband were maintained against the brothers of the deceased.

Turning to the commentators whose works are referred to as authorities in the south, though of secondary importance compared to the Mitakshara, we find that Kamalakara expressly lays down with reference to cases like the present that 'nearness' is to be determined by the rules given in the Mitakshara in respect to succession to the property of a male who dies without male descendants and that consequently first the wife, *i.e.*, the rival wife of a deceased succeeds, next the daughter, *i.e.*, the deceased's step-daughter, etc. (see West and Buhler, p. 518) and *Smrithi Chandrika* (see T. Krishnasawmi Iyer's Translation, Chapter IX, Section III, verse 38) also holds that the issue of a rival wife takes the property of the step-mother when the latter leaves no progeny, husband or the like. The views of

1. (1898) I. L. R. 21 M 263.
2. (1892) I. L. R. 17 B. 114 at 117.
3. (1897) I.L.R. 25 C. 354 at 367.
4. (1905) I.L.R. 30 B. 333.
5. (1906) I.L.R. 30 B. 421 (P.C.)
6. (1867) 11 M. I.A. 139 at p. 175.
7. (1886) I.L.R. 8 A. 393.

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modern lawyers like Golabchandra Sircar Sastri (see his *Hindu Law*, IVth edition, p. 461) and Jogendranath Bhattacharya (see his *Commentaries on Hindu Law*, p. 580) also favour the right of the deceased's step-daughter as against collateral relations of the husband. The learned vakil for the respondent further relied on Dr. Gurudas Bannerjee's book on the *Law of Stridhana* but I have not been able to consult it.

The learned pleader for the appellant, on the other hand, has not been able to refer us to anything which can be said to support his contention. In fact his argument was based on two general propositions which he would ask us to accept as propositions of universal and invariable application, *viz.*, that sapindas of the same *gotra* or family are preferred to sapindas of a different *gotra*, and that males shall be preferred to females. Now none of these maxims, however useful they may be in other connections, can have any force in cases which are provided for by our express text of the *Mitakshara*, or in other words such cases must be recognised as exceptions to the rules. Otherwise we should be setting at nought the rights of persons expressly recognised as heirs by the Mitakshara. This we are not at liberty to do. No sort of authority has been referred to by the appellants which countenances such a course as is suggested by them.

It is not necessary to consider the exact extent and applicability of these rules in such cases as are dealt with in *Lakshmammall* v. *Tiruvengada*[1], *Mari* v. *Chinnammal*[2] and *Salemma* v. *Lutchmana Reddi*[3] as it is clear and not disputed before us that according to the Mitakshara the daughter as an heir is placed immediately after the male issue and the widow and before all collaterals.

The decree of the lower appellate court is therefore confirmed and the appeal is dismissed with costs.

Ayling J.—I agree.

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1. (1882) I.L.R. 5 M. 241. 2. (1884) I.L.R. 8 M. 107 at p. 127.
3. (1897) I.L.R 21 M. 100.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Chinnasami Pillai *alias* Subramania Pillai. . Appellant*
v. (*Plaintiff*)
Kunju Pillai *alias* Muthusami Pillai & others .. .. Respondents (*Defendants*).

Subramania Pillai *v.* Muthusami Pillai.

Hindu Law—Inheritance — Mitakshara—Priority—Great grandson o great-grandfather and great-grandson of grandfather—Dravida School—Test of consanguinity and spiritual benefit—Respective applicability to the Madras School.

The word "sons" in the text of Mitakshara Ch. II, S. 4, *v.* 2; S. 4, *v.* 7 and 8 and S. 5, *v.* 1, does not include grandsons.

Where the competition is between two collateral sapindas not included among the enumerated heirs preference should be given to the sapinda belonging to the nearer line.

As between the great-grandson of the great-grandfather of the last male owner and the great-great-grandson of the grandfather, the latter is entitled to succeed in preference to the former.

Obiter :—It may be that all other tests being equal the superior efficacy of oblations would be a legitimate ground for giving preference, though it is difficult to conceive of a case among the sapindas in which the nearness of line would not be present as a determining factor. The question may arise only among bandhus of the same class and then the quality or the quantity of the spiritual benefit which they confer on the propositus may be a good ground for preference.

Appeals from the decrees of the Subordinate Judge's Court of Trichinopoly in O. S. Nos. 31 of 1905 and 17 of 1905, respectively.

P. R. Sundara Aiyar for appellants.

The Advocate-General (*P. S. Sivaswami Aiyar*) for respondents.

P. R. Sundara Aiyar :—The question is who is entitled to succeed to the estate of the last male owner, whether the great grandson of the great-grandfather or the great-grandson of the grandfather of the deceased owner. The appellant is the great-

* A. Nos. 68 of 1906 and 73 of 1907. 4th April, 1911.

grandson of the great-grandfather of the last male owner and the respondents are the great-great-grandsons of the grandfather and alienees who make common cause with him and uphold his title to succeed.

My first contention is that according to the express text of the Mitakshara, Ch. II, Sec. v, Pl. 4 & 5, the word '*sons*' in the expressions 'brother's sons,' 'uncle's sons', and 'grand-uncle's sons' also includes grandsons. The text then goes on to say: "In this manner must be understood the succession of the kindred * * up to the seventh degree among the *sapindas*." The word used in the Mitakshara for *sons* in the expressions ' brother's sons', etc., is सूनव: By analogy to Manu's text, Ch. IX, Verse 187, the word must be understood to include grandsons also—JOLLY'S *Hindu Law,* p. 252; *vide* Sarvadhikari's Chart at p. 656 and enumeration of heirs at pp. 657 and 658.

Even taking that the word '*sons*' in Mitakshara, Ch. II, Sec. V, Pl. 4 & 5, does not include grandsons as the enumeration of heirs in Mitakshara is not exhaustive, in analogy to the great-grandson of the propositus, the brother's grandson, the uncle's grandson and the grand-uncle's grandson must be brought in as heirs immediately after brother's sons, etc., respectively. Then Manu's text says: "To the nearest sapinda the inheritance next belongs"—Manu, Ch. IX, Verse 187. Sapindaship has been defined in Verse 186 of Ch. IX. "To three (ancestors) water must be offered, to three the funeral cake is given; the fourth is the giver of these and the fifth has no connection." By this the three descendants and three ascendants are mentioned as being sapindas by the offering of pindas and water to the common ancestor. The appellant is the 3rd in descent from the great-grandfather and as such is entitled to succeed in preference to the respondents who cannot come in under the text. Then in the Mitakshara, sapindaship has been defined as arising by connection with parts of one body. It has considerations only for propinquity or the number of corporeal particles or the preponderance of corporeal particles Propinquity may be found out by two tests, *viz.*, (1) spiritual efficacy; (2) counting from the common ancestor. Preference among claimants under the Mitakshara

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law may be found out by the test of spiritual efficacy—*Bhyah Ram Singh* v. *Bhyah Ugur Singh*[1]. (1) As the appellant is only three degrees removed from the common ancestor he offers undivided oblation to the great-grandfather of the propositus to whom the propositus himself is bound to offer oblations, whereas the respondent offers only divided oblations. (2) Another test is counting from the common ancestor. To find out nearness the counting must be from the common ancestor—*Vithal Rao* v. *Ram Rao*[2]. Nearness of line does not count much. The Sub-Judge is wrong in saying that the nearer line excludes the more remote. This principle is applicable only among bandhus. *Surya* v. *Lakshmi Narasamma* and *Lakshmi Narasamma* v. *Jaganadham* [3] is against me, but the recent decision of the Allahabad High Court supports me—*Kalian Rai* v. *Ram Chunder* [4].

The following authorities were referred to, *viz.*—Mitakshara; Ch. II, Sec. v, Pl. 4 & 5; Manu, Ch. IX, Verses 185, 186 & 187; Mitakshara, Ch. I, Sec. i., Verse 3; Sarvadhicari (Tagore Lectures) p. 428; West & Buhler, pp. 318, 124; Varadaraja's Vyavahara Nirnaya, p. 36; Nanda Pandita, Colebrook's footnote, p. 350; Subhodhini (Vereswara, Mandlik's Translation) pp. 360-2; Sarasvati Vilasa, Ss. 581-89 (Foulkes Translation); Smrithi Chandrika, pp. 27 & 28; Viramitrodaya, pp. 362, 364 (Mandlik's book); *Parasara Bhattar* v. *Ranga Bhattar*[5]; Jolly's "Hindu Law," p. 211; Sarvadhicari, pp. 639 & 640; Bhattacharya's "Hindu Law," p. 444. (2nd Edn.); Mayne, p. 573 (footnote); Sircar's "Hindu Law," p. 260, S. 10; Ghose's "Hindu Law," p. 172; West and Buhler, p. 124; *Bhyah Ram Singh* v. *Bhyah Ugur Singh*[1]; Butler's Note, S. 187, Ch. IX, Manu; Mayne, S. 271; West & Buhler's "Hindu Law," p. 67; Smrithi Chandrika, Verses 10-12, Ch. VIII; *Gowridevamma Devamma Garu* v. *Ramandora Garu*[6]; *Surya* v. *Lakshmi Narasamma* and *Lakshmi Narasamma* v. *Jaganadham*[3]; *Muthuswami* v. *Muthukumarasami*[7]; *Appandai Vathiar* v. *Bagupati Mudaliar*[8]; *Akshaychandra Battacharya* v *Haridas Goswami*[9]; *Kureemchand Gurain* v. *Udang Gurain*[10];

1. (1870) 13 M.I.A. 373.
2. (1899) I.L.R. 24 B. 317 at 330.
3. (1881) I.L.R. 5 M. 291.
4. (1902) I.L.R. 24 A. 128.
5. (1880) I.L.R. 2 M. 202.
6. (1870) M.H. C.R. 93 at 107.
7. (1892) I.L.R. 16 M. 23, 29.
8. (1910) 20 M.L.J. 273, 274.
9. (1908) I.L.R. 35 C. 721.
10. (1866) 6 W.R. 158, 160.

Putcheputty Dutt Iha, Bholanauth Iha and others v. *Rajender Narain Rae and Couver Mahender Narain Rae* [1].

The Advocate-General:—The three-fold classification into sapindas, sakulyas and samanodakas is quite foreign to the Mitakshara system. Mitakshara divides the kindred into sapindas and samanodakas only. Some of the sapindas are placed in the preferential class. These are the three descendants and two descendants of each of the three ascendants of the propositus. It is stated in Mitakshara, Ch. II, Sec. v, Pl. 4 & 5 and settled by judicial decisions—*Surya* v. *Lakshminarasamma* and *Lakshminarasamma* v. *Jaganadham*[2] that only two descendants of each of the three ascendants will come in the preferential class. The word *sons* in the expressions 'brother's sons', 'uncle's sons', 'granduncle's sons', should be construed in the primary sense only and not in the more extended sense as including grandsons. It is a cardinal rule of interpretation that words should be understood in their primary signification or मुख्यार्थं as opposed to गौणार्थं. Here only a limited interpretation should be given to the word *sons*. The word *sons* in Mitakshara, Ch. II, Sec. 4, Pl. 4 & 5 is used in an extended sense, meaning son, grandson and great-grandson, for the context requires it. There the word has reference to the text of Manu by which son, grandson, and great-grandson, come in. Similarly with reference to unobstructed heritage the word is used in an extended sense. The heading of Ch. II, Mitakshara, Sec. i, is अपुत्रस्य—of one without a son, grandson, etc. According to Subodhini and Balambhatta great-grandsons also will take the heritage. So the word *sons* is used in an extended sense in Ch. II, S. 4. On the other hand the context in Ch. II Sec. 5, Pl. 4 & 5, does not justify this extended signification. If *sons* includes grandsons, etc., it would be unnecessary to repeat "*their sons*" after 'his sons.' The use of the word 'issue' by Colebrook is not correct. Mitakshara has simply *sons*; Sarasvati Vilasa, Pl. 581-589; Parasara Madhaviya, para 40 and upwards, where he speaks of the paternal uncle's wealth. The brother's grandson cannot call the property as his paternal uncle's wealth —Sarvadhicari on 'Inheritance', p. 454; Smrithi Chandrika, Ch. XI, Sec. v, Verse 8; Subhodini, quoted in Mandlik, p. 360. Viramitrodaya (Sircar's Translation) Ch. III, para vii, understands Mitakshara in the same sense. Apararka, which is relied on by the other side, is authority only in Kashmir and nowhere else. He belongs to the spiritual theory school—

1. (1839) 2 M. I. A. 133. 2. (1881) I.L.R. 5 M. 291.

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Maynes' Hindu Law,' p. 28; Jolly, p. 13. Vaijayanti is not an authority in Southern India. It is a commentary on Vishnu Smrithi—and *Harington* J. in *Patcheputty Dutt Iha & others* v. *Rajunder Narain Rae & others* [1]. Varadaraja goes beyond the Mitakshara in inserting the brother's grandson (Burnell's Introduction, p. xi). Text writers understand Mitakshara as I do. Sarvadhicari admits that Mitakshara does not include brother's grandson. He introduces brother's grandson for symmetry—W. H. Macnaughten's "Principles and Precedents of Hindu Law," p. 28; Jolly, p. 208; West & Buhler, pp. 113 & 114. Bhattacharya conjectures that brother's grandson may be introduced—Pl. 44. Sircar (3rd Edition) Hindu Law, p. 260, is in my favour. Vyavastha Chandrika admits Mitakshara includes only brother's sons—Vol. I, p. 178; Mandlik, p. 359, 361, 364, 369, 378, 380; *Surya* v. *Lakshminarasamma* and *Lakshminarasamma* v. *Jaganadham*.[2] The analogy of the owner's descendants will not hold because though the daughter's son of the owner has a preferential right to succession the daughter's son of the ancestor will be postponed as a cognate. Again, even in the case of self acquisition the sons, grandsons and great-grandsons acquire a right by birth and take together—*Marudayi* v. *Doraisami* [3]. Sons and grandsons by predeceased son take together the self-acquisitions of the ancestor.

Introducing spiritual benefit as a test of propinquity would be introducing the Bengal system. The author of the Mitakshara always depends on the corporeal particles for propinquity—Mayne, paras 507, 509 & 514; Sarvadhicari, pp. 597, 601 & 602; *Lallubhai Bapubhai* v. *Cassimbhai*[4]; *Babu Lal* v. *Nanku Ram*[5]; *Baluswami Pandithar* v. *Narayana Rao*[6]; *Venkatgiri* v. *Chandra*[7]. *Appandai Vathiar* v. *Ragupati Mudaliar*.[8] is distinguishable on the following grounds. It went to the Privy Council from the North West Provinces where Viramitrodaya is an authority and which has in some respects leaning towards the Bengal school. Colebrooke's translation of sapinda as one connected by funeral oblations has misled them. There was no question of preference in that case, but only whether a person is an heir at all. So the observations are merely *obiter dicta*.

1. (1829) 2 M.I.A. at p. 155.
2. (1881) I.L.R. 5 M. 291.
3. (1907) I.L.R. 30 M. 348.
4. (1880) I.L.R. 5 Bom. 110 (P.C.)
5. (1894) I.L.R. 22 C. 339.
6. (1897) I.L.R. 20 M. 342.
7. (1900) I.L.R. 23 M. 123.
8. (1910) 20 M.L.J. 275.

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Manu defines sapindaship in Ch. V, Verse 60, which is the same as the Mitakshara definition. Manu, Ch. IX, Verse 187, should be understood in the light of Ch. V, verse 60. Manu Ch. IX, Verse 186, only declares the right of son, grandson and great-grandson to succeed. It should not be understood as defining or limiting sapindaship. Where Manu and Vignaneswara differ, the latter ought to prevail—*Baluswami Pandithar* v. *Narayana Row*[1]. The counting, it was contended, should be from the common ancestor. But that would be only when both the claimants are descended from the same ancestor. It is no doubt not stated in any of the Smrithis that the nearer line excludes the more remote. But it is stated by modern writers, and there are decisions also that the nearer line excludes the remoter line. This is treated as an elementary proposition in *Baluswami Pandithar* v. *Narayana Rao*[1] and West & Buhler, page 114.

Kalian Rai v. *Ram Chander*[2] recognises that the nearer line concludes the remoter line. They say the Madras cases are not authorities in Benares. Two cases in Bombay lay down the same view—*Raghava* v. *Kalingappa*[3]; *Vithal Rao* v. *Ram Rao*[4]. *Shanmugam Pillai* v. *Syed Gulam Ghori*[5] follows *Akshay Chander Bhattacharya* v. *Haridas Goswami*[6] and lays down the converse—*Kureemchand Gurain* v. *Udang Gurain*[7]. I am descended from the nearer ancestor Awadia Pillai. It would exclude the appellant who is descended from a remoter ancestor Karpagam Pillai. All the descendants up to the 7th degree should be exhausted before we go to the next higher.

P. R. Sundara Aiyer replied.

The Court delivered the following

JUDGMENT :—The question involved in these appeals is one relating to succession under the Hindu Law and has arisen among certain sapindas of one Samia Pillai alleged to have been adopted by one Siva Subramania Pillai. There are several claimants to the properties which originally belonged to Siva Subramania Pillai who died in 1844, but the dispute arose only

1. (1897) I.L.R. 20 M. 342.
2. (1902) I.L.R. 24 All. 128, 135.
3. (1892) I.L.R. 16 B. 716. 717.
4. (1900) I.L.R. 24 B. 317.
5. (1903) I.L.R. 27 M. 116.
6. (1908) I.L.R. 35 C. 721.
8. (1866) 6 W.R. 158.

on the death of the widow of Samia Pillai in 1900. The genealogical tree, Exhibit A, shows in full the relationship of the parties in all the suits to the deceased, but if the claim of Avadia Pillai, the plaintiff in O. S. 16, is entitled to preference, as held by the Subordinate Judge, over the claim of Chinnasami Pillai the plaintiff in O. S. 31 and the appellant in Appeal No. 68, then, it is conceded, the plaintiffs in the other suits would have no right to the properties. We have come to the conclusion that Avadia Pillia's claim is preferable to that of Chinnasami Pillai, and on this view the following table shows the relationship of the parties sufficiently for the purposes of these appeals .—

Karpugam Pillai.

- Avadia Pillai (by 1st wife.)
  - Chandra Sekhara Pillai (by first wife).
    - Appayu Pillai.
      - Chokkalingam Pillai.
        - Avadia Pillai (Plaintiff in O. S. 16).
  - Siva Subramania Pillai (by 3rd wife).
    - (alleged adopted son) Samia Pillai.
- Somasundram Pilai (by 2nd wife).
  - Manikam Pillai
    - Chinnasami Pillai (plaintiff in O. S. 31, and Appellant in A. S. 68).

For the purpose of this enquiry it would make no difference whether succession is reckoned from Samia Pillai or from his adoptive father, Sivasubramia Pillai. It will be observed that Avadia Pillai is the great-grandson of a brother of Sivasubramania, while Chinnasami Pillai is the grandson of a paternal uncle of Sivasubramania, the common ancestor of all being Karpugam Pillai, the grandfather of Sivasubramania. Both Avadia Pillai and Chinnasami Pillai are, therefore, removed from Sivasubramania by an equal number of steps, and while Avadia Pillai belongs to a nearer line, Chinnasami Pillai is entitled to offer full oblations to the common ancestor of himself and Sivasubramania, while Avadia Pillai is entitled to offer only divided oblations to the common ancestor of Sivasubramania and himself. Mr. P. R. Sundara Aiyar who appeared in support of Chinnasami's claim argued that in the passages in the Mitakshara where Vignaneswara enumerates the heirs in the ascending line or among the collaterals he means to include in the word "sons" the grandsons as well, whether of the brother, the

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paternal uncle or the great uncle. If this interpretation be accepted, then Chinnasami would be included within the list of enumerated heirs and as such would have precedence over Avadia Pillai. The learned vakil for Chinnasami, besides relying upon the language of the text of the Mitakshara, also relies upon the superior benefit of oblations and the analogy to the case of great-grandsons. The learned Advocate-General who appeared to support Avadia Pillai's case disputes the correctness of the interpretation which the appellant seeks to put on the text, and argues that spiritual benefit affords no test according to Vignaneswara, either of heirship or of preference among persons who are within the category of heirs. He contends that where the text is silent the nearness of sapindaship in the sense of the author of the Mitakshara is determined by the nearness of the line of descent from the common ancestor.

The question as to what is the proper construction of the texts of the Mitakshara relating to this matter was very fully considered by this court in *Surya* v. *Lakshminarasamma* and *Lakshminarasamma* v. *Jaganadham*[1] (per *Turner* C.J. and *Kindersley* J.) and recently by the Allahabad High Court in *Kalian Rai* v. *Ramchandar*[2] (per *Burkitt* and *Chamier* JJ). According to the former the expression 'brother's sons' does not include brother's grandsons, while the learned Judges in the Allahabad case hold the opposite view. Of the modern writers on Hindu Law Mr. V. N. Mandlik of Bombay (see his 'Hindu Law', pages 360, 361 and 378), Mr. G. C. Sirkar (see his 'Hindu Law,' 3rd Edition, page 260), Messrs West & Buhler (see their 'Digest of the Hindu Law of Inheritance' at page 174), Dr. Jolly (see his 'Hindu Law of Partition and Inheritance,' page 208), Mr. Bhattacharya (see his 'Commentaries on Hindu Law,' page 444), Mr. Sarvadhicari (see his 'Principles of the Hindu Law of Inheritance,' page 422 and 'Table of Succession No. 1' appended to Section X), and Mr. Mayne (see his 'Hindu Law,' 7th Edition, page 775)—all are of opinion, though some are more emphatic and clear on the point than the others, that the brother's grandson is not one of the heirs enumerated in the Mitakshara, while Shyama Churn Sircar alone (see 'Vyavastha Chandrika', page 178) can perhaps be said to hold the opposite view. Some of these

1. (1881) I. L. R. 5 M. 291. 2. (1902) I. L. R. 24 A. 128.

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learned authors, however, would place the brother's grandson next after the nephew on other grounds.

Among the Commentaries which are regarded as authoritative in Southern India or in the Mitakshara school generally, other than the Mitakshara itself, the Saraswati Vilasa (see Translation of the Rev. Thomas Foulkes, Placita 521-589, pages 116-117), the Madhaviya (see Translation by Mr. A. C. Burnell, paras 40 and 41, pages 27 and 28), the Smrithi Chandrika (see Translation by Mr. T. Krishnaswamy Iyer, Chapter XI, Section v, Pl. 8, pages 209-210), the Subhodhini by Vireswara (see Mandlik's 'Hindu Law', pages 360 and 361) do not assign to the brother's grandson a place after the brother's son, while Apararka (see Mr. Sarvadhicari's 'Principles of the Hindu Law of Inheritance,' pages 427-428), Nanda Pandita (see *Ibid*, page 481) and Varadaraja (see his Vyavavahara Nirnaya translated by Burnell, page 36) place the brother's grandson immediately after the brother's son.

As for the text of the Mitakshara itself we agree with the learned judges who decided *Surya* v. *Lakshminarasamma* and *Lakshminarasamma* v. *Jaganadham* [1] that Vignaneswara did not mean to include the brother's, the paternal uncle's or the great uncle's grandsons in the list of heirs named by him and that the word 'sons' in the text of the Mitakshara, Chapter II, Sec. IV, v. 2 ; Sec. IV, v. 7 and 8, Sec. V, v. 1, should not be given an extended meaning so as to include the grandsons. The learned author in the passages referred to was laying down the order of succession, and it is not to be presumed, especially in such connection, that he would use the word 'sons' in its secondary sense rather than in its primary sense unless there are good reasons for holding the contrary. We find no such reasons. Much reliance has indeed been placed on the analogy of the case of the great-grandson of the propositus, who admittedly has a place in the same category of heirs as the sons and grandsons. But Chapter I, Section i, Pl 3, expressly mentions sons of the grandsons and further the succession in the case of lineal descendants is what is called unobstructed while the succession of collaterals is obstructed, a distinction on which Vignaneswara himself lays emphasis in the passage last cited. The learned judges of the

1. (1881) I.L.R. 5 M. 291.

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Allahabad High Court in dealing with the question of interpretation rely mainly (see I. L. R. 24 Allahabad, at pages 132-134) on the opinion of Mr. Harrington as set out in 2 Moore's Indian Appeals, 132, pages 154-158, but the case which Mr. Harrington had to deal with raised only the question whether a man lineally descended in the sixth degree from the ancestor of the deceased in the sixth degree was entitled to succeed at all, his title being denied by the rival claimant, a maternal first cousin of the deceased. Mr. Harrington, after an elaborate discussion of the texts, came to the conclusion that the paternal kindred were entitled to the inheritance, according to the Mithila school of the Hindu Law, before the maternal kindred who would be bandhus or kinsmen belonging to a different gotra or family could be admitted. The only proposition which he had to establish was that according to the Mitakshara, the right of the sapindas to succeed to the inheritance in preference to persons belonging to the class of bandhus is not confined to the sapindas specifically named by Vignaneswara, and Mr. Harrington was not called upon to consider any question of preference among the sapindas themselves. He no doubt (see pages 157 and 158 of the report) says that the term 'putra,' and the words 'santana' and 'sunava' should be understood as generic terms for the male issue or descendants, but all that he wanted to prove was that in the Mitakshara sapindaship is extended to the 7th degree and; as he himself points out, the provisions of Chapter II, Section 5, paragraphs Nos. 5 and 6, expressly confer the rights of succession on all sapindas. We may also observe that Mr. Harrington apparently did not notice that Mr. Colebrook's translation of the word 'sapinda' as one connected by funeral oblations is incorrect as has now been clearly proved (Mayne's *Hindu Law* 7th Edition, paragraph 513, *Lallubhai Bapubhai* v. *Mankuvarbhai*[1] and the same case by the Privy Council, I.L.R. 5 Bom. at page 121) and he further relies in support of his reasoning on Jimutavahana and texts which have no authority in the Mitakshara school of law as prevalent in this Presidency. If Mr. Harrington's opinion was to be accepted in its full logical conclusion and not to be confined to the question he had to consider, the result would be that the descendants of the father up to the 7th degree

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1. (1876) I. L. R. 2 B. at 431.

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would exclude the paternal grandmother and grandfather expressly mentioned by Vignaneswara, and similarly the descendants of the grandfather up to the 7th degree must be exhausted before the claims of the great-grandfather and his sons and grandsons could be admitted, and so on. Indeed the learned Judges of the Allahabad High Court would seem prepared to go as far as that, though it was not necessary for them to decide that point. But it seems to us that such an interpretation would be opposed to the consensus of opinion among lawyers dealing with the Mitakshara school of law as prevalent in this Presidency. We may mention that the learned vakil for the appellant in Appeal No. 66 would not for obvious reasons support such a construction, according to which his client's claim must be postponed to that of Avadia Pillai. We may also mention that the other cases relied on in I. L. R. 24 All. 128, *viz.*, *Kureemchand Gurain* v. *Udang Gurain*[1] and *Oorhya Kooer* v. *Rajoonye*[2] decided that a brother's grandson may be an heir, though in the former case Mr. Justice *Jackson*, in arriving at the conclusion, relied on Mr. Harrington's view that the word 'sons' in the Mitakshara should have an extended meaning. We are, however, unable to accept that construction and agree with the learned Judges in *Surya* v. *Lakshminarasamma* and *Lakshiminarasammah* v. *Jaganadham*[3] that the word should be understood in its primary and limited sense.

The next question is, which of the two claimants is the nearer sapinda, according to the principle enunciated in Verse 3, Section III, Chapter II, of the Mitakshara—"To the nearest sapinda the inheritance next belongs." The author of Mitakshara throws no further light, and among the other commentators there is divergence of opinion as to the place to be assigned to the brother's grandson. Apararka, a commentator of the Yajnavalkya Smriti, the same text of which the Mitakshara is a commentary, would hold that among the gotrajas nearness is to be reckoned according to the comparative efficacy of spiritual offerings (see Sarvadhicari's 'Hindu Law,' pages 497-8). Varadaraja lays down that in default of brother's sons, brother's grandsons succeed, but does not mention the principle on which he bases this rule (see Burnell's Translation, p. 36). Nanda

1. (1866) 6. W. R. 158. 2. (1870) 14 W. R. 208.
3. (1881) I. L. R. 5 M. 291.

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Pandita holds that the three successive descendants of the father should be exhausted first, then the three descendants of the grandfather and then of the great-grandfather, and so on, relying on the text of Manu, that the 5th has no concern with funeral oblations, (see Sarvadhicari's 'Hindu Law,' page 481). The Smrithi Chandrika (see Ch. XI, Sec. v, paragraphs 2 and 8) may be said to support the respondent's claim, while the Saraswati Vilasa, Madhaviya, Subhodini and Viramitrodaya, though they do not place the brother's grandson in the list of enumerated heirs, do not express any opinion as to what is his proper place among the gotrajas. The learned Advocate-General urges that Apararka's authority is acknowledged chiefly in Kashmir and that the learned commentator makes no reference at all in his writings to the Mitakshara (see Mayne, p. 28), which is the governing authority in the south, while the Vaijayanti of Nanda Pandita (who lived in the 17th century) is a commentary on Vishnu Smriti and both writers are saturated with the notion of spiritual benefit which is not adopted in the south. As regards the value of the opinion of the author of the Smriti Chandrika on this point, Mr. P. R. Sundara Iyer urged that his scheme of succession is so substantially at variance with that of Vignaneswara that he cannot be relied upon as a safe guide in this connection. That the Smriti Chandrika's rule relating to the succession of ascendants and collaterals is in many respects different from that of the Mitakshara is apparent and is not denied by the Advocate-General and that fact must deprive the view expressed in that commentary, in so far as it represents the opinion of its author, of much weight in dealing with the present question. But the statement by that commentator that according to Vignaneswara the right of the brother's grandsons must be postponed cannot altogether be ignored. As regards Apararka he is, like Vignaneswara, a commentator of Yajnavalkya's Smriti and his views are very similar to those of the Mitakshara and we think that his work may be usefully consulted on points on which the Mitakshara is silent, while Varadaraja's Vyavahara Nirnaya is a supplementary authority in Southern India (see Mayne, paragraphs 26 and 27 and Burnell's Preface to Vyavahara Nirnaya). But we should not be justified in accepting the opinion of these commentators if such opinion is opposed to a clear principle of succession established by the Mitakshara as

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interpreted in this Presidency. Of the modern writers, Mr. Sarvadhicari would include the great-grandsons of each ancestor as nearer sapindas on the ground mainly of superior spiritual benefits which they can confer and as such having a preferential right over other unenumerated sapindas; Dr. Jolly would place the great-grandson of an ancestor on the list of the compact series of heirs, relying on the analogy of a man's own great-grandson; Mr. Bhattacharya would give him preference apparently both on the analogy of the great-grandson of the propositus himself and on the principle of spiritual benefit. Mr. V N. Mandlik (see his 'Hindu Law' p. 378), Messrs. West & Buhler ('Hindu Law,' p. 114) and Mr. G. Sircar (see his 'Principles of Hindu Law,' pp. 261 and 262) would, after the enumerated heirs, first exhaust the man's own descendants from the third to the sixth generation, then the father's line from the third to the sixth descendants, then the grandfather's line from the third to the sixth descendants, acting on the principle that the nearer line should exclude the more remote. Mr. Shyama Churn Sircar (Vyavastha Chandrika, p. 178) says that though the brother's grandson is not clearly mentioned in the Mitakshara and other digests in Sanskrit, yet it has been determined—referring to the rulings of the Calcutta High Court which have already been noticed—that he succeeds in default of a brother's son, because the term "brother's son" is inclusive of the brother's grandson. Mr. Mayne cannot be said to have expressed any decided opinion on the point.

The real point, therefore, on which the decision of the question depends is whether the superiority of spiritual benefit or the nearness of line is the determining test as to who should be deemed the nearer sapinda. We have already indicated that mere analogy to the case of the great-grandson cannot be a very satisfactory guide in this connection.

That Vignaneswara laid much stress on the nearness of line in framing his scheme of succession cannot admit of any doubt, and is patent from the order in which he arranges the heirs both in the ascending line and among the collaterals. In fact, as stated in very emphatic terms in *Balusami Pandithar* v. *Narayana Rao*[1], the first of the great principles pervading the law of

1. (1897) I.L.R. 20 M. 342 at p. 348.

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inheritance under the Mitakshara system is that the nearer line excludes the more remote (see also *Krishna Ayyangar* v. *Venkatarama Ayyangar*[1]). Should this clear principle then be outweighed so far as this Presidency is concerned by considerations of the greater or less capacity of rival sapindas to confer spiritual benefit on the deceased? We think not. Nothing is more clearly established than that the author of the Mitakshara, which is the supreme authority in this province, would generally allow very little, if any, force to the theory of spiritual benefit in his scheme of succession and as far as the succession of sapindas goes, nowhere does he seem to rely upon any such principle, whether in determining who is entitled to succeed as a sapinda or which of the several sapindas should have a preferential right. He defines sapindas as men who are connected through particles of the same body and not by funeral oblations and in the whole of the law of inheritance as propounded by him in the Mitakshara, at least according to the interpretation it has received in this Presidency, the tests of heirship are consanguinity and propinquity, and not the capacity to confer spiritual benefit. In many cases the two elements are combined in the same person, but, if they are not so combined, the person who is nearer in relationship, as ordinarily understood, is given preference. (See the discussion in Mayne's 'Hindu Law,' 7th Edition, parapraghs 509 to 511). Much reliance has been placed on a *dictum* of their Lordships of the Privy Council in *Bhya Ram Singh* v. *Bhya Ugar Singh*[2], to the effect that the question of preference is founded on superior efficacy of oblations, but the observation was made in a case governed by the Benares school of law and their Lordships had not to consider in that case the question whether the nearness of line or the capacity to confer greater spiritual benefit should determine the preferential right to succession. It may be that, all other tests being equal, the superior efficacy of oblations would be a legitimate ground for giving preference, though it is difficult to conceive of a case among the sapindas in which the nearness of line would not be present as a determining factor. As pointed out in *Muthusami* v. *Muthukumarasami*[3] the question may arise among bandhus of

1. (1905) I.L.R. 29 M. 116. 2. (1870) 13 M.I.A. 673 at p. 392.
3. (1892) I.L.R 16 M. 23 at p. 30.

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the same class and then the quality or the quantity of the spiritual benefit which they confer on the propositus may be a good ground for preference. The only rule which we need lay down in the present case is that, where the competition is between two collateral sapindas not included among the enumerated heirs, preference should be given to the sapinda belonging to the nearer line.

The judgment of the Subordinate Judge is, therefore, confirmed and appeals Nos. 68 and 73 are dismissed with costs. The costs will be divided among the respondents in proportion to the interests which they claim in the property.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Ravila Partichelamanna and another	..	Appellants* (*Defendants*)
v.		
Ravila Parti Rama Rao.	..	Respondent (*Plaintiff*).

Partichelamanna v. Parti Rama Row.

Registration Act, S. 17, Cl. 1—Compromise beyond the scope of suit not registered—How far valid in so far as it affects immoveable property—Evidentiary value.

Non-registration of a compulsorily registrable document leads to two consequences: (1) it cannot be *received as evidence* of any transaction affecting immoveable property ; (2) it shall not affect any immoveable property comprised therein.

A compromise which comprised matters outside the scope of the suit and which consequently was not embodied in the decree or order of court as to those matters is incapable of affecting any property covered by the portion not so embodied in the decree or order, if unregistered, and the fact that there was an entry in the court's record of the compromise would not make any difference.

Obiter :—How much of the compromise would be evidence under S. 35 of the Evidence Act would depend upon how much thereof could be regarded as having been entered in the record of the court. *Bindesri Nath* v. *Gunga Saran Sahu*[1], *Pranal Anni* v. *Lakshmi Anni* [2] explained; *dictum* in, *Natesa Chetty* v. *Vengu Nachiar* [3] dissented from ; *Raghubans Mani Singh* v. *Mahabir Singh* [4] declared not followed in *Kasi Kumbi* v. *Samar Kumbi* [5] ; *Saduruddin* v. *Chaggu*[6], *Birabhadra Nath* v. *Kalpatam Punda* [7], *Kalicharan Ghosal* v. *Ramachandra Mundal*[8], *Gurudas Singh* v. *Chandrika Singh* approved; *Jasimuddin Bishwas* v. *Bhuban Jelini* [10] distinguished.

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*S. A. No. 853 of 1910. 11th August, 1911.

1. (1898) I.L.R. 20 A. 171 (P.C.)
2. (1898) I.L.R. 22 M. 508. (P.C.)
3. (1909) I.L.R. 33 M. 102.
4. (1906) I.L.R. 28 A. 78.
5. (1910) I.L.R. 32 A. 206.
6. (1908) I.L.R. 31 A. 13.
7. (1905) I. C. L. J. 388.
8. (1905) I.L.R. 30 C. 783.
9. (1907) I.L.R. 36 C. 193.
10. (1907) I.L.R. 34 C. 456.

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* Second appeal from the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 31 of 1909 presented against the decree of the Court of the District Munsif of Cocanada in O. S. No. 599 of 1907.

The facts appear sufficiently in the judgment.

M. V. Krishnasawmi for appellant.

H. Balakrishna Rao, for respondent.

M. V. Krishnasami for appellant:—This case comes within the exception indicated by their Lordships of the Judicial Committee in *Pranal Anni* v. *Lakshmi Anni*[1]. It is expressly covered by the decision in *Bindesri Nath* v. *Ganga Saran Sahu.*[2] See *Natesa Chetty* v. *Vengu Nachiar*[3]; *Raghubans Mani Singh* v. *Mahabir Singh*[4]. *Jasimuddin Bishwas* v. *Bhuban Jelini*[5]. *Chandrika Singh* v. *Rash Behary*[6] takes a view contrary to that in *Natesa Chetty* v. *Vengu Nachiar*[3]. This is a compromise and does not require registration—*Ghouse Mahomed* v. *Khamas Ali Khan*[7]. Compromise is a recognition of antecedent rights and does not involve the creation of new rights—*Rani Mewa Kunwar* v. *Rani Hulas Kunwar*[8]; *Khunni Lal* v. *Govind Krishna Narain*[9]. A compromise petition does not require registration, being pleadings. Besides, the compromise petition only sets out the terms of the verbal settlement between the parties.

H. Balakrishna Rao, for respondent, submitted that the compromise petition is the compromise; it either directs partition or it only records an agreement to partition. In either case it is no defence—in the former because it requires registration; in the latter because an agreement capable of specific performance is in itself no defence to a suit in ejectment. In any view as *declaring* the title of parties, it requires registration. The case does not fall within *Natesa Chetty* v. *Vengu Nachiar*[3] nor within the exception in *Pranal Anni* v. *Lakshmi Anni*[1]. The claim in the plaint in the earlier suit and the claim in respect of the other matters were independent; at any rate there is nothing to shew that they are interdependent. The view in *Chandrika Singh* v. *Rash Behari*[6] is the sounder view.

The Court delivered the following

JUDGMENT:—In this case the plaintiff's suit is for the recovery of certain lands in the possession of the defendants. Both

1. (1898) I. L. R. 22 M. 508 (P.C.)
2. (1898) I.L.R. 20 A. 171 (P.C.)
3. (1909) I. L.R. 33 M. 102.
4. (1906) I. L. R. 28 A. 78.
5. (1907) I. L. R. 34 C. 456.
6. (1907) I. L.R. 36 C. 193
7. (1896) I. L. R. 23 C. 450.
8. (1874) 1 I.A. 156.
9. (1911) 21 M.L.J. 645 (P. C.).

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the lower courts have found the plaintiff's title and possession within 12 years prior to the suit proved.

The only question in this second appeal is whether the plaintiff's claim is unsustainable in consequence of a compromise entered into between the parties in a prior suit—O.S. No. 363 of 1904. That suit was instituted by the plaintiff against the present defendants and others for the recovery of another plot of land. The parties entered into a compromise in that suit. By the terms of that compromise it was settled *inter alia* that both the land sued for then and the lands which form the subject-matter of this suit should be divided into two moieties and that the plaintiff should take one moiety and the defendants the other moiety. The agreement of compromise was not registered under Act III of 1877. The plaintiff being then a minor, the compromise was submitted to the court under the provisions of S. 462 of the then Civil Procedure Code and the court gave leave to the plaintiff's next friend to enter into the compromise, holding it to be beneficial to the minor. A decree was afterwards passed in terms of the compromise in so far as it related to the property which was then sued for. The court, of course, could not pass a decree then in respect of the properties now in suit, as they were not included in the claim then made.

The plaintiff, it may be noted, attempted to get a share of the properties now sued for in the execution of the decree in that suit. His attempt naturally failed as the decree did not cover these properties. Both the lower courts have held that the defendants could not rely on the compromise as defence to this suit as it was compulsorily registrable under the provisions of S. 17 of the Registration Act.

It is contended before us on behalf of the appellants that this view is wrong and reliance is placed on the decree of the Privy Council in *Bindesri Nath* v *Ganga Saran Sahu*[1] and *Pranal Anni* v. *Lakshmi Anni*[2] and on the case of *Natesa Chetty* v. *Vengu Nachiar*[3]. Several other cases were cited at the argument on both sides. As there is some conflict of judicial opinion on the point it is desirable to refer at some length to the rulings of the Privy Council mentioned above.

1. (1898) I. L. R. 20 A. 171. P.C. 2. (1899) I. L. R. 22 M. 508.
3. (1909) I.L.R. 33 M 102.

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In *Bindesri Nath* v. *Ganga Saran Sahu* [1] the suit was to enforce the payment of money due on a mortgage bond by sale of the mortgaged property. The dispute before the parties was whether the plaintiff was entitled to recover against the property the interest due to him on the mortgage amount after the date fixed for payment originally in the instrument of mortgage. The Judicial Committee held, on the construction of the mortgage document, that he was so entitled. The plaintiff had based his claim to *post diem* interest also on joint petitions presented by him and by his debtors, the defendants in the suit, in the course of certain proceedings instituted by the plaintiff for foreclosure. In these petitions the parties stated the total amount of principal and interest which was then due on the mortgage. The sums thus stated included *post diem* interest up to the date of the petitions The court was asked to sanction the arrangement between the parties under S. 257-A., Civil Procednre Code, and to grant an extension of time in accordance therewith for the payment of the mortgage debt. The required sanction was granted by the court. The defendants contended that the consent petitions could not be relied upon by the plaintiff as they were not registered in accordance with the provisions of the Registration Act. The Privy Council observed: "Although in the view which their Lordships take, the question whether those proceedings can be founded on without their having been registered in terms of the Act of 1877 does not necessarily arise in this appeal, they think it right to add that having heard counsel fully on the point they are satisfied that the provisions of S. 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the court." In *Pranal Anni* v. *Lakshmi Anni* [2] a suit which had been instituted for possession of certain lands was amicably settled by a compromise between the parties, which related both to those lands and to other lands which were the subject-matter of the case before the Privy Council. The *razinama* which was presented to the court in the first suit stated that the parties had agreed to take each a certain share of the land sued for. One of the four schedules incorporated with it, namely Schedule I, related to and described the lands which were the

1. (1898) I-L.R. 20 A. 171 (P.C.) 2. (1899) I.L.R. 22 M. 508 (P.C.)

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subject of the second suit, but the body of the compromise contained no reference to it. It set forth as "remarks" that the lands included in schedule *D* were also to be taken in equal shares by the parties. The decree of the court awarded to the plaintiff in terms of the razinama a share of the lands then actually sued for. The question in the second suit was whether the razinama in the previous suit which was not registered could nevertheless be relied upon by the defendants in bar of the plaintiff's right to recover the whole of the lands. The Privy Council held that it could not. Their Lordships observed: "The objection founded upon its non-registration does not, in their Lordships' opinion, apply to its stipulations and provisions in so far as they were incorporated with and given effect to by the order made upon it by the Sub-Judge in the suit of 1885. The razinama, in so far as it was submitted to and was acted upon judicially by the learned judge, was in itself a step of judicial procedure not requiring registration, and any order pronounced in terms of it constituted *res judicata* binding upon both the parties to this appeal who gave their consent to it. If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit, and also a half share of the lands now in dispute, had informed the learned judge that these were the terms of the compromise and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned judge, if it had referred to or narrated these terms of the compromise, would have been judicial evidence, available to the appellant, that respondents had agreed to transfer to her the moiety of land now in dispute. But their Lordships are unable to find that any such course was taken either in the razinama or in the judicial order which gave effect to it. The razinama merely referred, by way of 'remark,' to the lands now in dispute before him. This order accordingly merely concerns the latter and has no reference whatever to the lands described in Schedule *D* of the razinama. So far as regarded those lands, the compromise was not submitted to the learned judge but was deliberately left by the parties to stand upon their unregistered agreement of union."

The contention for the appellants is that in these two cases their Lordships of the Privy Council have laid down that an

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unregistered document requiring registration under S. 17 of Act III of 1877, if referred to or narrated in a decree or order of a court or set out in pleadings filed by parties to the instrument in a court would have the same effect as if it had been registered although it forms no part of the decree or order of the court. Now S. 17 enacts that documents coming within the classes referred to in Clauses (*a*) to (*d*) thereof shall be registered. Clause (1) exempts from the rule of compulsory registration 'decrees and orders of courts' as an exception to Clauses (*b*) and (*c*). There is no provision in the section that pleadings before a court which are mere statements of parties should be registered. S. 49 of the Act lays down: "No document required by S. 17 to be registered shall affect any immoveable property comprised therein * * * or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." It will be observed that non-registration of a compulsorily registrable document leads to two consequences: one is that it cannot be *received in evidence* of any transaction affecting immoveable property, and the other that it shall not affect any immoveable property comprised therein. If a razinama has been passed into a decree or order by a court, then under Clause (1) of S. 17 it is exempted from compulsory registration, and the decree or order would constitute the matters comprised therein *res judicata* between the parties to the litigation. But if any portion of the razinama has not passed into a decree or order of court, it is *prima facie* difficult to see how a recital of it in the proceedings of the court or its inclusion in pleadings put before the court will come within the terms of Clause (1) and it is difficult to suppose that their Lordships of the Privy Council could have intended to extend the provisions of Clause (1) in the manner urged by the appellants. On examining the language employed by their Lordships, it is clear that they did not so intend. The observation in the earlier case is that the provisions of S. 17 do not apply to pleadings. This is no doubt obvious. In the latter case the *dictum* is, that the order of the judge, if it had referred to or narrated the terms of the compromise, not embodied in the decree of the court, would have been judicial evidence, available to the appellant that the respondents had agreed to transfer the moiety of the lands to which the reference or narration might

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relate. All that their Lordships meant, apparently, was that the entry of an agreement in a decree or order of court would be relevant to prove the agreement. This is laid down in S. 35 of the Evidence Act. It has been held that such an entry would be primary and not secondary evidence of the facts contained in it. See *Byathamma* v. *Abdulla*[1]; *Thama* v. *Kondan*[2]; *Parbuthy Dassi* v. *Purna Chunder Singh*.[3] But taking it that an agreement could be proved by means of the entry of it in an order of court, this circumstance could only get rid of one of the two consequences of non-registration laid down in S. 46 of the Registration Act, viz., the inadmissibility of the document in evidence. It does not, however, remove the other consequence, namely, that the document cannot affect the immoveable property comprised therein. The observations of the Privy Council do not lend any countenance to the suggestion that the reference or narration in a decree or order could have any such effect. The immoveable property comprised in a compromise can be affected only in so far as it has passed into a decree or order of the court. If a particular transaction is not required by law to be effected by a registered instrument and if the consequence of non-registration were declared to be merely its inadmissibility in evidence, then it might be possible to hold that such consequence might be avoided when the contents of the instrument are entered in judicial proceedings. It has to be remembered that in one sense, the whole of a compromise by which a suit is terminated is put before the court for being recorded though the court will pass a decree in terms thereof only in so far as it relates to the subject-matter of the suit. When it is placed before the court with a request to record it, it becomes part of the pleadings, and when the court records it, it by implication refers to the whole of the compromise. How much of the compromise would be evidence under S. 35 of the Evidence Act would depend upon how much thereof could be regarded as having been entered in the record of the court. But, as already pointed out, an entry in the court's record will not enable anything not actually part of the decree or order of the court to affect the immoveable property comprised in that order.

1. (1891) I.L.R. 15 M. 19, at p. 23. 2. (1892) I.L.R. 15 M. 378.
3. (1886) I. L. R. 9 C. 586.

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For these reasons it appears to be clear that the appellant's claim to the properties now in question on account of their inclusion in the compromise is unsustainable. As for *Natesa Chetti* v. *Vengu Nachiar*[1] there is a *dictum* there in appellant's favor. The learned Judges who decided the case (*Wallis* and *Sankaran Nair* JJ.) observe (see p. 108) referring to the passage in *Pranal Anni* v. *Lakshmi Anni*[2] already set out, in these words:—"In our opinion this passage clearly means that the compromise could have been enforced, although not registered, even about the lands not included in the statement. The learned Judges who decided *Raghubans Mani Singh* v. *Mahabir Singh*[3] understood their Lordships' judgment in the same way." With all deference to the learned Judges, this *dictum* cannot be accepted as correct. It is opposed to the decisions of this court in *Muthayya* v. *Venkatrathnam*[4] and *Patha Muthammal* v. *Esup Rowther*[5]. The decree of the Allahabad High Court in *Raghubans Mani Singh* v. *Mahabir Singh*[3] relied on by the learned Judges has not been followed in that court itself in the later cases of *Kasi Kunbi* v. *Sumar Kunbi*[6] and *Sadur-ud-din* v. *Chaggu*[7]. Our view is in accordance with the decisions of the Calcutta High Court in *Birbhadranath* v. *Kalpatru Panda*,[3] *Kalicharan Ghosal* v. *Ramchandra Mandal*[9] and *Gurudas Singh* v. *Chandrika Singh*.[10] *Jasimuddin Bishwas* v. *Bhuban Jelini*[11] was relied on in favor of the appellants. But that case is distinguishable. There a decree was passed against the defendant for the amount agreed upon as the proper rent by an unregistered compromise. The defendant was bound to execute a *solenama* according to the terms of the compromise, agreeing to pay that rent. He remained in occupation of the plaintiff's land but failed to execute the *solenama*. It was held that the plaintiff was entitled to the rent fixed by the compromise. The plaintiff would have been entitled to recover the amount from the defendants as for use and occupation, though that was not the exact ground on which the decision was based.

1. (1909) I. L. R. 33 M. 102.
2. (1899) I. L. R. 22 M. 508.
3. (1906) I. L. R. 28 A. 78.
4. (1901) I. L. R. 25 M. 553.
5. (1906) I. L. R. 29 M. 365.
6. (1910) I. L. R. 32 A. 206.
7. (1908) I. L. R. 31 A. 13.
8. (1905) 1 C. L. J. 388.
9. (1903) I. L. R. 30 C. 783.
10. (1907) I. L. R. 36 C. 193.
11. (1907) I. L. R. 34 C. 456.

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The defendants in their written statement did not put forward any title to the land except under the compromise referred to above. That is therefore the only root of their title and as it is unregistered they cannot rely on it as affecting the immoveable property comprised therein.

The second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Spencer.

Nataraja Mudaliar .. Appellant*
(*Plaintiff*)

v.

The Municipal Council of Mayavaram by its Chairman and another .. Respondents
(*Defendants*).

Nataraja Mudaliar v. The Municipal Council of Mayavaram.

Madras Acts—District Municipalities Act, Ss. 10, 250—*Rule* 36—*Jurisdiction of civil courts to question validity of Collector's order—Suit for damages and suit for injunction—Difference.*

The validity of the Collector's order under rule 36 of the election rules framed under the Madras District Municipalities Act passed in substantial conformity with the requirements of the rules cannot be questioned in a civil court. [*Bhai Shankar* v. *Municipality of Bombay*[1]. referred to. *Vijiaraghava* v. *Secretary of state*[2]. *Sabapet Singh* v. *Abdul Gaffur*,[3]; *Lalbhai* v. *Municipal Commissioners of Bombay*[4]. distinguished].

Obiter:—It may be that the Collector's order passed without any inquiry at all or based on grounds other than those set forth in Rule 35 is liable to be impeached in a civil court.

A suit for damages stands on a different footing from a suit for declaration and injunction against the Municipal Council in respect of an election.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 362 of 1908 presented against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 232 of of 1907.

T. V. Seshaghiri Iyer for appellant.

S. Srinivasa Aiyar for the Municipal Council.

The Government Pleader (*C. F. Napier*) for respondent.

T. V. Seshagiri Aiyar for appellant:—Right of suit is not taken away. What is understood by the order being final is, it is final so far as the channel therein indicated is concerned. A suit is not excluded unless expressly excluded by statute. My client has got a right to have the facts canvassed. So far

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* S. A. No. 562 of 1909. 8th August, 1911.

1. (1907) I.L.R. 31 B. 604 at 609.
2. (1884) I.L.R. 7 M. 466.
3. (1896) I.L.R. 24 C. 107.
4. (1908) I.L.R. 33 B. 334.

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as the Government is concerned it may be that the courts are not entitled to canvass the grounds for the opinion of the Government, but *Vijiaragava* v. *Secretary of State for India*[1] is an authority in favour of the court's power in other cases; also *Sabapet Singh* v. *Abdul Gaffur*[2]. See Maxwell p. 192 *et seq.* See *Secretary of State* v. *Venkateswarulu Naidu*[3]. He submitted that a colorable exercise of discretion is no discretion and cited *Leslie Williams* v. *Haines Thomas Giddy*[4]; *Lallbhai* v. *Municipal Commissioners of Bombay*[5].

The Government Pleader (C. F. Napier), for respondents, submitted that there is considerable difference between the words of the Act which *Vijiaragava* v. *Secretary of State for India*[1] was dealing with and the present Act; that till actual appointment the candidate is not a Municipal Councillor and has no status or franchise as *Sabapet Singh* v. *Abdul Gaffur*[2] inaccurately puts it to entitle him to a declaration under S. 42, Specific Relief Act. The order of the Collector was also final and no suit lay. He cited S. A. 1425 of 1907 and *Attorney General* v. *Great North Western Railway*[6]. No injunction could issue against Government—Specific Relief Act, S. 54.

S. Srinivasa Aiyangar for the Municipality cited Maxwell, pp. 193, 197; *The Queen* v. *County Court Judge of Essex*[7]; *Banaclough* v. *Brown*[8]; *Bhai Shankar* v. *The Municipal Corporation of Bombay*[9]; *Waygood* v. *James*[10].

T. V. Seshagri Aiyar, in reply, submitted that to say that pending appointment the candidate has no legal status is somewhat extravagant. *Bhai Shankar* v. *The Municipal Corporation of Bombay*[9] proceeds upon the view that the appointment of a regular tribunal precludes the court's jurisdiction. No such tribunal is provided for in this case. *Vijiaragava* v. *Secretary of State for India*[1] is no longer authority for the power of the court to canvass the grounds of the Government's action but surely remains authority for canvassing the grounds of the Collector's action because the Collector can act only on the footing of certain facts while the Government acts on the opinion it forms upon such facts. A declaration against Government is good for the

1. (1884) I.L.R. 7 M. 466.
2. (1896) I.L.R. 24 C. 107.
3. (1906) I.L.R. 30 M. 113.
4. (1911) 21 M. L. J. 641.
5. (1908) I.L.R. 33 B. 334.
6. (1876) I.L.R. 4 Ch. D. 735.
7. (1887) 18 Q. B. D. 704.
8. (1897) A. C. 615.
9. (1907) I.L.R. 31 B. 604.
10. (1869) L.R. 4 C. P. 361.

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reason stated in *Fischer's case*[1]. Injunction has been issued against Municipalities—*The Secretary of State for India* v. *Sukdeo*[2].

The Court delivered the following

JUDGMENT:—The plaintiff was a candidate for a seat in the Mayavaram Municipal Council and at an election held on 13th December 1906 he received the largest number of votes. An objection was preferred on the ground of bribery and corruption and after an enquiry by the Divisional Officer the Collector passed an order under Rule 36 of the Election Rules declaring the election invalid, and ordering a fresh election to be held.

The plaintiff then brought the present suit. He prayed (1) for a declaration that he had been duly elected and in consequence was entitled as such to exercise the rights and privileges of a Councillor; (2) for an injunction restraining the Municipal Council from holding a fresh election. His suit was dismissed in both courts. The District Munsiff held that the Collector's order could be questioned in a civil suit, such as the present one, but on going into the merits he held that the bribery was proved, that the Collector's order was a proper one, and that the plaintiff was entitled to no relief. The District Judge dismissed the appeal on the sole ground that the Collector's order was final as far as the result of the election was concerned and could not be questioned in a civil suit.

Before us, argument on both sides has been directed solely to the question whether the order of a Collector under Rule 36 above quoted can be questioned in a civil court, and if so, on what grounds. The learned vakil for the appellant wished to raise a further point whether the election rules themselves were not *ultra vires*. We have, however, felt ourselves bound to refuse to go into this point. It is not taken in the appeal memorandum and the omission was admittedly deliberate in view of the decision in *Secretary of State for India* v. *Venkateswarulu Naidu*[3]. The appellant's Vakil states that he is now prepared to argue that this decision is wrong but he has filed no memorandum of additional grounds of appeal as required by the rules of this court. We therefore refused leave to argue this point.

1. (1898) I.L.R. 22 M. 270. 2. (1899) I.L.R. 21 A. 341.
3. (1906) I.L.R. 30 M. 113.

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Coming then to the sole point for decision, we may say at once, that we are in substantial accord with the views of the learned District Judge who has discussed the matter very fully and ably in his judgment We do not understand him to mean, and we ourselves are not prepared to say, that under no circumstances whatever could a Collector's order purporting to be passed under Rule 36 of the Election Rules be called in question in a civil court. If such an order had been passed without any inquiry at all, or was based on grounds other than those set forth in Rule 35, a suit would probably lie to set it aside as *ultra vires.* But whereas, in the present case, the order appears to have been passed after the compliance with all the requirements of the rules and purported to be based on proper grounds, we agree with the District Judge in holding that it cannot be questioned in a civil suit, but is conclusive as far as the result of the election is concerned. In other words the candidate adversely affected cannot demand that a civil court should hold a fresh inqury into the merits of the dispute ; and if it comes to a different decision on these, should treat the Collector's order as a nullity and give a declaration deciding the result and effect of the election. In this case, no formal defect in procedure has been relied on ; the only allegation in the plaint is that the Collector's order is unsupported by "legal evidence"—a plea which has been sufficiently dealt with by the District Judge.

These conclusions, in our opinion, spring naturally from the fact that the status of a Municipal Councillor is the creation of S. 10 of the Madras District Municipalities Act (IV of 1884) and that creation is subject *inter alia* to the condition imposed by the election rules framed by the Governor-in-Council under S. 250 of the same Act and invested by Cl. (3) with the force of law. One of these rules is Rule 36 which empowers the Collector under certain circumstances to declare an election invalid and order another election to be held. The election which, as the plaintiff contends, gives him a vested status is, in fact, only held conditionally on its being liable to be declared invalid, and an invalid election can confer no status whatever. The appellant's Vakil lays stress on the words " appointed by election" in S. 10 of the Act as indicating that a candidate acquires by election alone, apart from subsequent notification of appointment, a status which he can bring in to establish a civil suit. But the term "election" in

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these sections undoubtedly means a valid election—one which is not set aside under Rule 36. It is only such a valid election that could confer any status and it is not therefore necessary for us to go into the question of what is the legal position of a candidate who has been validly elected but whose appointment has not been notified under S. 21-A of the Act.

In support of our view that the validity of a Collector's order passed in substantial conformity with the requirements of the rules cannot be questioned in a civil court, we may quote the remarks of *Jenkins* C.J. in *Bhaishankar* v. *The Municipal Corporation of Bombay* [1]: " Where a special tribunal out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary courts, for they never had any; there is no change of the old order of things ; a new order is brought into being." And again at p. 610 : " The jurisdiction of the courts can be excluded, not only by express words, but also by implication, and there is certainty enough in S. 33 of the Municipal Act for this purpose, for there is no right which the plaintiff can at this stage assert as the subject of this suit, which is not subject to the condition that its essential basis must depend on the decision of the tribunal created for that purpose. ". We consider that as in S. 33 of the Act, then in contemplation, so in Rule 36 in the present case, there is certainty enough to bar by implication the jurisdiction of the civil court.

We may also quote Maxwell on the Interpretation of Statutes, 4th Edn., p. 197: " Where indeed a new duty or *cause of action* is created by statute and a special jurisdiction out of the course of the common law is prescribed, there is no ouster of the jurisdiction of the ordinary courts, *for they never had any.* "

The most pertinent of the cases relied on by the appellant are those reported in *Vijiaraghava* v. *Secretary of State for*

1. (1907) I.L.R. 31 B. 604 at p. 609.

India[1], *Sabapet Sing* v. *Abdul Gaffur*[2] and *Lalbhai* v. *The Municipal Commissioners of Bombay*.[3] We have carefully considered these rulings but we do not find anything in them which should lead us to modify the views above indicated.

The first of these cases arose out of a suit brought by a Municipal Councillor for damages for wrongful removal from office under S. 9 of Madras Act III of 1871. Apart from certain differences in the provisions of the Act, it can be distinguished from the present case on two broad grounds. In the first place, in that case, the Advocate General on behalf of Government explicitly abandoned the plea that the plaintiff had been guilty of any misconduct or neglect of duty, the only grounds on which under the section Government were empowered to remove him. In its stead he set up a purely discretionary power to remove which their Lordships held not to vest in Government. No such absolute discretionary power is in question. Whether if the Government had stood by the position that the plaintiff had actually been guilty of misconduct or neglect, the court would have deemed it proper to go into the truth of these allegations it is difficult to say. The issues framed seem to raise no such question of fact. It is true that two of the learned Judges deal at considerable length with certain evidence bearing on plaintiff's conduct; but as explained by *Hutchins* J. this evidence was considered only as bearing on the question of damages. The second ground of distinction is that as the suit was finally determined, it was one for damages only. The plaintiff had originally sued for two declarations—(1) that his removal was null and void; (2) that he was entitled to hold office as commissioner for the residue of his three years. The prayer for the second declaration was withdrawn and this is most important. Whether the prayer for the first declaration was also withdrawn is not certain (the statements in the judgments of *Hutchins* and *Kernan* JJ. on this point being conflicting) : but it is quite clear that it was not granted.

A suit for damages and a suit for the reliefs prayed for in the present suit stand on a very different footing. It is quite conceivable that a court might grant damages claimed in consequence of an order and yet decline to declare that the order was

1. (1884) I. L. R. 7 M. 466, 2. (1899) I. L. R. 24 C. 107.
3. (1908) I.L.R. 33 B. 334.

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null and void. A comparison of the relief granted in the reported case, with the relief not granted (whether in consequence of a withdrawal or not) tends to suggest that such a distinction may have been actually drawn.

The other cases are equally distinguishable. In *Sabapet Singh* v. *Abdul Gaffur*[1] the Magistrate had set aside the election on the ground that the plaintiff, the candidate with most votes, was not qualified to stand. The suit was brought to declare that the plaintiff was a person qualified to vote and stand as a candidate (the qualifications were identical) and for a declaration that he was duly elected. We quite agree that the suit would lie as regards the first declaration—a matter which, as the learned Judges point out, would affect the plaintiff's right to vote and stand at all future elections and this is the chief point dealt with by them. Th second declaration that he was duly elected was as a matter of fact refused. We doubt the learned Judges would go into an objection to the election, which was not the basis of the Magistrate's order, and say that they ought not to do anything to validate an election which was open to so grave an objection. This certainly suggests that they deemed the civil courts to have the power to override the Magistrate's order and adjudicate on the validity of an election, But in as much as they refused to exercise the power the pronouncement, such as it is, is of the nature of an *obiter dictum*, and the court appears to have had in mind the special provisions of S. 15 of the Act then under consideration which apparently reserves the jurisdiction of civil courts.

The case in *Lallbhai* v. *The Municipal Corporation of Bombay*[2] is really beside the point. It is merely an authority for holding that even discretionary powers must be exercised in a reasonable mannner and not capriciously or arbitrarily.

The second appeal is dismised with costs.

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1. (1896) I. L. R. 24 C. 107. 2. (1908) I. L. R. 33 B. 334.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Rajah Venugopal Bahadur . .. Petitioner *

v.

Thirumala Kandama Kondala Nagayya Ramakrishna Kadirvelusawmi Naicker, Minor, by Velu Thayammal .. Respondent.

Guardians and Wards Act, Ss. 29, 38, *Sub-sec.* 41, 43—"*Any person*"—*Right to be heard.*

Venugopal Bahadur *v.* Thayammal.

The words "any person" do not mean only a relative or friend, but are wide enough to cover applications by persons other than relatives or friends of the minor.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Madura in I. A. No. 100 of 1911 (in O.P. No. 475 of 1910).

The petitioner had an agreement to lease from the natural guardian of the minor Zamindar of Gundamanayakanur. Pending the same, the guardian granted a lease to a Syndicate in London and in order to strengthen their position applied to the District Court of Madura to be appointed a guardian and also to give sanction to the lease. The petitioner applied to the District Judge to be heard, who refused to hear him saying he had no *locus standi* under S.31, Cl. (4), of the Guardian and Wards Act and appointed the mother guardian and sanctioned the lease. Hence the petitions by the petitioner to revise the order refusing to hear him and as well the final order, and to stay further proceedings in the interim. Their Lordships heard all the petitions together.

C. P. Ramasawmi Aiyer for petitioner.

T. Rangachariar for respondent.

C. P. Ramasawmi Aiyar, for petitioner:—Section 31, Cl. (4), while providing that notice is to go to relative or friend, places no restriction as to the person who can oppose the application. Section 48, Cl. (1), shows that any person interested may make an application to the court to regulate the conduct of the guardian. It is but proper that when the property is under the control of court, claims in respect of the same matter ought to be brought to the notice of the court and as expeditiously as possi-

* C.R.P. 317 of 1911 in C.M.P. 866 of 1911. 8th August, 1911.

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ble be disposed of instead of putting the estate to the costs of a litigation. The same considerations that apply to the case of a receiver apply to the case of a guardian.

T. Rangachariar, for respondent :—Section 31, Cl. (4), ought to be restricted to such a person as notice has been served upon. Complicated issues may arise and the court will be launched upon a regular trial. [*Sundara Aiyar* J.—The section says that he shall record the statement and not necessarily finally decide.] Is a man who has not the remotest connection with the minor to be heard? May be, he comes in merely for the purpose of obstruction? [*Sundara Aiyar* J.—We are not deciding that]. A restricted and a reasonable construction ought to be put upon the clause. [*Abdur Rahim* J.—Why should not the court hear to prevent the action of possibly evil-minded relations or friends ?]

The Court delivered the following

JUDGMENT :—Both the parties requested us to dispose of the petitions along with C.M.P. No. 866 of 1911. The petitioner, who alleges that the guardian of the minor Zemindar of Gundamanaikanur entered into a contract with him to grant a prospecting and mining lease of the zemindary, applied to the District Judge of Madura to be heard in the application made by the guardian of the zemindar under S. 31 of the Guardian and Wards Act for an order sanctioning a lease to be granted by the guardian to another person. The learned Judge refused to hear him, holding that the petitioner, not being a relative or friend of the minor, was not entitled to be heard. We think this is a wrong view of Sub-section (4) of S. 31 of the Act. It says : "Before granting permission to a guardian to do an act mentioned in S. 29 the court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof and shall hear and record the statement of any person who appears in opposition to the application." Mr. Rungachari who appears on behalf of the guardian contends that " any person " in the last part of the sub-section must mean a friend or relative, but the language does not require such a narrow construction. The Legislature appears to have purposely used language wide enough to cover an application by persons other than relatives or friends of the minor, and in this view we are fortified by the provisions of S. 43

which enables the court to entertain the application of any person interested to obtain an order regulating the conduct or proceedings of a guardian. The petitioner before us was in our opinion, entitled to be heard, and we must therefore set aside the order of the District Judge, dated the 31st March 1911, and direct him to dispose of the petition of the guardian, Original Petition No. 475 of 1911, after hearing the petitioner in so far as it relates to the sanctioning of the lease.

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The petitioner will have costs of this application, to be paid out of the estate.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Sri Sri Venkatramadas, Maharaja of Jeypore .. Petitioner* (*Plaintiff*)

v.

Raghunatha Patro and others .. Respondents (*Defendants*).

Ganjam and Vizagapatam Agency Rules—Rules 20 *and* 18—*Petition against order under Rule* 18.

Venkatramadas v. Raghunatha Patro.

A petition lies to the High Court under Rule 20 from an order of the Agent under Rule 18 summarily dismissing an appeal.

[*Jagannadha* v. *Godanna*[1] dissented from.]

Application under Rule 20 of the Ganjam and Vizagapatam Agency Rules to direct the Agent to the Governor, at Vizagapatam, to review his order dated 17th September 1909 in the appeal preferred to him against the decree in O. S. No. 20 of 1908 on the file of the Special Assistant Agent, Kosapet Division.

The appeal arose out of a suit for declaration under S. 283 of the old Civil Procedure Code. The decree-holder was the plaintiff-(petitioner.) He obtained a decree for money against the father of the first and second respondents. In execution of that decree he attached a mango tope belonging to the judgment-debtor. The third respondent herein put in a claim petition alleging that the tope was gifted away to a temple of which he was the trustee. The claim was allowed and the attachment raised. Now the decree-holder brought the present suit for a declaration that the

* C. M. P. 2,479 of 1909. 14th August 1911.

1. (1892) I. L. R. 16 M. 229.

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mango tope was never gifted away by the judgment-debtor and that it was still in the possession and enjoyment of the respondents 1 and 2. The 1st court dismissed the suit on the ground that the previous order was passed under S. 244 of the C.P.C. and that the present suit was not maintainable, and on appeal the Agent to the Governor at Vizagapatam summarily dismissed the appeal under Rule 18 and refused to issue notice to the respondent. The plaintiff put in this C.M.P. under Rule 20 for an order directing the Agent to review his own order.

C. R. Thiruvenkatachariar for appellant.

B. Narasimha Rao for respondents.

B. Narasimha Rao raised a preliminary objection that the petition does not lie to the High Court, and relied on *Jagannadha* v. *Godanna*[1] in support of his objection.

C. R. Thiruvenkatachariar, on the merits, contended that S.244 does not apply to the Agency Tracts and the lower courts were wrong in dismissing the suit under that section.

The Court made the following

ORDER :—We do not think there is force in the preliminary objection that no petition lies to the High Court under Rule 20 of the Ganjam and Vizagapatam Agency Rules on the ground that the Agent has acted under Rule 18. In this contention the learned pleader for the respondent is no doubt supported by *Jagannadha* v. *Godanna*[1], but, with all respect to the learned Judges who decided that case, we are unable to accept that decision as correct. They give no reasons. Rule 18 only says that the Agent may summarily dismiss an appeal without issuing notice to the respondent. But such an order of dismissal as it disposes of the suits of the parties, would be a decree and Rule 20 says that the High Court, in a proper case, may direct the Agent to review his judgment. We hold we have jurisdiction to entertain this petition.

The Agent does not give any reasons in support of the order of dismissal. But the Special Assistant Agent who originally heard the suit dismissed it on the ground that S.244 of the C.P.C. of 1882 was a bar to the plaintiff's claim. The section itself is not in force in this Agency. But supposing that the principle of that section could be applied, which we do not decide, the 3rd

1. (1892) I. L. R. 16 M. 229.

defendant whose claim was upheld in execution proceedings was not a party to the suit, and therefore he could not invoke the principle of that section as a bar to the plaintiff's suit.

Venkatramadas v. Raghunatha Patro.

We set aside the orderof the Agent and direct him to review his judgment in the light of the above observation.

Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Vidyapurna Thirthaswami & another	..	Appellants * in S.A. No. 1309 of 1910 *(2nd & 3rd Defendants)*
Sitamma	..	Appellant in S. A. No. 1310 of 1910 *(1st Defendant)*
v.		
Subraya & another	..	Respondents in both *(Plaintiffs).*

Sitamma v. Subraya.

C. P. C., (1882) S. 396—*Commission to examine witnesses — Party's right to.*

A party to a suit has a right to the issue of a commission to examine a witness beyond the prescribed distance, apart from the question whether he would be ultimately benefited by it.

Second appeals from the decree of the Temporary Subordinate Judge's Court of South Canara in A. S. Nos. 420 and 421 of 1908 presented against the decree of the Court of the District Munsif of Karkal in O. S. No. 171 of 1907.

The facts of the case are these :—

The plaintiffs as reversioners to the late Madhwaraya sued to recover from the defendants possession of the plaint-mentioned immoveable properties held by them as alienees from his widow Satyabhama together with Rs. 235-15-0 on account of the arrears of mesne profits from 31st January 1904 to 30th April 1906 and subsequent mesne profits at the plaint rate from 1st May 1906 till delivery.

They further alleged that the plaint mentioned ancestral property of their family was allotted to the share of the said Madhwaraya in the partition effected between him and their

* S. A. No. 1309 & 1310 of 1910. 11th August, 1911

Sitamma v. Subraya.

(plaintiff's) father Ramappayya; that Madhwaraya died issueless on or about the year 1874; leaving him surviving his widow Satyabhama on whom the plaint property devolved; that she herself died on or about January 1904 and that the plaintiffs were entitled to the property as the nearest reversioners to Madhwaraya. Satyabhama admittedly died in Travancore and the defendants were not personally aware as to the exact date of her death and as to who all knew of her death. The 2nd defendant applied for the examination of certain very respectable persons of Travancore State on commission. Though the suit had been posted for 15th July 1908, the court of first instance refused to send out the commission on 30th May 1908. Objection was taken that the exclusion of the important evidence of these witnesses had greatly prejudiced the appellants and they prayed that they might be ordered to be examined. Hence the appeal.

B. Sitarama Rao for appellants.

K. Y. Adiga for respondents.

B. Sitarama Rao, for appellant:—The case for the defence had not been closed at the time the application was made. The party has a right to the issue of a commission for examination of witnesses. It is in the discretion of the court to adjourn so as to enable the party to enjoy the benefit of the commission. In this case there was ample time. The case had been posted to a date more than a month after the application for the issue of the commission.—*Hureedass Bysack* v. *Meer Moazzum Hossein*[1]; *Bhagwat Das* v. *Debi Din.*[2]

K. Y. Adiga, for respondents, contended that it was a matter of discretion.

The Court delivered the following

JUDGMENT:—We think that the District Munsif was wrong in refusing to issue a commission for the examination of certain witnesses named in the 2nd defendant's petition dated 25th May 1908.

The defendants were entitled as of right to the issue of commission apart from the question whether they would have ultimately benefited by it. It would be at their own risk that the commission would be issued. See *Huree Dass Bysack* v. *Meer Moazzum Hossein*[1]. But it appears that there was in fact sufficient time for the return of the commission before the next date

1. (1871) 15 W. R. 447.

2. (1894) I. L. R. 16 A. 218.

of hearing. We set aside the judgment of the appellate court and direct that commission be issued by the appellate court as prayed for by the defendants. The appellate court will dispose of the appeal after consideration of that evidence and the other evidence already on record. Sitamma v. Subraya.

We may mention that it is admitted by the learned pleaders on both sides that the only question for disposal is that relating to the plea of limitation. Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

Angammall .. Appellant*

v.

Malic Mahomed Saeed Aslami Sahib .. Respondent.

Angammal v. Aslami Sahib.

Landlord and tenant—Compensation for building on ejectment—T. P. A., S. 108 *(h)—Right to removal of superstructure or compensation after expiration of tenancy.*

Plaintiff took a lease about twenty years before suit of a site in the City of Madras from defendant's predecessor in title. Ten years thereafter plaintiff erected a building thereon to the knowledge of the defendant's predecessor. In the next year, defendant bought the land and the plaintiff attorned to him to hold the site at a certain rent, to quit at one month's notice removing the superstructure.

Held :—Per *Chief Justice* (agreeing with *Wallis* J).—That the plaintiff tenant was entitled neither to the removal of the superstructure nor to compensation after the expiry of the tenancy.

Per *Sankaran Nair* J.—S. 108 *(h)*, T. P. A., is only an enabling section. It does not take away rights pre-existing by virtue of the common law or the usage of the country.

Where a brick building is constructed with the consent of the owner, an agreement to pay compensation to the tenant should be implied. He is equally entitled to remove it after the termination of the tenancy.

Held also on the facts of the case that the building was on the site before the lease, that the plaintiff was holding only the site as tenant and the house as owner; and that the defendant landlord could not recover the house which was not let by him and which was not subsequently attached to the ground; and that if the landlord wanted the building he should pay for it.

On appeal from the judgment of Mr. Justice *Wallis* dated 6th January 1910, in C. S. No. 16 of 1908, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

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* O. S. A. No. 7 of 1910. 11th April 1911.

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The facts appear from the judgment of *Wallis* J. which was as follows :—

JUDGMENT :—*Wallis*, J.—This is a suit by the plaintiff to recover possession of a certain house, or, in the alternative, to be paid compensation for it, or, if that is not granted, that she may be declared to be entitled to remove the superstructure.

The facts are that in about 1883 the plaintiff's husband took this site on lease from the predecessor-in-title of the 1st defendant at a rental of Rs. 1-8-3 a month, and that, as it appears subsequently, some addition was made to the site so taken and it appears that upon this site a building was erected.

The story told by the plaintiff's husband in the box was that the whole of this building was erected in less than a year. But the 1st defendant in the box stated that the upper story was only added after he had become the purchaser of the house some years later, and this statement was not cross-examined and was apparently accepted as being an accurate statement of the facts.

Now I will deal with the facts before coming to the law. The plaintiff's vakil sought to adduce evidence that there was a custom in this part of Madras which would support his case. But since such custom is not set up in the plaint, I declined to admit any evidence of it.

Then her 1st witness gave evidence that while he was erecting this building, the original lessor and the predecessor of the first defendant, one Mahomed Hassan, who ordinarily resided at Hyderabad, was present in Madras and saw the building erected and suggested that a portion of it should be made 16 feet wide instead of 8 feet, which he said was too narrow for a shop. So far as Mahomed Hassan, the original lessor, is concerned, this is the sole evidence upon which it is endeavoured to build an estoppel against the 1st defendant. I do not consider that, even if true, this evidence is sufficient. Further, I do not consider that a statement of this sort by an interested witness, which is utterly uncorroborated, could be safely acted on, even if it was sufficient in law.

Then Mr. Naraina Row relies upon the admission of the 1st defendant, that after he had purchased the building, he was aware that this superstructure was being put on, in fact that he

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had rendered himself liable for the rent of the additional building. It is a quite clear that the 1st defendant did know that the building was being so enlarged. But beyond that there is no evidence that he did anything which would give the plaintiff any equitable rights against him or derogate from his own rights.

The subject of the rights, in India, of a tenant who erects buildings on the land leased to him is dealt with in a very careful and exhaustive judgment of Sir *Bhashyam Aiyangar* in *Ismai Kani Rowthan* v. *Nazarali Sahib*[1]. And in that case the learned Judge points out that, both under the Hindu law and the Muhammadan law and the common law of India before the Transfer of Property Act, a tenant had a right to erect buildings and to remove these buildings during the continuance of the lease; and that was his common law right, and that is the right which is recognized in S. 108 (*h*) of the Transfer of Property Act. The learned Judge cites the decision of the Privy Council in *Beni Ram* v. *Kundan Lal*[2] in which their Lordships laid down that in order to raise the equitable estoppel it was incumbent upon the parties to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation. Now there is absolutely no evidence in this case, in my opinion, upon which it could be legally inferred by plain implication that either the 1st defendant or his predecessor ever contracted that the right which lessees had under their original agreement should be changed into a perpetual right of occupation. On the contrary, we have evidence, Exhibit I, which was a rental agreement executed by the plaintiff herself in 1898, in favour of the present 1st defendant. But the document was attested by the husband of the plaintiff. There is no evidence to contradict it. And the only inference is that they fully knew what they were doing. And it is not to be assumed, in the absence of any evidence to the contrary, that they were unaware of the contents of the rental agreement which they were signing. Nor is it alleged in the pleadings, where this rental agreement is referred to, that the plaintiff and her husband

1. (1903) 27 M. at p. 211, 2. (1898) 21 A. p. 496.

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were unaware of its terms. Therefore I have come to the conclusion that the plaintiff has altogether failed to make out any rights, such as she claims either to the possession of the premises or to receive compensation for the buildings which she erected upon them. She must be taken to have erected those buildings under the right which the law gives her, *viz.*, the right to remove those buildings when her tenancy was determined.

There is, however, another point in the case. The plaintiff, after proceedings which lasted some time, was eventually evicted from the premises on February 26th, 1907. On the 1st August following, the 1st defendant gave her notice to remove the superstructure within a fortnight. She did not do so, and he let the premises about 12th October to a Mr. Young. Then on the 29th October the plaintiff through her vakil wrote and claimed a right to remove the superstructure, and the 1st defendant in his reply stated that she had lost that right.

Now, I have to decide this according to the terms of the statute law on the question : and the terms of S. 108 (*h*) of the Transfer of Property Act are that the "lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth; provided he leaves the property in the state in which he received it." It is this section which has been found to be applicable to the case *Ismai Kani Rowthan* v. *Nazarali Sahib*[1]. The right to remove the superstructure under this section is distinctly confined to any time during the continuance of the lease and I have not been referred to any authority to the contrary. And in my opinion, the right of the lessee is so limited and he cannot legally claim at any subsequent time to remove the superstructure. It is true that, in the present case, the 1st defendant as a matter of grace allowed her a fortnight from the 1st August to remove the superstructure.

She failed to take advantage of that concession. I find therefore, that the plaintiff has no right to remove the superstructure after the determination of the lease. On the determination of the lease her duty is to put the lessor in possession of the property. And it would require some express words of the Statute to authorise a lessee, after he has given up possession, for interfering further in any way with the premises. I hold that the

1. (1903) I.L.R. 27 M. 211.

plaintiff fails on this part of the case also and that the suit must be dismissed with costs. Angammall v. Aslami Sahib.

[From this judgment, the plaintiff preferred an appeal.—ED.]

K. Narayana Row for appellant.

C. Vencatasubbaramayya for respondent.

K. Narayana Row :—If land is let to a tenant and he builds thereon to the knowledge of the owner who does not protest, then the tenant cannot be ejected, whatever might have been the tenure before—*Dattatvija Rayaji Pai* v. *Stridhan*[1]; *Promatha Nath Roy* v. *Srigobind*[2]; *Kunhamed* v. *Narayan*[3]; *Mahalatchmi Ammal* v. *Palani Chetti*[4]. I submit *Ismai Kani Rowthan* v. *Nazarali Sahib* [5] is not correct so far as it departs from *Mahalatchmi Ammal* v. *Palani Chetti*[4]. I rely also on S. A. 835 of 1906 for raising a presumption of permanent tenancy under such circumstances. The learned judge further has held that if such tenant does not remove the superstructure or improvements during the term of the tenancy his right to remove is afterwards lost. This is wrong, for apart from this right given by S. 108, Cl. (*h*), of the Transfer of Property Act, the tenant has got a Common Law right of removing them—*In re Thakoorchand Paramanik*[6]—for they belonged to the tenant before the expiry of the term, and so long as it is not extinguished by adverse ossession, etc., the right remains. Section 108, Cl. (*h*), does not create a right for the first time ; it simply recognises a right already existing. The reason of the rule laid down by S. 108, Cl. (*h*), is that the tenant cannot have a right of ingress into the premises, and that is why I want the assistance of the court. *Ismai Kani Rowthen's case*[5] is cautious and leaves the question open. A. S. 174 of 1905 reported in 1910 M.W.N. 369 says that the observations in this last case are *obiter*.

C. Venkatasubbaramayya :—[*Court.*—We do not want to trouble you on the questions of compensation and right to possession.] No compensation can be given, for the rights of the parties are to be governed by the contract of letting which never contemplated any buildings to be erected—*Ismai Kani Rowthan* v. *Nazarali Shaib.* [5] Moreover the superstructure is the property of the

1. (1892) I.L.R. 17 B. 736.
2. (1905) I.L.R. 32 C. 648.
3. (1888) I.L.R. 12 M. 320.
4. (1871) 6 M.H.C.R. 245.
5. (1903) I.L.R. 27 M. 211.
6. (1866) B.L.R. Sup. Vol. F.B.R. 595-597, 598.

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tenant only during the tenancy. [*Sankaran Nair* J.—Why not after the tenancy also? Do not *In re Thakoorchand Parmanick* [1] and *Ismai Kani Rowthan* v. *Nazarali Sahib*[2] say that there is an option on the part of the lessor to buy the building? That could be only after the tenancy ceases. During the continuance of the tenancy the landlord has no right or option.] Even the option is only during the tenancy. The legislature in S. 108, Cl. (*h*), gave the tenant the right which he had not before. The rights which lessor and lessee can claim after the Transfer of Property Act could be only those provided by the Act. Moreover, if there is any right to superstructure that should have been pleaded before the lessee was ordered by the Small Cause Court to be ejected. Even if there is a right in the tenant after the tenancy ceases to the superstructure, and the lessor has the option of buying or asking the tenant to remove it, I submit the tenant has lost all his rights as I exercised my right in that I asked the tenant to remove the superstructure in two weeks and that he refused. [*Chief Justice.*—Shephard's Notes to S. 108, Cl. (*h*), say that the section does not recognise any such right but that such right may be found in the contract or in local usage.] [*S. Nair* J.—If a right existed before the Act then how is that taken away except by express legislation?] By implication in S. 108, Cl. (*h*). To recognise such a right would work great hardship on the landlord who might have entered into possession. [What is the practice in cases in which the landlord wants to eject the tenants through ordinary courts?] To pray that the tenant be ejected and to request the court to give the tenant a reasonable time to remove his things. In this case plaintiff was negligent throughout. [*Court.*—You may be entitled to costs.] The damages which my client has been put to he must get before the tenant gets possession of the superstructure. [*C.J.*—When your predecessor let the land there was no building on it, but when you bought it there was a building and the tenant executed a rental agreement with you agreeing to quit on a month's notice.. So do you say that you are in a better position than your precedessor?] Yes. [*S. Nair* J.—But that rental agreement recognises the superstructure as the tenant's.]

1. (1866) B.L.R. Sup. Vol. F.B.R. 595, 597, 598.
2. (1903) I.L.R. 27 M. 211, 214.

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Even before the Transfer of Property Act the ancient Hindu law or Mahomedan law did not give the tenant any right to remove or demand compensation after tenancy—*Ismai Kani Rowthan* v. *Nazarali Sahib* [1]— a decision which examined the ancient texts on the subject. Moreover, the procedure of S. 47 of Presidency Small Cause Court Act was not adopted by the tenant and that is his only remedy. [*S. Nair.*—Refer to S. 49 of Presidency Small Cause Court Act.] I rely upon S. 94 of that Act which says that no suit shall be brought to reopen the proceedings in the Small Cause Court. In *Ismai Kani Rowthan* v. *Nazarali Sahib* [1] and *In re Thakoorchand Parmanick*[2] there was no prior decree for ejectment of a Presidency Small Cause Court. *Ram Barani Ram* v. *Salig Ram Singh* [3] decides that the tenant has no right to remove after the tenancy ceases. This is strengthened by Cl. (i) of S. 108. *In re Thakoorchand Parmanick*[2] does not apply to a case of landlord and tenant. My contention is further strengthened by the clause in the rental agreement that the landlord might sell the superstructure in case there is arrear of rent. A code is exhaustive as to the matters it deals with—*Gokul Mandar* v. *Pudmanund Singh.*[4] Compensation was not allowed in *Juggut Mohinee Dossee* v. *Dwarkanath Bysack.*[5] The decision of the Bengal Full Bench is not inconsistent with anything in the Contract Act or the Transfer of Property Act—*Russooklall* v. *Lokenauth* [6]. I rely also on the cases quoted in *Ismai Kani Rowthan* v. *Nazarali Sahib*[1].

[*K. Narayana Row.*—In *Ismai Kani Rowthan* v. *Nazarali Sahib*[1] at p. 213, it is stated that the landlord did not contend that the tenant cannot remove after the expiry of the tenancy.]

K. Narayana Row, in reply :—Compensation is allowed in English Law—Woodfall, 16th Edn., p. 861.

The Court delivered the following

JUDGMENTS:—*The Chief Justice* :—I think *Wallis*, J., was right. The facts are stated in his judgment. I need not repeat them.

I am not satisfied that Sir *Barnes Peacock*, in the passage in his judgment in *In the matter of the petition of Thakoorchand*

1. (1903) I.L.R. 27 M. 211 at 214, 215, 217.
2. (1866) B.L.R. F.B. Sup. Vol., 595.
3. (1880) I.L.R. 2 A. 896.
4. (1902) 29 C. 707, 715 (P.C.)
5. (1882) I.L.R. 8 C. 582.
6. (1880) I.L.R. 5 C. 686, 692.

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Parmanick[1], which is cited in *Ismai Kani Rowthan* v. *Nazarali Sahib*[2], intended to lay down that, in cases where the builder did not remove material before the expiry of his lease, the option in the owner of the soil to take the building was an option which he could only exercise subject to the payment of compensation to the builder. There is a passage on page 217 of Sir *Bhashyam Iyengar's* judgment in *Ismai Kani Rowthan* v. *Nazarali Sahib*[2]: "According to the customary or common law of the land, as laid down in *In the matter of petition of Thakoorchand Parmanick*[1], the option in such cases will be with the lessor either to take the building on paying compensation, or, if he is unwilling to pay compensation, to allow the tenant to remove the building etc.," which would seem to suggest that, at common law, the lessor's right to take the building, where it had not been pulled down during the continuance of the tenancy was subject to the lessee's right to compensation. This proposition, however, seems inconsistent with the statement of the law on page 216: "Thus both under the Hindu and the Mahammadan law—and it may here be observed that the parties to the present suit are Mahamadans —and the common law of the land (as laid down by the Full Bench of the Calcutta High Court in *In the matter of the petition of Thakoorchand Parmanick*)[1], a tenant who erects a building on land let to him can only remove the same and not claim compensation for it on eviction by the landlord. When the Transfer of Property Act was enacted, this rule was adopted by the legislature in section 108 (*h*)" and also with the statement on page 217: "The rules laid down by the Transfer of Property Act thus substantially reproduce the law as it stood before the Act."

But assuming that at common law the lessor's right to take the building, after the expiration of the tenancy, was subject to the lessee's right to compensation, the law was altered by S. 108 (*h*) of the Transfer of Property Act. In his work on the "Law of Transfer in British India" Mr. Gour observe (paragraph 2166):—"Formerly in cases decided before the Act, the lessee was held to be entitled to either the removal of his fixtures, or to compensation, the latter being usually awarded at

1. (1856) B.L.R. Sup. F.B.R. 595 at p. 597.

2. (1903) I.L.R. 27 M. p. 211, at p. 214.

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the instance of the outgoing tenant in cases where the removal of materials would have materially prejudiced him. Under the terms of the clause, however, the tenant is no longer entitled to the alternative relief. He must remove or forego the materials which he is entitled to, unless he can establish local usage, or make out a case of estoppel against the landlord."

In Shephard and Brown's "Commentaries on the Indian Transfer of Property Act"—page 441, Seventh Edition—the learned authors observe: "A claim to remove fixtures after the expiration of the lease may be founded on contract or local usage. The section does not recognize it or the alternative right of compensation which was recognized in certain cases decided be fore the Act came into force."

The nature of the estoppel referred to by Mr. Gour is thus described by Lord *Watson* in *Beni Ram* v. *Kundan Lal*[1].

"In order to raise the equitable estoppel which was enforced against the appellants by both the appellate courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation."

I agree with *Wallis* J. that the evidence in this case is not sufficient to establish an estoppel. But, apart from this evidence, in the rental agreement of 1st May 1898, an agreement entered into after the erection of the building, there was an express stipulation that the plaintiff might be evicted on one month's notice. In the face of this, I do not see how the lessee can rely on any plea of equitable estoppel as an answer to the claim in ejectment.

In my opinion, on the facts of this case, the position of the lessee is not improved as regards any right to compensation or to remove the building after the termination of the tenancy, on the fact that the house had been built by the plaintiff before the rental agreement of 1898 was entered into.

1. (1898) I.L.R. 21 A. p. 496 (P.C.) on p. 502.

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I also agree with *Wallis* J. that the rights of the defendant are not affected by the fact that he gave the plaintiff an opportunity of removing the building after the expiration of the lease —an opportunity of which the plaintiff did not take advantage. It is to be observed that the equity discussed in *Ramsden* v. *Dyson*[1], and *Beni Ram* v. *Kundan Lal*[2], was not an equity givng a right to compensation, but an equity giving a larger right of possession than that created by the lease, and it may be that the true view is, as I suggested in my judgment in Appeals Nos. 197 and 174 of 1905, that unless the lessor is estopped from suing for possession no question of compensation arises, but that if the lessor is estopped the court can say—"you are estopped but we will not enforce this equity against you if you pay the lessee compensation."

I would dismiss this appeal with costs.

Sankaran Nair, J.:—The plaintiff brings this suit for a declaration that she is the owner and for possession of a house mentioned in the plaint; or in the alternative to be paid compensation for it; or, if that prayer is not granted, to be allowed to remove the superstructure. The plaintiff's husband took the house on lease from the predecessor-in-title of the 1st defendant in 1883. That lease was renewed by the 1st defendant in 1898. While in possession under that lease, the 1st defendant filed an ejectment suit, No. 146 of 1906 on the file of the Small Cause Court, Madras, and, though she set up the claim now advanced, she was ordered, without the determination of the rights set up by her, to deliver possession of the land on or before the 26th of February 1907, and, on her failure to do so, the defendant was put in possession on that date. The plaint states that the plaintiff erected a house which is stated to be of the value of Rs. 5,000 soon after she obtained the lease of 1883, and therefore the defendant is not now entitled to turn her out of the house. *Wallis* J. held that the rights of the parties are governed by Exhibit II, the lease of 1898, which creates only a monthly tenancy and that the evidence only shows that the house was erected with the knowledge of the defendant, and without any protest from him and this is not enough to create an estoppel

1. (1865) L.R. 1 E. and I.A. (H.L.) 129. 2. (1898) I.L.R. 21 A. 496.

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against the defendant's claim to recover, according to the law as declared by the Judicial Committee in *Beni Ram* v. *Kundan Lal*[1], which followed *Ramsden* v. *Dyson*[2]. I may state at once that, though there is some evidence to the contrary, I agree with *Wallis* J. in his appreciation of the evidence and his decision on this point.

The facts necessary for the determination of the other questions are practically admitted. Exhibit II is the lease of the year 1898. It recites that the plaintiff has been holding the land under a prior lease at a certain rent and the plaintiff therein agrees to pay a higher *ground* rent for the future. Then it states that if the lessee commits default in payment the owners "should remove the superstructure of me the deponent (the lessee) from the land belonging to them and recover the ground rent by putting up the aforesaid superstructure at auction." Then there is a further stipulation that the lessee shall not alienate the superstructure without the consent and knowledge of the owners, and if she demolishes the superstructure and carries away the materials she "shall leave mud walls existing on the said land of the aforesaid owners."

Thus the following facts are clear from this lease ; that in 1898 when the lease was renewed the rent was claimed only for the ground, not for the building which had been already erected. It was treated as the absolute property of the plaintiff (tenant) and a charge was created on it for any rent that may remain due to the owner. The right of voluntary alienation was recognised subject to the owner's consent. The right of carrying away the materials was also recognised. Whether this last stipulation was confined to the period of the lease or not it is not stated. From the nature of the lease, the fact that the structural alterations admittedly were made with the knowledge of the defendant, and the terms of the lease, it is clear that the building must have been constructed with the defendant's consent, otherwise his ownership would not have been recognised. But that is immaterial as the lease, Exhibit II, admits that the house continued to be the property of the plaintiff and the ground alone was let. It is also admitted that the plaintiff was given

1. (1898) I.L.R. 21 A. 496. 2. (1865) L.R.I.E. and I.A. (H.L.) p. 129.

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time after the determination of the tenancy and after decree to remove the superstructure.

Wallis J. held, following as he was bound to do the decision of Mr. Justice *Bhashyam Aiyangar*, concurred in by Mr. Justice *Moore* in *Ismai Kani Rowthen* v. *Nazarali Sahib*,[1] that under the common law of India a tenant has only a right to erect buildings and remove them during the continuance of the lease ; that he is not entitled to any compensation for his improvements or to remove them after the determination of the tenancy ; and that it is only that right which is now recognised in S. 108, Cl. (*h*), of the Transfer of Property Act; and, as the right to remove the buildings is thus restricted to the duration of the lease, the plaintiff cannot claim to remove the superstructure afterwards. He therefore disallowed her claim to compensation or to remove the superstructure. The question whether the ownership of the plaintiff in the house and the consent of the defendant to the erection of the building would make any difference is not dealt with in the judgment.

There are one or two passages in the judgment of Mr. Justice *Bhashyam Aiyangar*, which may make one hesitate to accept the above statement of the law as his final conclusion. But on the whole I think that *Wallis* J. is right in the view he took of that judgment.

A decision that a tenant is bound to remove any building that he may have erected on the land during the continuance of the lease and that if he fails to remove it within that time he is not entitled either to compensation or to remove them afterwards, is, in my opinion, so entirely opposed to the usage in this presidency and so disastrous in its results, that I am not prepared to follow that view without a further and more careful consideration of the question than it seems to have received in that judgment. If the Transfer of Property Act declares the law to that effect, no other question remains for consideration. The section 108 (*h*) itself, however, only enables a tenant to remove his building during the term of the tenancy. But it is contended that it thereby impliedly negatives the right to receive any compensation or to remove the same afterwards. It is true that

1. (1903) I. L. R. 27 M. 211.

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the Act does not confer this right on the tenant. But if he had that right before, as I shall show later, the Act does not, in my opinion, take it away.

Under the Muhammadan law, as the Judicial Committee pointed out in *The Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling and Co.*[1]: "if a person usurp land and erect a building he must be directed to clear the land and restore, and an option is given to the landlord to purchase it because in that case there is an advantage to both and the injury to both is obviated. It is quite clear from the fact that the usurper is given a right of removal, such right is quite independent of any tenancy, and after the tenancy has expired the building may be removed by a person who has ceased to be a tenant."

The Hindu law also is not against the tenant's right in this respect. The Hindu law texts that are always referred to with reference to the question are Narada Smrithi, (Chapter VI), Slokas 20 and 21:

"If a man has built a house on the ground of a stranger and lives in it, paying *rent* for it, he may take with him, when he leaves the house, the thatch, the timber, the bricks, and other (building materials.)"

"But if he has been residing on the ground of a stranger, without paying rent and against that man's wish, he shall by no means take with him, on leaving it, the thatch and the timber."

These slokas have been quoted in various Sanskrit works as laying down the law. When a person lives on another's land without paying rent, the reason for the delivery of the materials to the owner of the ground is stated to be that it is to be regarded as a compensation for the ground having been used without authorization from the owner. See Sacred Books of the East, Vol. 33, p. 143, footnote. It is clear, therefore, that in any event, even in the case of a trespasser who builds a house, it is to be treated as the property of the man who built it.

I will now refer to the law as declared in Southern India. As the cases refer not only to the claim to remove the buildings after the tenancy but also to the right to receive compensation, both the

1. (1900) I.L.R. 26 B. p 1.

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questions will be dealt with together. It is still the law of the Laccadive Islands that the person who plants the trees is the owner thereof, though they are planted on another's land. In Malabar, it is well known that not only tenants but even others who are in possession of the property, except by criminal trespass, get the value of their improvements. There has never been at any time any doubt entertained on this matter. In South Canara, in S. A. No. 742 of 1894, a question was raised whether a usufructuary mortgagee was entitled to the value of his improvements, and after evidence was taken on custom, the High Court (*Subrahmanya Aiyar* and *Davies*, JJ.) held that the mortgagees are entitled to it and they added: "By improvements we understand any work beneficial to the property, or in other words to which a reasonable owner would have consented." In all these cases from South Canara, so far as I am aware, and from Malabar, before the recent legislation on the question, whenever buildings had to be removed by the tenants on account of their unsuitability to the holding, and therefore not being improvements, the tenants were allowed to do so after the decree, *i. e.*, after the determination of the tenancy and a time was always fixed by the decree within which they had to be removed. The first reported case dealing with the claim for improvements elsewhere that I am aware of is the decision in *Appa Pillai* v. *Gopalaswami Reddi*[1]. The Sudder Court consisting of three Judges laid down the law in these terms:—"It appears that the 1st defendant's family have been in occupation of the land in issue for three generations, and have constructed on it substantial buildings, tiled and terraced. The court are of opinion that in exercising his right to eject the plaintiff is bound to afford the 1st defendant compensation for these buildings, which he has thus suffered him to construct and occupy." They accordingly directed the plaintiff to pay the defendant the value of the buildings as estimated at the time that possession may be given. The right to remove the building even after the suit was *not* denied and the lower court allowed the defendant to remove them. It will be observed that the right to compensation is rested on the fact that the buildings were raised with the implied consent of the plaintiff (landlord), long possession being an element in the consideration of the question

1. (1860) S. A. No. 186 of 1859. p. 41 Sudder Reports.

and not upon the nature of the particular tenancy. In the case of *Mahalakshmi Ammal* v. *Palani Chetty*[1], the plaintiff, the landlord, in seeking to recover possession of property let to the tenant prayed not that he might recover the lands *with* the buildings thereon constructed by the tenant but that the tenant might be directed to *remove* the buildings. There was a decree by the Munsif directing the removal of the building. On appeal that decree was modified by the Principal Sudder Amin directing the payment of compensation to the defendant. On second appeal this decree was confirmed by Mr. Justice *Holloway*, on the ground that where eviction is not in the contemplation of parties and the improvement is permanent, precedents are in favour of allowing compensation. Mr. Justice *Innes*, also on the ground that such should be presumed to have been the intention of the parties, and the fact that the construction of the house was contemplated by the agreement itself, supported the view. It will be observed that this was also the reason assigned by the Sudder Court Judges. Mr. Justice *Innes* further observed that if this were not so all that the tenant could do was to pull his house to pieces and remove the materials which would not of course realize anything like the value of the building. It seems to me the principle deducible from these cases is that when permission is given to construct the permanent building in question, such consent being deducible from the terms of the instrument, the duration of the tenancy then in the contemplation of the parties, and the purpose of the letting, the court will imply an agreement between the parties. In S. A. No. 452 of 1870 the law was thus laid down :—" It is certainly the customary law of Malabar, and we are disposed from a number of precedents to believe it to be that of Canara also, that the evicting landlord shall pay the value of the permanent improvements to the tenant." In the case of *Blake* v. *Savundrathammal*,[2] the facts were these :— The lands belonged to the Society for the Propagation of the Gospel and they were originally held under them by a Kasavargam tenant. It was contended that the defendant was not entitled to compensation as he was a purchaser of a defendant's right only on 25th June 1885 the date the tenancy was put an end to. But this contention was disalowed and his claim for compensation

1. (1871) 6 M. H. C. R. p. 245. 2. (1898) I. L. R. 22 M. 116.

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was allowed. In dealing with the tenant's right to compensation, it was pointed out by the High Court that the Kasavargam tenant has a proprietary right to his house and referred to the Sudder Court's ruling above cited to suoport his right for the value of the improvements. The ownership of the tenant in the house built is the reason assigned for awarding compensation. It is remarkable that there was no prayer for the recovery of possession of the land *and building* but the plaintiffs claimed a decree for possession of the site only and a direction to the defendants *to remove* the buildings : and the purchase by the defendant on the determination of the tenancy was only advanced as a reason for not giving compensation but not for denying the defendant's claim to remove the building.

The next decision that may be referred to is the one which overrules *Mahalakshmi Ammal* v. *Palani Chetty*[1]. There also the land was leased for constructing a building. There also the suit was for possession "*after removal* of the buildings erected thereon by the defendants." The decrees of the lower courts allowed defendant one month to remove the building and surrender possession. The defendants claimed compensation for them in second appeal. It was conceded that the case is governed by the rule of justice, equity and good conscience. It was held that under the Hindu Law as well as the Mahammadan Law the right of the tenant is the same as that adopted in S. 108 (*h*). The decision in *Mahalakshmi Ammal* v. *Palani Chetti*[1] was dissented from, and, as the plaintiff did not claim that the defendant cannot be allowed to remove the building after the determination of the tenancy, the decree was allowed to stand and compensation to the defendant for the buildings was refused. I have already pointed out that, in the series of cases before this decision, the only question was whether the tenant was not entitled to claim compensation, and there was no doubt at any time entertained about his right to remove the buildings for which a time was generally fixed in the decree itself. This implies, of course, that the tenant has the right to remove the buildings after the determination of the tenancy as the suit in ejectment will only be after such determination. In another case which was heard at the same time (*Lakshmana Padayachi* v. *Ramanathan Chettiar*[2]) the landlord prayed for a decree for possession

1. (1871) 6 M. H. C. R. 245. 2. (1903) I. L. R. 27 M. 517.

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against Purakudis, agricultural tenants, *after* the removal of the building. Even after that decision the practice was the same. The landlords only prayed that the defendants may be directed to remove the buildings, not that they might recover the land with them. In certain second appeals which came before this court after the present case was argued, the prayer of the landlords was only to recover the sites from the defendants—Purakudis, etc., agricultural tenants—after the removal of the superstructures thereon. (See S. A. Nos. 558 of 1909, 858 of 1909, 696 and 697 of 1908). The ruling therefore in *Ismai Kani Rowthan* v. *Nazarali Sahib*, [1] that a tenant is bound to remove the materials during the continuance of the tenancy, seems to be opposed to the rulings of this court, and to the usage, so far as I am aware, in this Presidency including this Presidency Town and has not been followed since. I may also point out that the decision in *Ismai Kani Rowthan* v. *Nazarali Sahib*[1] does not seem to be consistent with the rule of English Common Law either, as it appears that in that case the tenant took a lease of the land for constructing a building thereon for carrying on trade and such cases in English law, as I shall point out, generally formed an exception.

I shall briefly refer to the cases decided by the other High Courts. In re *Thakoor Chunder Parmanick's* case [2], it is distinctly laid down that the tenant is entitled either to remove the material during the tenancy, or if allowed to remain after tenancy to get compensation or remove them, at the option of the landlord. That this was so understood by the Calcutta High Court is clear from the judgment of *Wilson* J., in *Russicklall Mudduck* v. *Lokinath Kurmokar*[3] which is similar to the case before us. There a tenant who was ejected after the determination of the tenancy sued to recover compensation or be allowed to remove the building at the option of the owner and *Wilson* J. held that, under the decision above cited, " any one who has built on land which he occupies under any *bona fide* claim of title is entitled to remove the materials or be paid for them." In the case in *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack*,[4] the same learned Judge applied the strict English Common Law rule as the

1. (1903) I.L.R. 27 M. 211. 2. (1860) B.L.R. Supp. Vol. F.B.R. p. 595.
3. (1880) I.L.R. 5 C. 688. 4. (1882) I.L.R. 8 C. 582 at p. 590.

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case before them was not one of tenancy and the Hindu law was not applicable. His judgment was confirmed in appeal. In *Ismail Khan Mahomed* v. *Jaigum Bibi*[1], S. 108 (*h*) of the Transfer of Property Act is stated to lay down the same rule as in the Full Bench case. The Advocate-General in that case, however, did not dispute the right of the tenant to remove the building and six months' time was given him by the decree. Thus, so far as the Bengal High Court is concerned, the right of the tenant to get compensation or remove the building in cases where the English law has not to be applied after the determination of the tenancy and even after ejectment, has been expressly affirmed. No decided case deals with the rights of a tenant who has built a house with the consent of the landlord or whose ownership has been recognised by the landlord. According to *Wilson* J. he would probably be entitled to compensation.

In the only Allahabad case *Beni Ram* v. *Kundan Lal*[2], that was referred to in argument about the tenant's right to remove buildings or to claim compensation, the tenant was allowed to remove the buildings after decree. In fact the plaintiff did not claim a higher right, though it is true that the Judicial Committee refer to S. 108 (*h*) of the Transfer of Property Act as the rule established in India. The question before them, however, was the right to receive compensation and the observation was not made with reference to the right to remove after the tenancy had expired. In that case the owner knew of the construction of the buildings and did not object, but there was no consent, nor is there any case of consent in the Allahabad Reports.

In Bombay the law was thus laid down by *Couch* C. J., in 1869—*Narayan Baghoji* v. *Bholagir Guru Mangir*[3]. "We cannot apply to cases arising in India the doctrine of the English law as to buildings, *viz.*, that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India, that the party so building on another's land should be allowed to remove the materials" and in that case the defendant who was not a tenant and had notice of the plaintiff's

1. (1900) I.L.R. 27 C. 570, at p. 586. 2. (1898) I.L.R. 21 A. 496.
3. (1869) 6 B. H.C. R. p. 80 at p. 85

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claim while building, was allowed time to remove the superstructure. In *Shaik Husain* v. *Govardhandas Paramanandas*[1], this decision is cited with approval and it is said that "the *same law* is as applicable to a tenant building on his landlord's land during his tenancy as to a *stranger* building on the land of another," and the reason given is that the tenant must be taken to have known the terms of lease as well as the landlord. This obviously refers to a tenant who has not got permission to build as then alone he would be in the position of a stranger. In *Shaik Husain* v. *Govardhandas Paramanandas*[1], the *Chief Justice* says that the tenant did not ask for leave to remove the materials. If a stranger is entitled to remove the building it is clear that the right to remove has nothing to do with the tenancy and a person whose tenancy has expired does not certainly stand on a worse footing than a stranger. I am not aware of any case in which the question of a tenant with right to erect the particular building or whose ownership of the same is recognised, has been discussed in Bombay.

The English law is thus briefly stated in Goodeve's *Law of Real Property*, 5th Edition, pp. 24 and 25:—" By the ancient rule of the Common Law, expressed in the maxim *Quicquid plantatur solo, solo cedit*, whatever is planted or built in the soil or freehold becomes, in point of law, part of the freehold or inheritance. Thus a house becomes part of the land on which it stands. In like manner anything annexed or affixed to any building (and not merely laid upon or brought into contact with the building) was, by the old Common Law rule, treated as an addition to the property of the owner of the inheritance in the soil, and was termed a 'fixture.' "

There is another rule of common law which, as Lord *Cairns*, states in *Bain* v. *Brand*[2], "is quite a different and a separate rule ;—whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or years, without the commission of that which, in the law of *England* is called waste and which, according to the law both of *England* and *Scotland*, is undoubtedly an offence which can be restrained. Those are two rules, not one by way of exception to the other, but two rules standing consistently together."

1. (1895) I.L.R. 20 B. 1. at p. 6.
2. (1876) A. C., Vol. I, p. 767.

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Lord *Cairns* proceeds to state that to the first rule, that which is fixed to the inheritance becomes a part of the inheritance, there is no exception but to the second rule it has been found necessary to engraft exceptions.

The most important exception stated to be almost as old as the rule itself, is the right to the removal of fixtures put up for the purposes of trade by a tenant. The courts admitted an innovation in this instance that the "commercial interests of the country might be advanced by the encouragement given to tenants to employ their capital in making improvements for carrying on trade with the certainty of having the benefit of their expenditure secured them at the end of their terms. The *benefit of the public* may be regarded as the principal object of the law in bestowing this indulgence" (see Woodfall on *Landlord and Tenant*, 18th Edition, page 717). Similarly articles put up for ornament and convenience though falling within the rule as above stated have been allowed to be taken away. The principle upon which this exception is found is that otherwise it would greatly incommode the tenants in the enjoyment of their property. Attempts were made to extend the above rule, which was laid down with reference to trade fixtures, to improvements effected for agricultural purposes only. But in *Elwes* v. *Mawe* [1] which has become the leading case Lord *Ellenborough* held that though the improvements were made for purposes of agriculture and for better enjoying the immediate profits of the land, they cannot be removed, though he admitted in his judgment in that case that Lord *Kenyon* had held that "buildings erected by the tenants for purposes of farming were, or rather ought to be, governed by the the same rules which had been so long judiciously holden to apply in the case of buildings for the purposes of trade." This judgment has been strongly criticised, as pointed out in page 212 of Smith's Leading Cases, on the ground that it confines the privilege of the tenant within narrower limits than are designated by the policy to which it owes its existence and that there is no good reason for conferring it on trade to the exclusion of husbandry, a pursuit equally advantageous to the community and which is now like manufactures often carried on with the aid of valuable machinery. Even if the privilege be confined to trade, still

1. (1802) 2 Smith's L. C. 6 RR. 523.

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many of the occupations of the agriculturists are trades, using that word in its extended sense, not in the narrow and technical one which it expresses in the old bankruptcy acts. And then the learned editors refer to the cases which show that the word *trade* with reference to the subject now under consideration ought to bear its more extended sense. To meet the growing necessities of the situation various statutes were passed in 1851, 1875, 1876, 1883, 1895 and 1900 which gave agricultural tenants the right to remove fixtures including buildings permanently fixed to the soil which they had not before and the right to receive compensation in the numerous cases therein mentioned. It appears to me clear from this summary that the rule of English Common Law has been always held to be inequitable, that judges have been introducing innovations so far as they could without destroying the rule itself, and that the Statute Law of England has interfered largely with the operation of the rule of Common Law in public interests. In these circumstances it appears to me that it can scarcely be contended with any show of reason that the rule of English Common Law is a rule of justice, equity and good conscience which we ought to administer in this country. There is no more reason for adopting the old common law rules than the statute laws which naturally are more consonant with justice and equity.

As to the period of time within which in English Common Law the fixtures have to be removed, the law is not clear. The earlier cases lay down the rule that they must be removed during the term and after the term they belong to the lessor. In *Weeton* v. *Woodcock*[1] "The rule," said *Alderson* B., "to be collected from the several cases is that the tenant's right to remove fixtures continues during his original term and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant." In *Penton* v. *Robart*[2] Lord *Kenyon* said: "Where the tenant has by law a right to carry away any erections or other things on the premises which he has quitted, the inclination of my mind is, that he has a right to come on the premises for the purpose of taking them away."

1. (1840) 7 M. & W. p. 14 at p. 19 s.c. 56 RR. p. 606.
2. (1801) 4 Esp. p. 33 s.c. 6 RR. 371.

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Let us now consider the Transfer of Property Act. Section 108 of that Act, in so far as it is material to this question, runs thus :—

" In the absence of a contract or local usage to the contrary * * * the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth ; provided he leaves the property in the state in which he received it."

It is clear to my mind that this is only an enabling provision. It gives the lessee a right, whether he had it before or not, under the law of the land, to remove the building during the continuance of the lease in the absence of a contract or local usage to the contrary. If there is any such contract or local usage, he has not that right. Such contract or local usage is therefore one to be proved by the lessor to displace this right which is given under the Act. It is said at p. 217, *Ismai Kani Rowthan* v. *Nazarali Sahib* [1], that local usage to remove the building after the term or to claim compensation is a usage to the contrary and has to be proved to entitle a tenant to compensation or removal, on the ground probably that the section impliedly negatives such rights. This has been subsequently declared by a Full Bench of this court to be not right. A right to claim compensation or to removal after the determination of the tenancy, if the building is not removed during the term, is not inconsistent with a right to remove during the tenancy. See *Vasudevan Nambudripad* v. *Valia Chathu Achan* [2]. There the landlord claimed the improvement and contended that the tenant had only a right to compensation. It was held the tenant had both the rights. The admitted right to receive compensation was not considered contrary to the right to remove. The same argument applies to the right to remove after the term. The section, therefore, in conferring a right to remove a building during the tenancy, does not take away or negative any right which a tenant had, before the passing of this Act, to claim compensation or remove the building after the expiry of the period. A claim to remove fixtures after the expiration of the lease or to claim compensation may no doubt be founded upon local usage as under the general law of the land,

1. (1903) I.L.R. 27 M. 211. 2. (1900) I.L.R 24 M. p. 47.

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but that has nothing to do with the Transfer of Property Act, and the contract or local usage referred to in that section has only reference to the claim of the lessor to cut down the right. It leaves untouched any rights a lessee may have otherwise than under that section. In many cases it is generally stated that S. 108, Cl. (*h*), only reproduces the law as laid down by the decisions. But, as I have already pointed out, those opinions were stated with reference to the claim for compensation and were meant only to show that the right of the tenant was only to remove the building. They were not, I believe, intended to deal with the question whether he had any right to remove after the expiration of the tenancy: and if they are, with all respect, I am unable to agree with that view.

The rights of tenants throughout India were not uniform. The Madras High Court had, when the Transfer of Property Act was passed, recognised their right to compensation (*Makalakshmiammal* v. *Palanichetti* [1]); the Calcutta High Court, the right to remove the building (*Thakoor Chunder Paramanick's case* [2]; *Russickloll Mudduck* v. *Lokenath Kurmokar* [3]); the strict English law of irremovability had also been enforced (*Jaggut Mohinee Dossee* v. *Dwarkanath Bysack* [4]). The Legislature therefore allowed the tenant the minimum which it considered he should have and a rule was enacted getting rid of the distinctions in English law as to the things which a tenant may or may not remove during the tenancy and substituting one general rule enabling him to remove during the tenancy buildings of all sorts erected by him.

An enabling section in a Code intended to apply to all India conferring certain limited rights on a tenant cannot be construed to take away impliedly or to negative any rights which the general law may have recognised in his favour in some provinces. The tendency of Anglo-Indian legislation has always been to strengthen the position of tenants against landlords; and, without words to that effect, I am not prepared to hold that any recognised rights are taken away. If the section is construed to have that operation in cases of tenancies of uncertain duration—see S. 111 (*a*). (*b*), (*c*), on forfeiture (*g*)—the tenant will generally be

1. (1871) 6 M. H.C.R. 245.
2. (1860) B.L.R. Supp. Vol. F.B R. 595.
3. (1880) I.L.R. 5 C. 688.
4. (1882) I.L.R. 8 C. 590.

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deprived of his fixtures as he may not know the date of the determination of his tenancy. In cases of tenants to whom the right is for the first time conceded, this may not inflict hardship. It is of course otherwise with others.

As to the decisions :—In *Ismai Kani Rowthan* v. *Nazarali Sahib*[1], it was unnecessary to decide that question as the right was conceded by the landlord. No decision except the one in *Juggut Mohinee Dossee* v. *Dwarkanath Bysack*[2] negatives the right of removal, and that decision was expressly based on the ground that it has to be decided according to English law and the same learned Judge who decided this case on the original side decided the other way in *Russickloll Mudduck* v. *Lokenath Kurmokar*[3] when he was free to decide otherwise than under English law. Other decisions in all three Presidencies recognise the right of removal after decree or determination of tenancy. In this Presidency the law recognised the right of compensation in some cases ; in others of removal before that decision, and that decision has not been followed in practice—not so far as my experience goes even in the Presidency town. I am therefore of opinion that a tenant has got the right to remove the building even after determination of tenancy, if he is not given compensation. It was further argued that as the plaintiff failed to remove the building within a reasonable time he cannot do so now. I agree with the contention that the right of removal should ordinarily be exercised before the tenant surrenders possession. But in this case I arrive at the conclusion that the plaintiff should be given some time, if necessary. In the leading case which established the right of removing trade fixtures, Lord *Holt* says that after the term " they become a gift in law to the reversion and are not removable"—*Poole's case* [4]. The plaintiff's surrender of possession was involuntary and a presumption of gift ought not to be raised. He had a *bona fide* claim to compensation. *Wilson* J., in the Calcutta case above cited (*Russickloll Mudduck* v. *Lokenath Kurmokar* [3]). allowed such a claim. Lord *Kenyon* in *Penton* v. *Robart* [5], recognised it, and the plaintiff in this case was not an ordinary tenant but one whose ownership in the house was recognised. If he is the owner of the house it stands to reason he must be allowed to remove it, irrespective of his tenancy.

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1. (1903) I.L.R. 27 M. 211.
2. (1882) I.L.R. 8 C. 82.
3. (1880) I.L.R. 5 C. 688.
4. (1795) 1, Salk, 308 s. c. 91 E.R. 320.
5. (1801) 4 Esp. 33 s. c. 6 R.R. 376.

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The claim to receive compensation now remains for consideration. It is a matter for observation that the right to receive the value of improvements has been established in districts which have very little in common with one another so far as land tenures are concerned. Once it is conceded that the tenant has a right both under the common and statute law to remove any building he might construct, it follows that he need not seek the permission of the landlord to erect a building. When therefore he obtains such permission or recognition of his ownership to the building to be, or which has been, constructed, and in particular a permanent building which cannot be removed without material loss to him, what is the inference? It is that the tenancy is permanent or that compensation will be paid to him. In England where the right to remove is not recognised by the common law, it may be that the inference is only an implied agreement to allow it to be removed. But in India it is different. It has been repeatedly held that where nothing else appears there is a presumption of the grant of a perpetual tenancy when a tenant with permission given constructs a permanent structure. Where such presumption cannot be raised then you imply an agreement to pay compensation as it would be otherwise inequitable to turn out the tenant. This is really the basis of the Madras judgments. The conditions are that the structure must be permanent, which cannot be removed without material loss; the owner must have consented either expressly, or circumstances from which his consent may be implied must be proved; or the tenant's ownership must be recognised which comes to the same thing. It will be seen at once that these conditions cannot be complied with by a trespasser, a tenant who has not got the leave of the landlord either expressly or by implication to build.

If the theory that what is attached to a man's freehold must remain there is abandoned otherwise the tenant's right to remove during or after the period of tenancy cannot be recognised—then the case is only one of justice and equity between the owner of the ground and the owner of the house standing thereon. In the case before us the defendant has clearly admitted the plaintiff's ownership, and it is also clear that the house was built with the landlord's consent. In *Wood* v. *Hewett*,[1] it was decided that a jury may infer from the circumstances an agreement between the parties that the original owner is at liberty to take away the chattel. It follows that a promise to pay compensation may be

1. 8 Q. B. p. 913.

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inferred if the circumstances justify it. The same principle is recognised in *Lancaster* v. *Eve*[1], where the building could be demolished and the materials removed without injury to the land or substantial loss to the defendant, the landlord may be allowed the option as the outgoing tenant cannot materially suffer. But when the house is of brick and the foundations are a few feet deep in the ground as probably in this case, the demolition of the building, digging up and the removal of the foundation will be costly to the tenant, and will tend to keep the landlord out of his property many months and the materials will be only of trifling value to the tenant : perhaps not even sufficient to pay the cost of removal. If it is shown that the landlord agreed to the construction of such a building, it appears to me not only that the court will be justified in presuming, in the absence of any circumstances to the contrary, that the landlord agreed to compensate the tenant in case of eviction but his consent ought to be implied. The fact that it is a building lease is not by itself enough to imply consent to the particular building in question. The nature of the building itself may rebut any presumption of consent. The question whether it has been given is one of fact, but where consent has been proved and it is not shown for what purpose it has been given—as for removal his consent is not necessary—agreement to compensate may be well implied as otherwise it would enable the landlord to derive any unfair profit by an act authorised by him. Consent is a recognition of the tenant's ownership. The rule now enacted in England by statute directing compensation if the consent is given in writing in lieu of the old common law rule shows that this is in accordance with justice and equity, according to English jurisprudence. The same principle is recognised in the case of the mortgagee—see S. 63, Transfer of Property Act. The 'Hedaya' declares that by payment of compensation " there is an advantage to both and the injury to both is obviated " (see P. C. judgment in *The Secretary of State for Foreign Affairs* v. *Charlesworth Pilling and Co.*[2]) Where, as in *Venkatavaragappa* v. *Tirumalai*,[3] there is nothing on the land in which the tenant could claim any property, there is no compensation to be paid. The wells in that case were not built-up wells.

The fact that a rule will work injustice in scarcely any case and in the majority of cases it will prevent hardship is the foundation of English Equity Jurisprudence. I am not prepared for

1. (1858-1859) C. B. N. S. V. 5. p. 717. 2. (1901) I.L.R. 26 B. 1.
3. (1886) I. L. R. 10 M. p. 112.

the above reasons to depart from a rule of real property law laid down by the Sudder Court and the High Court more than thirty years ago. The reasons in *Ismai Kani Rowthan* v. *Nazarali Sahib*[1] are, in my opinion, utterly insufficient for that purpose. The question is asked whether the duration of the lease would make any difference in the implication to be drawn and it is replied that a distinction cannot be drawn. I can easily conceive circumstances where it might make a distinction. It is further questioned whether a tenant could claim improvements if he surrenders possession. In that case justice does not require the implication of an agreement. I am, therefore, of opinion that when a building is constructed with the consent of the owner, we ought to imply an agreement to pay compensation to the tenant.

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On general grounds I have come to the conclusion that the plaintiff is entitled to the relief claimed. But there is a short ground on which this case might be disposed of.

The rights of these parties must depend upon the terms of Ex. II. The tenancy which is now determined is the tenancy created by that instrument. The plaintiff did not build the house while holding as a tenant under Ex. II. The old tenancy was at an end, and, if the defendant's contention is right, the house became his property when plaintiff failed to remove it. S. 108 (*h*) has obviously no application therefore so far as that tenancy is concerned. But under Ex. II he was holding the house as owner and the ground as a tenant. Therefore he cannot recover the house which has not been let and not been subsequently attached to the ground. All those arguments which proceed on the basis of a tenant building on the landlord's land have no application and if the defendant wants the building he must pay for it. For these reasons I would modify the decree of *Wallis* J. and direct compensation to be ascertained and paid to the plaintiff.

The Chief Justice:—The result will be the appeal is dismissed with costs.

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1. (1903) I. L. R. 27 M. p. 211.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar.

Arumuga Gounden .. Appellant.*
(*Defendant*)

v.

Chinnammal .. Respondent
(*Plaintiff*).

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Right of suit—Third party Beneficiary.

The rule that a person not a party to a contract cannot sue to enforce any rights created by it is one which requires considerable modifications in India. [*Khwaja Muhammad Khan* v. *Hussaini Begum*[1] referred to.] Where co-parceners in a Hindu family agree that payments should be made to female members for maintenance a female so provided for can sue for maintenance; and it does not matter that she was not legally entitled to it independent of the agreement.

Second appeal from the decree of the District Court of Coimbatore in A. S. No. 41 of 1906 presented against the decree of the Court of the District Munsif of Udumalpet in O. S. No. 1039 of 1905.

T. M. Krishnaswami Aiyar for appellant.

S. Ranganadha Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This second appeal which is preferred by the defendant arises out of a suit by the plaintiff for recovering the value of paddy secured to her for maintenance by an agreement between the defendant and his brother. The plaintiff says she was the concubine of the defendant's father. Whether she was an unmarried woman continuously kept by the defendant's father or not does not appear. It is alleged here that she was not such a concubine, but this position was not taken up in the courts below. There was a suit for p rtition between the defendant and his brother. That suit was referred to arbitration, and while the case was before the arbitrators the parties put in a *razinama* in pursuance of which an award was passed, and the award afterwards paseed into a decree. According to this razinama the defendant and his brother agreed to give a certain quantity of paddy every year for plaintiff's maintenance.

* S. A. 1600 of 1910. 3rd August, 1911.

1. (1910) I. L. R. 32 A. 410 (P.C.)

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The plaintiff seems to have instituted a prior suit (*i. e.*, prior to the present one) against the defendant for the paddy due to her according to this agreement between the defendant and his brother, and that suit was settled by a compromise. But what the terms of the compromise were do not appear. The suit was dismissed on account of the compromise. The plaintiff now alleges that the paddy due to her was given her for two or three years but subsequently it was withheld by the present defendant. In the written statement the plaintiff's right to recover what she claimed is denied. Her claim is characterised as fraudulent. There is no express denial of the razinama in pursuance of which the award was passed. On the other hand, as I read the written statement, the defendant admits the razinama by implication. The lower courts have passed a decree in favour of the plaintiff entitling her to recover the paddy sued for under the razinama. It is contended here that the plaintiff not being a party to the arbitration proceedings and the award is not entitled to sue on the basis thereof. But the award in this case was based on a contract of compromise between the defendant and his brother. The question therefore for decision is not whether an award passed by the arbitrators *in invitum* in favor of a person not a party to the arbitration will entitle the party to maintain a suit on the basis of it. The question really is whether the plaintiff is not entitled to sue on the *agreement* between the defendant and his brother which was enforced by the award and subsequently by a decree of court. It must be remembered that the plaintiff was not a stranger to the family. Whether she was one who would legally be entitled to enforce the claim for maintenance against the parties to the agreement or not, it was not denied in the lower courts that she was a concubine of the defendant's father. According to the decision in *Shuppu Ammal* v. *Subramanyam*[1] which is binding on me, sitting as a single judge, a person in the position of the plaintiff in this suit would be entitled to maintain a suit for the recovery of what is secured to her on the agreement of compromise though she was not a party to it. I am unable to agree with the argument for the appellant that that judgment is based on the ground that there was a charge created in

1. (1910) I. L. R. 33 M. 238.

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favour of the plaintiff in that suit. On the other hand the learned Judges say: "The decisions in *Rukmabai* v. *Govind* [1] and *Husaini Begam* v. *Khwaja Muhammad Khan* [2] justify an action by her on the ground that she is the beneficiary." Then they proceed to mention another ground on which their decision could be sustained, namely, that there was a charge created in favour of the plaintiff. The recent decision of the Judicial Committee of the Privy Council in *Khwajah Mahammad Khan* v. *Husaini Begum*[3] would seem to show that the rule that a person not a party to a contract cannot sue to enforce any rights created by it is one which would require considerable modification in the circumstances of this country. I should consider that if the rule is subject to exceptions a very proper class of exceptions would be where coparceners in a Hindu family agree that payments should be made to female members for maintenance, and the exception need not be confined to cases where the maintenance provided is in favour of persons who have a strict legal right to it. I am, therefore, of opinion that the plaintiff is entitled to sue for the enforcement of the right created in her favour by the razinama. I ought to observe that the defendant raised a further plea that he had settled the plaintiff's right to maintenance. The statement is not quite specific, but I am inclined to think that it refers to her claim according to the razinama. If this construction be right then the defendant would be taken to have acquiesced in and consented to abide by the terms of the razinama in so far as they related to the plaintiff. Defendant's plea is not a meritorious one. I am of opinion that he has also failed to sustain it in law.

I dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Messrs. Ramsay & Co., the present Secretaries & Treasurers of the Madras Equitable Assurance Society. .. .. Appellants*

v.

The Official Assignee of Madras .. .. Respondent.

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* O. S. No.. 37 of 1909. 28th April, 1911.

1. (1904) 6 Bom. L.R. 421. 2. (1906) I. L. R. 29 A. 151.

3. (1910) I.L.R. 32 A. 410 (P.C.)

Banker and Customer—Banker as Secretary and Treasurer—Fiduciar relationship—Mixing up of moneys—Voluntary payment, defined.

Ramsay & Co. *v.* The Official Assignee of Madras.

A. B. and Co. were the Secretaries and Treasurers of the plaintiff Co. and as such held the moneys belonging to the plaintiff company. Three months after a resolution by the directors of the plaintiff company that a sum should be invested in the purchase of Government pro-notes, A. B. and Co. purchased the suit pro-notes and soon after presented a petition for insolvency and a vesting order was made in a suit by the plaintiff company against the Official Assignee.

Held:—That A. B. and Co. held the money in a fiduciary capacity and not as the bankers of the plaintiff company.

Per *Abdur Rahim* J:—That A. B. and Co. did not misappropriate the moneys by the mere fact of their having mixed up the company's money with their own; that even otherwise, there was no voluntary payment in the circumstances of the case.

Voluntary payment defined.

On appeal from the judgment of the Hon'ble Mr. Justice *Bakewell* dated the 25th August 1909 in the Ordinary Original Civil Jurisdiction of this Court made in C. S. No. 210 of 1907.

The facts appear from the judgment of *Abdur Rahim J.*

N. Grant for the appellants.

K. Ramanath Shenoi and *D. M. C. Downing* for the respondents.

The Court delivered the following

JUDGMENTS :—*Munro* J. :—The facts are fully set out in the judgment of *Bakewell* J. and need not be repeated. The first question which arises for determination is whether, as found by the learned Judge, Messrs. Arbuthnot & Co., were the Society's bankers. I am clearly of opinion on the evidence that they were not, but held monies as the Secretaries & Treasurers of the Society. They also carried on a banking business, and the evidence proves no more than that they dealt with the funds of the Society in the same manner as they dealt with monies received from their banking constituents, probably in the first instance for no other reason than that of convenience. It was not alleged in the written statement that Messrs. Arbuthnot & Co. held the Society's money as bankers, nor was there any issue which raised the question. On the other hand, the written statement and the issues treat the Society's money as held by Messrs. Arbuthnot & Co. as Secretaries and Treasurers, and in the annual balance sheet, the Society's cash balance is always shown as "cash with

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the Secretaries and Treasurers." The manner in which the Society's funds were entered in the accounts of the banking department does not prove anything in the circumstances of the case. The argument for the respondent on this point was mainly based upon the existence of Exh. *E.*, which is a book showing receipts and disbursements on account of the Society. This book is in the same form as the Pass Books issued by Messrs. Arbuthnot & Co., to their banking constituents, but in my opinion it also proves nothing. Convenience will furnish an ample explanation. Messrs. Arbuthnot & Co. requiring an account book, not unnaturally utilised a book which was ready to their hand. No cheque book was ever issued to the Society, though we find printed in Exh. *B* a notice that constituents can only draw upon their banking accounts on the forms furnished by the bank.

The position then simply is this: Messrs Arbuthnot & Co. held the funds of the Society as its Secretaries & Treasurers and consequently in a fiduciary capacity, and they committed a breach of trust in using the money in their banking business and in not carrying out the directions given to them in the minute of the 31st July 1906. This being found, there is no dispute that Messrs. Arbuthnot & Co. became debtors to the Society, and it is contended for the respondent that the Society can only rank with the unsecured creditors in respect of the amount represented by the Government Promissory Notes now in question. The answer to this is that it was the duty of Messrs. Arbuthnot & Co. not to mix the money of the Society which they held as its Secretaries & Treasurers with their own money, and that the Society's money is recoverable from the unspent balance in their hands at the time of the insolvency—see *In re Hallett's Estate*[1] referred to in *Official Assignee of Madras* v. *Smith.*[2] It is not contended that the assets of Messrs. Arbuthnot & Co. are not sufficient to meet this and other preferential claims. In these circumstances, the question of fraudulent preference does not arise, and I think the plaintiffs are entitled to the declaration asked for, unless certain other objections taken by the learned Judge to the grant of the declaration are good. The learned Judge held that the plaintiffs were not entitled to

1. (1879) 13 Ch. D. 696. 2. (1908) I. L. R. 32 M. 68.

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sue. But the counsel for the respondent concedes that the plaintiffs who are the Secretaries of the Society are entitled to sue and under Act VI of 1869 the Secretaries are the proper persons to sue. The learned Judge was of opinion that all the necessary parties were not joined in the suit, but no objection on this score was taken in the written statement. No doubt any decree that may be passed in this suit will not bind the Secretary of State as he is not a party, but it is so extremely unlikely that he will raise any difficulty about recognising the title declared by the court, that I do not think his absence is a sufficient reason for refusing a declaration—see *Hem Chunder Sanyal* v. *Samamoyi Debi.*[1] Finally the learned Judge held that the suit for a declaratory decree was bad because other remedies were open. What those other remedies were, are not, to my mind, clearly indicated and no objection on this score was taken in the written statement, nor was there any specific issue about it. Counsel for respondent suggests that the plaintiffs might have sued the Secretary of State for the interest due on the Promissory Notes But as held above the Secretary of State is not an absolutely necessary party to this suit and is not likely to require a suit to make him pay the interest to the party found entitled to the notes. I would therefore reverse the decree of the learned Judge, and give the plaintiffs a decree as prayed for with costs throughout.

Abdur Rahim J. :—I have also come to the conclusion that the judgment of the learned judge cannot be sustained.

Messrs. Arbuthnot & Co who carried on the business of Bankers were appointed as Secretaries and Treasurers of the Madras Equitable Assurance Society which is a Life Assurance Society governed by a special Act; and in their capacity as such Secretaries & Treasurers received monies belonging to the Society. On the 31st July 1906 it appears that Arbuthnot & Co. had an available cash balance of Rs. 89,272-5-7 belonging to the Society and it was resolved on that date by the Directors that out of this sum Rs. 75,000 should be invested in the purchase of Government papers. In pursuance of that resolution Arbuthnot & Co. bought Government Promissory Notes of the nominal value of Rs 25,000 on behalf of the Society on the 7th of August 1906. No question has been raised as to these Notes.

1. (1895) I.L.R. 22 C. 354 at 359.

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On the 9th October 1906 the firm of Arbuthnot & Co. bought in their own name Government Promissory Notes of the value of Rs. 25,000 from the National Bank. This purchase was first entered in a suspense account but on the 11th October, that is two days afterwards, the Society was debited with the cost of these securities. On the 25th October the firm of Arbuthnot & Co. sold Government Promissory Notes of the value of Rs. 10,000 to the Society and the securities were entered to the credit of the Society. On the 22nd October Arbuthnot & Co. presented a petition in insolvency and a vesting order was made. On that date the Government Promissory Notes for Rs. 25,000 and Rs. 10,000 to which suit relates stood in the names of Sir George Arbuthnot, Chairman of the Directors of the Society, and of the two other Directors of the Society.

Upon these facts the first question that arose was whether Arbuthnot & Co., who held the Society's funds as Secretaries & Treasurers held them as trustees. There can be no doubt that when Arbuthnot & Co., received the monies of the Society in their capacity as Secretaries & Treasurers of the Society, they received them as trustees.

It has been contended on behalf of the Official Assignee and that seems also to be the finding of the learned Judge, that the Society was an ordinary customer of Arbuthnot's bank. There is no evidence to show, and in fact it was never alleged, that the Society at any stage opened an ordinary current or deposit account with Arbuthnot & Co.'s bank. The Society was never given a cheque book and it has never drawn money by means of cheque. But it is argued that, as a matter of fact, Arbuthnot & Co.'s bank did, with the sanction of the Directors, treat the Society's money like their ordinary customers' money and this is what the learned Judge finds. With all respect to him there is really no evidence to justify such a conclusion. All that is relied upon in order to make out that the Society somehow or other became a customer of Arbuthnot & Co.'s bank, although it never had a cheque book nor drew money by means of cheques and did not have a deposit account, is that the Society's account, which Arbuthnot & Co. as Secretaries and Treasurers had to keep, was copied from

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the Ledger into a Pass Book. No doubt the book in which these entries are made is one of the ordinary pass books issued by the bank to its customers. To my mind, however, this proves nothing; having regard to the other circumstances it is clear that a pass book was used in this case merely for the sake of convenience, and not because the Society had a banking account with Arbuthnot & Co. which in fact it had not. Reliance is also placed on a vague and general statement elicited in cross-examination from one of the witnesses, Mr. Cronan, to the effect that there was no difference between monies paid to the credit of the Society and those paid to the credit of Arbuthnot & Co. This statement does not mean that the Society was in fact a customer of the bank. On the other hand the rest of Mr. Cronan's evidence is absolutely clear to show that the Society never had any account with Arbuthnot & Co. and this evidence agrees with the admitted facts of the case. In fact it does not appear to have ever been the case of the Official Assignee that the Society was a customer of Arbuthnot & Co.'s bank.

It is next contended on behalf of the Official Assignee that the firm of Arbuthnot & Co. at any rate misappropriated the Society's money and therefore the Society must be content to rank with the general creditors of the insolvents. But all that has been proved in this connection is that Arbuthnot & Co. mixed up the money of the Society with their own money. They had an account with the Bank of Madras and it appears that monies belonging to the Society used also to be paid up by Arbuthnot & Co. into the Bank of Madras in the same accounts. No doubt it was the duty of Arbuthnot & Co. as Secretaries and Treasurers of the Society not to mix up the Society's money with their own money and it might be said that such mixing up was a breach of trust on their part as Secretaries & Treasurers; but that in itself does not amount to misappropriation by them of the Society's money. It is a well established rule of equity that if trust money is mixed up with the trustee's private money, then, the trust will have a lien on the aggregate amount and any sum which may be drawn by the trustee for his own money. However wrong it was on the part of Arbuthnot & Co. to blend the Society's money with their own in the first instance, they must be held to have subsequently ear-marked and

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separated the trust money from their own money when they made purchases of the Government Securities in question on behalf of the Society. It is difficult to see in these circumstances how it can be said that Arbuthnot & Co. appropriated the sums in question to their own use.

If there was no appropriation, then no question of "voluntary" payment to or preference of the Society within the meaning of S. 34 of the Indian Insolvency Act arises. But even if it could be held in the circumstances of this case that Arbuthnot & Co. did, as a matter of fact, misappropriate the Society's money and thereby turned themselves into an ordinary debtor of the Society, I should have no hesitation in holding that what took place on the 9th, 11th and 20th October did not amount to a 'voluntary' payment or preference within the meaning of the Bankruptcy law. It has been contended by the learned counsel for the Official Assignee that S. 24 of the Indian Insolvency Act which forbids all voluntary payments within two months of the Act of Insolvency if the insolvent was in insolvent circumstances at the time, lays down a rule of wider scope than the rule of English law which requires that a payment by an insolvent must be with a view to give fraudulent preference before it can be impeached. But I do not think that there is really any substantial difference between the English law on the point and the law as enacted in S. 24 of the Indian Act, so far as the present question is concerned. (See 10 Bom. H. C. R. 327). Under the English law, if a payment is made with a view to give preference to one creditor over the other creditors, it will be invalid and the English decisions go to show that a payment would be regarded as being made with a view to give preference to a particular creditor if it was made 'voluntarily.' (See Halsbury's "Laws of England," Vol. II, p. 283). Then, judging by the test of what is or is not a 'voluntary' payment within the meaning of the Bankruptcy law as expounded in the English cases on the subject, there can be no question but that the payment in this case could, in no sense, be called 'voluntary'. The test of a 'voluntary' payment is whether it was spontaneously made by the debtor of his own motion; if so, it will be presumed to have been made with a view to give preference to one creditor over the others. If on the other hand the payment was made under the pressure of a

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demand from the creditor or because of pressure arising from outside circumstances and influencing the mind of the creditor, such as the existence of a special agreement or a possible danger of prosecution or if the payment was made in the ordinary course of business, such payment would not be deemed to be voluntary (Halsbury's "Laws of England," Vol. II pp. 284-5). It is for the Official Assignee to make out affirmatively that a particular payment was 'voluntary'; that is the payment was in fact made in order to, or with a view to give preference to a particular creditor.

In this case, if Arbuthnot & Co. had misappropriated the trust money, and thereby committed a breach of trust and subsequently wanted to repair the breach of trust by making the purchases in question which apparently was their intention, the cases *Sharp* v. *Jackson*[1] and *In re Lake*[2] show that the payment would not be regarded as 'voluntary.' Besides, on the 31st July there was a distinct direction by the directors of the Society for the purchase of Government paper of the value of Rs. 75,000 and there cannot be the least doubt that the Government Promissory notes bought on the 9th October and 20th October were bought for the Society in order to carry out that direction in the same way as the Government Paper of the value of Rs. 25,000 which was bought on the 7th August. The learned Judge has distinguished the latter purchase from the other two purchases because of the delay of nearly two months intervening between the date of the resolution and the purchases in dispute. This delay, in my opinion, is not sufficient to show that the purchases in question were not made in pursuance of the resolution of 31st July. I do not find any authority for the proposition that when there has been a demand or a special agreement of the nature proved in this case it should be immediately carried out or otherwise any payment though made in pursuance of it must be deemed to be 'voluntary.' The proposition seems to me to be untenable. The cases where a creditor gives time to the debtor to pay, have, in my opinion no application to the facts of this case. Arbuthnot & Co., in view of the resolution of the 31st July, might well have regarded themselves as legally bound, and in fact they were so bound, to make the payment which they did

1. (1899) A. C. 419.

2. (1901) I. Q. B. 710.

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actually make. That would be sufficient to take the case out of the rule relating to voluntary payments (see *Inre Crawford*[1].)

I am therefore of opinion that looking at the case from any point of view, the claim of the plaintiff must be allowed.

As regards the technical objection regarding the form of the suit it is enough for me to say that I agree with my learned brother that there is no substance in those objections, and such objections should not have been raised at the last stage of the suit.

The appeal will, therefore, be allowed and the plaintiff will have a decree as prayed for, with costs of this appeal and before the learned Judge of the court below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

Nadamuni Narayana Iyengar ... Appellant* (*Defendant*)

v.

Veerabhadra Pillai *alias* Rangaratnam Pillai (minor) ... Respondent (*Plaintiff*).

Narayana Iyengar v. Rangaratnam Pillai.

C.P.C. (Act XIV of 1882)—S. 244—Suit to set aside sale against stranger-purchaser—Maintainability—Stranger-purchase whether, and how far, representative of parties to suit.

A suit against the auction-purchaser to recover a temple office sold in execution of a money-decree against the holder of the office is not maintainable under the Civil Procedure Code (Act XIV of 1882) unless the sale be set aside in execution.

Per *Wallis* J.:—S. 244, C.P.C., is a bar to the suit. It is well settled that the provisions of S. 244 prohibit a suit by a party or his representatives against an auction-purchaser to raise a question which, as between the judgment-debtor and the decree-holder, must have been determined under S. 244. [*Manikka Odayan* v. *Rajagopal Pillai*[2] explained].

Per *Krishnaswami Aiyar* J.:—S. 244, C.P.C., is no bar. The auction-purchaser derives his rights from the sale but the sale not having been set aside in execution the party to the execution proceedings, should not be permitted to impeach it except by application to the executing court.

Obiter:—A stranger-purchaser cannot be the representative of either the decree-holder or the judgment-debtor. The true rule is, where the decree is a mortgage-decree, the purchaser in execution will be the representative

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*S. A. No. 390 of 1909. 12th August, 1910.

1. (1874) 9 Ch. Ap. 752. 2. (1907) I.L.R. 30 M. 507.

Narayana Iyengar v. Rangaratnam Pillai. — Wallis J.

of the judgment-debtor. Where property is attached and sold under a money-decree, a stranger-purchaser obtains the rights of the judgment-debtor but is not the representative of either the judgment-debtor or the decree-holder. [*Manikka Odayan* v. *Rajagopal Pillai*[1] dissented from.]

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 172 of 1908, presented against the decree of the Court of the District Munsif of Srirangam in O. S. No. 80 of 1904.

The facts appear from the judgments.

T. Narasimha Aiyangar for appellant.

T. Rangachari for respondent.

T. Narasimha Aiyangar contended that the suit was barred by S. 244, Civil Procedure Code, and relied upon *Manikka Odayan* v. *Rajagopal Pillai*[1]. [Mr. *Rangachari* referred to *Krishna Satapasti* v. *Sarasvatla Sambasiva Row*[2] and *Sadhu Taraganar* v. *Hussain Sahib*.[3]] He contended that there having been an order for sale and the sale not having been set aside in the course of the execution proceedings, a separate suit was not sustainable. Even supposing that there was no attachment it was only a mere irregularity and not a matter going to the root of the jurisdiction of the court to sell—*Biru Mahata* v. *Shyamacharam Kawas*[4]; *Kishori Mohun Roy* v. *Mahomed Mujaffar Hossein*[5]; *Muniappa* v. *Subramaniya*[6]. (Also *Ramaswami Naik* v. *Ramaswami Chetty*[7].—ED.)

T. Rangachari relied upon *Pasupathy* v. *Kothanda*[8] to show that the sale was without jurisdiction, being contrary to S. 266, C.P.C., and therefore need not be set aside.

The Court delivered the following

JUDGMENTS :—*Wallis* J.—This is a suit to recover a temple office which is alleged to be hereditary in the plaintiff's family and which was purchased at a court-auction by the defendant in execution of a decree against a previous holder of the office. The plaintiff obtained a decree in the lower appellate court on the ground that the office was one of personal service and that the attachment and sale were bad as opposed to S. 266 (*l*) of the Code of Civil Procedure. It is now contended that such a suit is barred by the operation of S. 244 of the

1. (1907) I. L. R. 30 M. 507.
2. (1908) I. L. R. 31 M. 177.
3. (1905) I. L. R. 28 M. 87.
4. (1895) I. L. R. 22 C. 483.
5. (1890) I. L. R. 18 C. 188.
6. (1894) I. L. R. 18 M. 437.
7. (1907) I. L. R. 30 M. 255.
8. (1904) I. L. R. 28 M. 64.

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Civil Procedure Code and should have been dismissed. It is well settled that as between the judgment-debtor and the decree-holder, this is an objection which can only be taken in execution and it is also well settled that the provisions of S. 244 prohibit a suit by a party or his representatives against an auction-purchaser to raise a question which, as between the judgment-debtor and the decree-holder, must have been determined under that section—*Basti Ram* v. *Fattu*[1]; *Daulat Singh* v. *Jugal Kishore*[2] and *Mayan Pathuti* v. *Pakuran*[3]. These decisions are not based on the ground that the auction-purchaser is the representative of the decree-holder within the meaning of the section, but upon the general intention of the legislature as manifested in the section. The view that the auction-purchaser may be treated as the representative of the decree-holder in cases arising between him and the judgment-debtor was no doubt taken in *Manikka Odayan* v. *Rajagopal Pillai*[4] relying on *Sadhu Taraganar* v. *Hussain Sahib*[5] in preference to the authorities cited the other day. But as pointed out in *Krishna Satapasti* v. *Sarasvatula Sambasiva Row*,[6] *Sadhu Taraganar* v. *Hussain Sahib*[5] does dot support so general a proposition, as in that case the decree-holder was the auction-purchaser and the parties in question were his representatives by virtue of their purchase from him. The decision in *Manikka Odayan* v. *Rajagopala Pillai*[4] should, I think, have been supported on the ground that the application raised a question between the representatives of the judgment-debtor and the decree-holder in which the auction-purchaser had been added as a party interested—*Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[7]; *Hira Lal Ghose* v. *Chundro Kanto Ghose*[8]. In the present case we must reverse the decree of the lower appellate court and restore that of the Disrict Munsif with costs here and in the lower appellate court.

Krishnaswami Aiyar J.—A decree was passed against the plaintiff's father in O. S. No. 90 of 1894 on the file of the Srirangam Munsif for maintenance, making the emoluments of the Mirasi office of accountant in the Srirangam temple liable. The

1. (1886) I.L.R. 8 A. 146.
2. (1906) I.L.R. 22 A. 108.
3. (1900) I.L.R. 22 M. 347.
4. (1907) I.L.R. 30 M. 507.
5. (1905) I.L.R. 28 M. 87.
6. (1908) I.L.R. 31 M. 177.
7. (1895) I.L.R. 19 C. 683 (P.C.)
8. (1899) I.L.R. 26 C. 539.

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decree was executed against the plaintiff after the death of his father and it must be taken that due notice was issued to the plaintiff of the proceedings in execution. The office of accountant was itself attached and, assuming that the attachment was irregular, no exception having been taken to the attachment, the attached property was sold on the 16th July 1897 and the sale confirmed. The defendant, who purchased the office in execution, obtained possession of it in November 1903. The plaintiff institutes the present suit for the surrender by the defendant of the Mirasi office on the ground that the sale was null and void. The plaintiff having obtained a decree in the District Court, the defendant has preferred this second appeal. It seems to me that the suit is not maintainable. The plaintiff was a party to the execution proceedings and the only mode in which he can impeach the sale is by an application to the executing court to set aside the sale. It is argued for the plaintiff that the sale is a nullity because the decree did not direct the sale of the office and the office was inalienable. There was a personal decree against the plaintiff's father and even assuming that the office was not charged with the liability, it could be proceeded against in execution of the money decree. Supposing that the office was inalienable, on which I do not express an opinion, it was competent to the executing court to deal with the question whether the office was saleable. No exception having been taken in execution to the sale, we must take it that the sale was rightly held. The defendant cannot be ousted from possession until the sale is duly set aside. No attempt having been made by the plaintiff to impeach the sale in execution and the sale having been confirmed, it is not competent to the plaintiff to disturb the possession of the auction-purchaser by suit. See *Mayan Pathuti* v. *Pakuran*[1] and *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein*[2]. The auction-purchaser derives his rights from the sale which the party to the execution proceeding should not be permitted to impeach except by application to the executing court. The true principle has been sometimes overlooked and the bar to the suit of the judgment-debtor against the stranger-purchaser or *vice versa* rested on S. 244 of the Code of Civil Procedure, the suit being supposed to raise a question between

1. (1898) I.L.R. 22 M. 347. 2. (1890) I.L.R. 18 C. 188.

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the parties to the suit or their representatives. See *Dhani Ram* v. *Chaturbhuj*[1] and *Daulat Singh* v. *Jugal Kishore*[2].

But this latter view appears to me to be erroneous. The mistake arises from a confusion between two ideas. One is that S. 244 being a bar to setting aside the sale except in a proceeding between the parties, the suit against the purchaser is not maintainable until it is so set aside. The other is that S. 244 bars the suit as the purchaser is the representative of the decree-holder. It seems to me the former view is correct. Section 335 would be consistent with the latter. We cannot treat this suit as an application under S. 244 to set aside the sale as the decree-holder who would be affected by it is not a party. It is perhaps unnecessary to discuss the question whether S. 244 is a bar to the present suit though I have no hesitation in expressing my concurrence with the decision in *Krishna Satapasti* v. *Sarasvatula Sambasiva Row*[3]. It seems to me that the view upheld in *Manikka Odayan* v. *Rajagopala Pillai*[4] that the auction-purchaser is the representative of the decree-holder in execution of a money decree is not tenable. *Sadhu Taraganar* v. *Hussain Sahib*[5], which was the case of a purchaser from the decree-holder who purchased in execution of his own decree, is different from the case of a stranger-purchaser. It is difficult to see how a stranger purchasing in execution of a money decree can ever be treated as the representative of the decree-holder. He purchases the rights of the judgment-debtor in the property attached and not those of the decree-holder between whom and himself there is no privity of estate. It may sometimes be that the purchase carries more than the interest of a judgment-debtor, as for example when the judgment-debtor has done something with the property in fraud of the decree-holder. The stranger-purchaser cannot be the representative of both parties. The true rule is that where the decree is a mortgage decree, the purchaser in execution will be the representative of the judgment-debtor. Where property is attached and sold under a money decree a stranger purchasing the property obtains the right of the judgment-debtor in the property but is not the representative even of the judgment-debtor; still less can he be the representative of the

1. (1900) I.L.R. 22 A. 86.
2. (1900) I.L.R. 22 A. 108.
3. (1907) I. L. R. 31 M. 177.
4. (1907) I. L. R. 30 M. 507.
5. (1905) I. L. R. 28 M. 87.

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decree-holder. The authorities cited by the learned Judges in *Manikka Odayan* v. *Rajagopala Pillai*[1] are against the view which they have enunciated. See *Bashir Uddin* v. *Jori Singh*[2]; *Mammod* v. *Locke*; *Chinnammal* v. *Anthinatha Iyengar.*[4] It appears to me that *Sadhu Taraganar* v. *Hussain Sahib*[5] was relied on under a misapprehension as pointed out in *Krishna Satupasti* v. *Saraswatula Sambasiva Row*[6]. Nor do the other cases, *viz.*, *Kasinatha Ayyar* v. *Uthumansa Rowthan*[7], *Isham Chunder Sirkar* v. *Beni Madhub Sirkar*[8] and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[9] support the judgment in *Manikka Odayan* v. *Rajagopala Pillai*[1]. Section 244 therefore does not bar the suit.

I would, however, in the view already expressed, set aside the decree of the District Judge and dismiss the suit with costs throughout.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE, BENGAL.]

Present.—Lord Atkinson, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Mouji Lal and others ... Appellants*

v.

Mussammat Chandrabati Kumari .. Respondent.

Mouji Lal *v.* Chandrabati Kumari.

Marriage—Presumption—Proof—Legitimacy—Forms and ceremonies—Capacity of mind.

The objection to a marriage on the ground of mental incapacity must depend on a question of degree. *Held* that in the case before their Lordships the evidence of mental infirmity was wholly insufficient to establish such a degree of that defect as to rebut the extremely strong presumption in favour of the validity of marriage. To matters of form and ceremony, the established presumption in favour of marriage undoubtedly applies.

Where a man and a woman were proved to have been recognised by all persons concerned as man and wife, so described in important documents on important occasions, and their daughters were respectably married as would be natural in the case of legitimate children :—*Held*, that these facts following as they did upon ceremony of marriage which undoubtedly took

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* 2nd May 1911.

1. (1907) I.L.R. 30 M. 507.
2. (1896) I. L. R. 19 A. 140.
3. (1897) I. L. R. 20 M. 487.
4. (1900) 10 M.L.J. 228.
5. (1905) I.L.R. 28 M. 87.
6. (1907) I.L.R. 31 M. 177.
7. (1902) I. L. R. 25 M. 529.
8. (1897) I. L. R. 24 C. 62.
9. (1895) I. L. R., 19 C. 683. (P.C.)

Mouji Lal v. Chandrabati Kumari.

place, though its validity is attacked, afforded an extremely strong presumption in favour of the validity of the marriage and the legitimacy of its offspring.

This was an appeal by Mouji Lal and others from two decrees of the High Court of Judicature at Fort William in Bengal dated 11th April 1905, which reversed three decrees of the District Judge of Bhagulpur, dated 14th April 1903, and ordered the grant of letters of administration to the estate of Ishri Pershad to Chandrabati Kumari. Pending the appeal to the Judicial Committee Mouji Lal died and he was represented by Tarini Prasad.

The question at issue in this appeal was the validity of the marriage of Ishri Pershad and Girjabati, the parents of the respondents, Lagan Dai and Chandrabati. Girjabati died long since, and Ishri Pershad died on 31st July 1902, and the present appeal arose out of applications made by the appellants and respondents respectively for the grant of letters of administration to his estate. If the marriage were held valid then the respondents or one of them would be admittedly entitled to letters of administration.

Eddis for the appellants.

Ross (and *Branson*) for the respondent.

Their Lordships' Judgment was delivered by

Sir Arthur Wilson—This is an appeal against two decrees of the Calcutta High Court, dated the 11th April 1905, which reversed certain decrees of the District Judge of Bhagulpur.

The whole proceedings arise out of some conflicting applications for the grant of letters of administration to the estate of one Ishri Pershad, who died on the 31st July 1902. In the present appeal the only claims in question are those of the respondent Chandrabati, alleged to be a daughter of the deceased, and that of the appellants, who base their claim on their position as somewhat distant agnates. It is admitted that the agnates are entitled if Chandrabati is not. The question, therefore, is whether Chandrabati and a sister of hers, who is not a party to this appeal, are daughters of Ishri Pershad, and that again depends upon whether he was married to their mother Girjabati.

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On that question the courts in India have differed, the District Judge deciding against the marriage, and the High Court in favour of it.

Their Lordships are of opinion that the view taken by the learned Judges of the High Court is correct.

In the judgment of *Pargiter*, J., it is clearly and concisely shown that from the time of the alleged marriage, Ishri Pershad and Girjabati were recognised by all persons concerned, as man and wife, and so described in important documents and on important occasions. Their daughters were respectably married, as would be natural in the case of legitimate children; and these facts following upon a ceremony of marriage which undoubtedly took place, though its validity is attacked, afford an extremely strong presumption in favour of the validity of the marriage and the legitimacy of its offspring.

On two grounds it is sought to impugn the efficacy of the marriage. It is said first, that the alleged husband was at the time completely insane, so much so as to be incompetent to enter into a marriage.

Their Lordships agree with the learned Judges of the High Court in thinking that, to put it at the highest, the objection to a marriage on the ground of mental incapacity must depend on a question of degree, and that in the present case the evidence of mental infirmity is wholly insufficient to establish such a degree of that defect as to rebut the extremely strong presumption in favour of the validity of the marriage.

The second ground of attack upon the marriage rested upon the allegation that the forms and ceremonies necessary to constitute a valid marriage had not been gone through on the occasion in question.

On this point also the opinion of the learned Judge of the High Court was in favour of the marriage, and, their Lordships think, rightly. To such matters of form and ceremony the established presumption in favour of marriage undoubtedly applies.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellants will pay the costs of the respondent Chandrabati, who alone appeared in the appeal.

Solicitors: *Messrs. Theodore Bell & Co.* for the appellants.

Solicitors: *Mr. W. W. Box* for the respondent.

Raman Chetty v. Steel Brothers & Co., Ltd.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Present:—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Raman Chetty .. Appellant*

v.

Steel Brothers & Company, Ltd. .. Respondents.

Mortgage—Priority—Estoppel of prior mortgagee.

A prior mortgagee who concurs in inducing the subsequent mortgagee to advance his money as a first charge cannot afterwards turn round and claim priority over that charge in favour of his own mortgage.

This was an appeal from an order of the Chief Court of Lower Burma, dated the 15th December 1908, confirming an order of the same court in its Insolvency Jurisdiction, dated the 21st June 1907.

The point at issue in this appeal was whether the appellant or the respondents were entitled to the sale proceeds of certain boats and a steam launch, the property of one Maung Gyi, an insolvent.

Buckmaster, K. C. (with him *McCarthy*) for the appellant.

L. DeGruyther, K. C., and *Eddis* for the respondents.

Their Lordships' Judgment was delivered by

Sir Arthur Wilson—This appeal arises out of conflicting claims set up by the respective parties in insolvency proceedings, which took place in the Chief Court of lower Burma. The subject matter of the appeal is the sale-proceeds of a steam launch and a number of cargo boats which had been the property of the insolvent Maung Gyi, and which were sold in the course of realising the estate of the insolvent.

The claim of the appellant was based upon a mortgage, dated the 30th December 1903, by which the steam launch and most of the cargo boats were mortgaged by Maung Gyi to one Nagappa Chetty, who was the agent of the present appellant, to secure a sum of money then advanced. On the 30th November 1904, and on the 24th July 1905, further mortgages or charges were made in favour of persons who are no parties to the present

*18th May 1911.

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proceedings; and, owing to the course pursued by the parties interested and to the course of the present proceedings, those last mentioned transactions need not be considered in disposing of the present case. The case is concerned with Nagappa's mortgage of the 30th December 1903, and September 1905; and the sale proceeds being insufficient to meet the two claims, or indeed either of them in full, the question is, which of them is entitled to priority over the other? Both the learned Judge who sat in Insolvency and those who heard the appeal from his judgment, decided in favour of the respondents.

On the argument of the appeal before their Lordships, several questions were argued, some of which might have given rise to difficulty if it had been necessary to decide them; but in their Lordships' opinion the case may be, and ought to be, disposed of upon one ground which is simple and clear, namely, that the appellant was an assenting party to the mortgage or charge executed in favour of the respondents, and actually received a large portion of the mortgage money thus raised. This is quite clear from the letter dated the 12th December 1905; and the mortgage or charge in favour of the respondents contained an express covenant that the property mortgaged was free from encumbrances. The appellant, having thus concurred in inducing the respondents to advance their money, as a first charge, cannot now turn round and claim priority over that charge in favour of their own mortgage subsisting from an earlier date.

On this ground their Lordships are of opinion that the case has been rightly decided in Burma, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Solicitors: *Messrs. Bramall and White* for the appellant.

Solicitors: *Messrs. Sanderson, Adkin, Lee and Eddis* for the respondents.

Madho Prasad v. Ramrattan Gir.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE, BENGAL.]

Present :—Lord Macnaghten, Lord Atkinson, Lord Robson and Mr. Ameer Ali.

Madho Prasad .. Appellant *
v. (*Plaintiff*).
Mahant Ramrattan Gir and others .. Respondents (*Defendants.*)

Mortgage suit—Onus of proof of title to mortgage.

It is for the mortagagee to prove the title of the mortgagor in a mortgage suit.

Held on the facts that the mortgagee had failed to make out the title of the mortgagor to mortgage the properties, the mortgagee himself having been aware that the property belonged to a mutt and that the mortgagor was one of the claimants to the mahuntship and had not succeeded in establishing his title.

This was an appeal from a judgment and decree, dated the 8th February 1906, of the High Court of Judicature at Fort William in Bengal which reversed a judgment and decree of the Subordinate Judge at Chapra, dated the 9th July 1904. The High Court had dismissed the plaintiff's suit.

The principal question for determination on the appeal was whether the Bakulbar Math, an endowed temple dedicated to Mahadeoji, was liable to discharge a mortgage, dated the 8th April 1891, executed under the circumstauces hereinafter mentioned.

DeGruyther, K. C., and *Dunne* for the appellant.

Richards, K. C. and *Bhugwandin Dube* for the respondent.

Their Lordships' Judgment was delivered by

Lord Macnaghten.—This is an appeal against a decree of the Calcutta High Court reversing a decree of the Subordinate Judge of Chapra, and dismissing the appellant's suit with costs.

The suit was brought to enforce a mortgage bond executed by the late Raghubans Gir, and purporting to charge certain property appertaining to the Bakulahar Gir of which one Ishwar Gir was formerly Mahant.

* 2nd May 1911,

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Mahant Ishwar Gir died on the 4th October 1887. On his death disputes arose as to the succession to the Mahantship. The rival claimants were Raghubans Gir and the respondent, Ram Rattan Gir. Both had been grand *Chelas* of Ishwar Gir. Raghubans produced a will in his favour which he succeeded in establishing. Ram Rattan alleged that Ishwar Gir had installed him in his place, and he managed to obtain and keep possession of the property of the Math. Each had strenuous partisans, and the contest was waged with much spirit and a lavish expenditure of borrowed money.

On the 9th of September 1891, a compromise was effected by an *ekrarnama* of that date executed by both Ram Rattan Gir and Raghubans Gir. The *ekrarnama* stated that for the past three years disputes had been going on with regard to the guardianship of Math Bakulahar, that none of the matters had been set at rest, that there was no hope that even on the disposal of the cases for mutation of names in respect of the mouzahs appertaining to the Math the disputes would come to an end, and that there was great likelihood that in the meantime all the properties of the Math would be wasted and ruined. Then the instrument proceeds as follows:—

"Therefore we two persons having waived our respective claims have come to the following settlement. During our life time the Gadi of Mahant Iswar Gir will remain vacant, and no person should sit in that place, and in his place his charm paduka (wooden sandals) should be placd and we should do pujah to the same; neither of the parties has, except the right to administer the property of the math which are *wakf* properties, any proprietary title thereto and the proceeds thereof should be jointy managed by us and applied for religious purposes and used for religious expenses in connection with the *Asthal* for which they are designed, and whatever may be left should be treated as belonging to the god Sri Mahadeoji Swamy.

Then there were provisions for the registration of the names of the two parties as managers of the property of the Math, for the indemnification of their respective partisans, and for their survivor becoming "Malik and possessor unto the late Mahant Ishwar Gir." It was also provided that if during the joint administration it should be necessary to raise a loan for the necessary expenses of the Math, or for the payment of old or of future debts, then they two would jointly take the loan and repay the same from the properties of the Math, and the survivor should be bound to repay the loan which might have beeen raised jointly.

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The mortgage, which it was the object of this suit to enforce, was dated the 8th of April 1891. It will be observed that it is not specifically mentioned in the *ekrarnama*, and no provision was made by the parties to that instrument for the payment of the money which it purported to secure.

Raghubans Gir died on the 13th November 1891, and thereupon Ram Rattan Gir became the Mahant.

The plaint in this suit was not filed till the 14th of July 1902.

The Subordinate Judge made a decree in favour of the plaintiff.

The High Court dismissed the suit on the ground that the plaintiff had failed to show that the mortgage was binding on the properties of the Math in the hands of the present Mahant, Ram Rattan Gir.

In their Lordships' opinion the decision of the High Court is right. It cannot be disputed that the original mortgagee now represented by the plaintiff was aware that the property which the mortgage bond purported to charge was property belonging to the Math, and also aware that the mortgagor, Raghubans Gir, had not succeeded in establishing his title to the Mahantship. It is enough to say that it was for the plaintiff to prove his title and he has not done so.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismised.

The appellant will pay the costs of the appeal.

Solicitors: *Messrs Watkins and Hunter* for the appellant.

Solicitors: *Messrs. T. L. Willson & Co.* for the respondents.

Govinda Taragan v. Veeran.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice yling.

C. P. Govinda Taragan .. Appellant*
v. (*Petitioner*)
Veeran and others .. .. Respondents
(*Defendants*).

T.P.A., *Ss.* 92, 93—*Mortgage—Redemption suit—Application by mortgagor for sale on failure to deposit—Competency.*

It is competent to a mortgagor to apply for sale where a decree directing a sale has been passed under S. 92, T. P. A. in a suit for redemption. [Dictum of *Bhashyam Aiyangar* J. in *Vedapuratti* v. *Vallabha Valia Raja*[1] approved. *Vallabha Valiaraja* v. *Vedapuratti*[3] not followed.]

Appeal from the decree of the District Court of South Malabar in A. No 88 of 1910 presented against the order of the Court of the District Munsif of Walluvanad in E. P. No. 650 of 1909 in O. S. No. 214 of 1906.

Kundu Panikar for appellant.

N. A. Vaidyanatha Aiyar for respondents.

Kundu Panikar relied upon the observations of Sir *V. Bhashyam Aiyangar* J. in *Vedapuratti* v. *Vallabha Valia Raja*[1] and the altered language of Order 34, r. 5, and S. 9 Transfer of Property Act.

N. A. Vaidyanatha Aiyar :—The Transfer of Property Act does not contemplate execution of decrees under S. 92, Transfer of Property Act, except under S. 93. The construction contended for would give the mortgagor a higher right than S. 25 of the Conveyancing Act, for instance, would give him in England. It would be permitting the mortgagor to take advantage of his own wrong. No right can be conferred by mere implication. I refer to SHEPHARD and BROWN, T. P. Act. 3rd Ed., p. 312; GHOSE on Mortgages, 3rd Ed., p. 910 ; Gour, T. P. Act, 1292 ; *Vallabha Valiaraja* v. *Vedapuratti*[3] ; *Sita Ram* v. *Madho Lal*.[4].

Kundu Panikar replied.

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* C. M. S. A. No. 60 of 1910. 6th September, 1910.

1. (1901) I. L. R. 25 M. 300.
2. (1880) I. L. R. 6 C. 378.
3. (1895) I. L. R. 19 M. 40.
4. (1901) I.L.R. 24 A. 44, 51, 59 (F.B.)

Govinda Taragan v. Veeran.

The Court delivered the following

JUDGMENT :—This second appeal relates to the execution of the decree in O. S. No. 214 of 1906 in the District Munsif's Court of Walluvanad confirmed on appeal by the District Court of Calicut. The decree in the suit which was to redeem a *kanom* demise granted by the plaintiff to the defendants ran in these terms:—"This court doth order and decree that upon payment by the plaintiff into court to the credit of the defendants 1 and 2 within 6 months from this date of the kanom amount Rs. 28-9-2 and value of improvements Rs. 157-13-0, less arrears of revenue Rs. 6-7-1, court costs Rs. 17-9-8, and future rent from 1082 at 20 paras of paddy worth 8 annas a para and 4 annas 7 pies a year until execution of the decree, the defendants do deliver up to the plaintiff, or to such person as he may appoint in his behalf, all documents in their possession or power relating to the plaint mortgaged property and described in the schedule hereunto annexed and do retransfer the same to the plaintiff free from the mortgage and from all encumbrance created by the defendants or by any person claiming under them and put the plaintiff into possession of the same *and that in default of payment of the amount due as aforesaid on or before the date specified as above the said mortgaged property or a sufficient portion thereof be sold* and the proceeds of such sale after defraying thereout the expenses of the sale, be paid into court and applied in payment of the amount due as aforesaid *and the balance, if any, be paid to the plaintiff or other person entitled to receive it.*" The decree was thus in accordance with S. 92 of the Transfer of Property Act which directs that in a suit for redemption the court shall, in case of non-payment of the redemption money within the time fixed, order a sale unless the mortgage be by conditional sale. The plaintiff-mortgagor did not deposit the money due according to the decree within the time fixed. He afterwards applied to the court in execution for an order directing the sale of the mortgaged property. Both the lower courts have dismissed the petition, holding that under S. 93 of the Transfer of Property Act only the mortgagee, and not the mortgagor, is entitled to apply for an order for the sale of the property if the mortgagor does not make payment of the redemption amount as provided by the decree. The decree-holder has preferred this second appeal.

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It is contended before us that the mortgagor is also entitled, in the circumstances narrated above, to apply for an order directing the sale of the mortgaged property. The case has to be decided according to the provisions of the Transfer of Property Act, the decree having been passed while the provisions of that Act with respect to mortgage decrees were in force. There is not much judicial authority on the question we have to decide. In *Vedapuratti* v. *Vallabha Valiya Rajah*[1] there is a *dictum of Sir V. Bhashyam Aiyangar* J. (on page 315) in the appellant's favour. The learned Judge observes: "Notwithstanding that S. 93, Transfer of Property Act, deals only with a mortgagee's application for an order for sale, it would, on principle, seem that there could be no objection to the mortgagor applying for the execution of the decree under S. 92 and obtaining an order for the sale of the mortgaged property, the sale of which has been decreed under the last paragraph of S. 92 in case payment is not made on or before the date fixed in the decree for redemption." The appellant's pleader cites the opinion of Dr. R. B. GHOSE and Messrs. SHEPHARD and BROWN that the Transfer of Property Act is in opposition to this dictum. In *Vallabha Valiyaraja* v. *Vedapuratti*[2] it appears to have been assumed by *Parker* J. at page 47 and *Shephard* J. at page 49, that the mortgagee alone could apply for sale where a decree directing a sale has been passed under S. 92 of the Act in a suit for redemption. But the question did not arise for decision in that case.

On a careful examination of the provisions of the Act we have come to the conclusion that the *dictum* of Sir *V. Bhashyam Aiyangar* J. is right and that we should follow it. S. 92 makes it imperative on the court to pass a decree for sale in every suit for redemption unless the mortgage be by conditional sale. A decree for foreclosure can be passed only in the case of conditional mortgages and English mortgages. The intention of the statute appears clearly to be that there should be no foreclosure in the case of simple and usufructuary mortgages. Although the plaintiff's right to redeem is conditional upon his paying the amount due by him under the mortgage, he is not to be foreclosed if he does not fulfil the condition, and the consequence of his not fulfilling it is that the

1. (1901) I. L. R. 25 M. 300. 2. (1895) I. L. R. 19 M. 40.

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property should be sold. The ordinary rule in the case of conditional decrees is, no doubt, that where a person, who has obtained a judgment upon condition, does not perform or comply with such condition, he should be considered to have waived or abandoned the judgment. (See Order XLII, Rule 2, of the English Judicature Act). But this rule cannot be applied to decrees for redemption under the Transfer of Property Act as the legislature has expressly provided that the result of the non-fufilment of the condition is to be something else, namely, that the mortgaged property is to be sold. In England formerly a sale could not be directed in an action by the mortgagor for redemption. See Chancery Amendment Act, 15 and 16 Victoria, Cap. 86, S. 48. But S. 15 of the Conveyancing Act, 1881, entitles the mortgagor to an order for sale in an action brought by him, either for redemption alone, or for sale alone, or for sale or redemption in the alternative. When a sale is not ordered a decree for redemption would include a clause dismissing the suit on the plaintiff's failure to pay the mortgage amount to the defendant within the time fixed. See *Harmer* v. *Priestly*[1]; SETON on *Decrees*, Volume II, 1040, No. 11, 4th Edition. Such a dismissal of the action would operate as a decree of foreclosure because the mortgagor cannot afterwards file another bill for the same purpose. See *Marshall* v. *Shrewsbury*[2]; *Cholmley* v. *Countess of Oxford*[3]; *Inman* v. *Waring*[4]; *Parker* v. *Housefield*,[5] PEMBERTON on *Judgments*, p. 422. The Transfer of Property Act has deliberately omitted to provide that a suit for redemption should be dismissed where the mortgagor fails to pay the mortgage amount and expressly lays down that foreclosure is to be confined to cases of mortgage by conditional sale. The mortgagor's right of redemption can be destroyed only by a final order of foreclosure or sale. (Provisos to Ss. 60 and 87, also S. 89). It could not have been intended that when he fails to pay the redemption amount the relationship of mortgagor and mortgagee should perpetually continue, unless the mortgagee should choose to apply for sale.

It has now been held by this court, agreeing with the Bombay High Court and reversing the former current of decisions,

1. (1853) 16 Beav. 569 s.c. 22 L. J. Ch. 104.
2. (1875) L.R. 10 Ch. 250.
3. (1741) 2 Atkyns, 267.
4. (1850) 3 De. G. & Sm. 729 s.c. 64 E.R. 680.
5. (1834) 2. Myl. & K. 419.

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that after obtaining a decree for redemption the mortgagor cannot institute a second suit for the same purpose.—*Vedapuratti* v. *Vallabha Valia Raja*[1]—although the Allahabad High Court, altering its own former views, is now of opinion that a second suit for redemption is maintainable—see *Sita Ram* v. *Madho Lal.*[2] There is, therefore, no way by which a mortgagor who has failed to deposit the mortgage money within the time fixed could enforce his right of redemption except by making an application for sale. As the decree directs that the property shall be sold there is no reason in principle why the plaintiff should not be entitled to apply to the court for the enforcement of the direction.

Mr. Vythianatha Aiyar, for the respondents, lays stress on the language of the second paragraph of S. 93 that *the defendant* may apply for an order that the mortgaged property be sold, and it is apparently this language that has influenced the opinions of the learned commentators on whom he relies. But it appears to us that the language was intended to indicate that though the plaintiff in the suit is the mortgagor and he would ordinarily be understood to be the decree-holder, the mortgagee-defendant is also entitled to apply for an order of sale. In S. 88 which deals with suits for foreclosure, it is provided that either the plaintiff, *i.e.*, the mortgagee or the defendant, *i.e.* the mortgagor, may ask that a decree for sale should be passed in lieu of a decree for foreclosure. And S. 89 provides that either the plaintiff or the defendant may apply for an order absolute for sale in case the mortgagor fails to pay the mortgage amount. It is further contended that while the English Conveyancing Act expressly authorises the mortgagor in a redemption suit to ask for a decree for sale, the Indian Act does not do so, and that it is to be inferred from this difference between the two Acts that a mortgagor suing for redemption is not intended in India to have a right to apply for sale at any stage of the proceedings. But this difference does not affect the decision of the question before us. Mortgages in India, except the class called English mortgages, are not regarded as similar, in all respects, to mortgages in England. With respect to English mortgages S. 88, as already pointed out, entitles a mortgagor to ask

1. (1901) I.L.R. 25 M. 300. 2. (1901) I.L.R. 24 A. 44.

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for sale when the mortgagee institutes a suit for foreclosure. The reason why no alternative provision for sale or foreclosure is made in S. 92 is that the Indian Law goes further than the English Law and provides that except in the case of mortgages by conditional sale and English mortgages there shall be a decree for sale only and not for foreclosure or dismissal of the suit, in the case of all suits for redemption. The result is that in the case of simple and usufructuary mortgages the mortgagor need not ask for an alternative decree for sale as the court can pass only a decree for sale in case of non-redemption, that in the case of English mortgages a decree for foreclosure will be passed in favour of the defendant-mortgagee in redemption suits and the mortgagor has apparently no right to ask for a decree for sale instead, and that in foreclosure suits, where the mortgage is an English mortgage the mortgagor-defendant may ask for a decree for sale in lieu of one for foreclosure but that he cannot do so where the mortgage is one by conditional sale. It is difficult to believe that the sale being the only course open where the mortgagor does not pay the mortgage amount, the mortgagor was intended not to be entitled to apply for it as much as the mortgagee. In some cases the provision for sale may be as much for the benefit of the mortgagor as for the benefit of the mortgagee. So long as the mortgage subsists, which, as already pointed out, it would, unless the mortgagee obtains an order absolute for sale, the mortgagor may not be able to dispose of his property by sale to third parties; while, if the property be sold by the court, he would be entitled to the sale proceeds after discharging the charges on the property. Where the decree is imperative there is no reason why the decree should not be regarded as passed for the benefit of all the parties to the suit. Now is there any reason for holding that any of the parties who would be benefited by the sale cannot apply for the enforcement of the decree? We ought perhaps to observe that in Order 34, Rule 5, in the present Civil Procedure Code, corresponding to S. 89 of the Transfer of Property Act, the provision is that in case of non-payment by the mortgagor, the court shall "on application made in that behalf *by the plaintiff*" pass an order absolute for sale, although Rule 4 (2) enacts that a decree for sale may be passed at the instance of

the mortgagor as well as of the mortgagee. It is difficult to say that it was intended that the mortgagor who can get a decree for sale passed cannot apply for the execution of such decree. It is, however, unnecessary to consider this question further.

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We are of opinion, for the foregoing reasons, that the order of the lower court dismissing the plaintiff's application cannot be supported and we reverse these orders and remand the execution petition to the court of first instance for disposal according to law. The costs of this appeal will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Spencer.

The Secretary of State for India in Council represented by the Collector of Tanjore .. Appellant* (*2nd defendant*)

v.

Saminatha Koundan & another .. Respondents (*Plaintiff 1st defendant*).

Appeal, right of—Appeal by defendant in whose favor the suit has been dismissed.

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A party against whom a suit is dismissed with costs has no right of appeal, especially when he is not adversely affected in any way by the decision in the suit or by any finding necessarily implied therein.

A lessee of fishery rights sued his lessor and a third person who claimed title to the fishery adversely to the plaintiff's lessor for injunction and damages. The suit was dismissed with costs as against both defendants on the ground that plaintiff being out of possession and as lessee for a year only was not entitled to an injunction and that the plaintiff had not proved any appreciable damage.

Held that under the circumstances the plaintiff's lessor was not entitled to appeal.

Second Appeal from the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 1052 of 1905 presented against the decree of the Court of the District Munsif of Kumbakonam in C. S. No. 313 of 1903.

The facts are given in the judgment.

The Advocate General (*P. S. Sivaswami Aiyar*) for appellants.

S. Srinivasa Aiyangar and *T. V. Gopalaswami Mudaliar* for the 2nd respondent.

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*S. A. No. 705 of 1907, 2nd August, 1911.

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S. Srinivasa Aiyangar raised a preliminary objection that no appeal lay. Plaintiff claimed damages against 2nd defendant (Government) in the alternative. This was negatived by both the lower courts. In the decree plaintiff is made to pay 2nd defendant's costs. The question here is: has the 2nd defendant a right of appeal against the decree of the appellate court? There is no decree against him. The 2nd defendant is not prejudiced. There must be a decree against him or the decree must operate as *res judicata*. "Any party aggrieved by the decree" has got a right of appeal. Sections 540, 584 of the old code and S. 96 of the new code referred to. Only if the statute allows it an appeal will lie. The issues in contest were framed only between plaintiff and 1st defendant. Findings on those issues will not affect the 2nd defendant. Unless the findings are embodied in the decree it will not operate as *res judicata*. Incidental decision will not operate as *res judicata*—*Anusuyabhai* v. *Saharan*[1]; *Jannutinanissa* v. *Luftumanna*[2]. The question of appeal will be governed by the statute. The question of *res judicata* will be governed by other considerations. Wherever there is *res judicata* there is not always a right of appeal. *Karuppan* v. *Ayyathorai*[3], *Yusuf Sahib* v. *Durga*[4], *Jamna Das* v. *Udey Ram*[5], *Ananta Das* v. *Ashburner*[6], *Krishna* v. *Mohesh Chandra*[7], *Kylosh* v. *Ram Lal*[8], *Minakshi* v. *Subramanya*[9], *Kulaikada Pillai* v. *Visvanatha*[10], were referred to.

The Advocate-General :—The section under which an appeal lies is 540. It does not say at whose instance. The section contains no limitations. *Prima facie* any person aggrieved may appeal. [*Ayling* J.—'An appeal from' means with a view to the modification or varying of the decree. What modification do you suggest ?] That the right of fishery belongs to the 2nd defendant. Plaintiff sues as lessee from 2nd defendant. There is an express issue framed by the Munsif as to the right of the 2nd defendant to the fishery. The contest was between plaintiff and 2nd defendant on the one hand and 1st defendant on the other

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1. (1883) I. L. R. 7 B. 464.
2. (1885) I. L. R. 7 A. 606, 610 (F. B.)
3. (1886) I. L. R. 9 M. 445.
4. (1907) I. L. R. 30 M. 447.
5. (1899) I. L. R. 21 A. 117.
6. (1876) I. L. R. 1 A. 266.
7. (1905) 9 C. W. N. 584.
8. (1880) I. L. R. 6 C. 206.
9. (1888) I. L. R. 11 M. 26, 34.
10. (1904) I. L. R. 28 M. 229.

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hand. The decision will operate as *res judicata* between 1st and 2nd defendant. If this could operate as *res judicata* that would be a substantial grievance entitling me to appeal. The following cases were referred to :—*Yusuf Sahib* v. *Durga*[1], *Nagalla Kottappa* v. *Nagalla Mallappa*[2], *Sreenath Das* v. *Probodh Chunder Das*[3], *Jamna Das* v. *Udey Ram*[4], *Krishna* v. *Mohesh Chandra*.[5].

S. Srinivasa Aiyangar replied.

The Court delivered the following

JUDGMENT :—This appeal arises out of a dispute as to fishery rights in two channels in the Tanjore District claimed by the first defendant, the head of the Tiruppanandal Mutt. The plaintiff was a man who had taken a lease of the fishery rights in these and other channels from Government; and being obstructed in the exercise of his rights in respect of these channels by the first defendant, he filed this suit impleading not only the first defendant but also the Secretary of State as the 2nd defendant. In his plaint he prayed for an injunction restraining the first defendant from interfering with the fishery in the plaint channels and for damages caused to him (the plaintiff) by such interference and he added an alternative prayer that in case it was found that the first defendant was not liable for the aforesaid damages the second defendant should be directed to pay them.

The Munsif dismissed his suit *in toto* and ordered him to pay the costs of both the defendants. He appealed to the Subordinate Judge who, after calling for findings on three issues left undecided by the District Munsif dismissed the appeal with costs of both the respondents.

The present second appeal is preferred by the Secretary of of State (the 2nd defendant in the Munsif's Court and the second respondent in the Subordinate Court) and the first defendant who now figures as the second respondent raised the preliminary objection that as the decrees of both the courts are entirely in the present appellant's favour, he is not entitled to appeal against them.

1. (1907) I. L. R. 30 M. 447. 2. (1910) M. W. N. 719, 720.
3. (1910) 11 C. L. J, 580. 4. (1899) I. L. R. 21 A. 117.
5. (1905) 9 C.W.N. 584 589-89.

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The case is a somewhat curious one, and the plaint is by no means free from doubt; but on the whole we think the objection must be allowed. Undoubtedly, as it stands, the decree of the Subordinate Judge as also that of the District Munsif is entirely in the appellant's (second defendant's) favour. Not only is the suit for relief against him dismissed but he is given his costs in both courts.

The learned Advocate-General argued at considerable length that any party to a suit aggrieved by the decree is entitled to appeal against it, although the decree, on the face of it, may be entirely in his favour. He relies mainly on the ruling of *Woodroffe* J. in *Krishna Chandra* v. *Mohesh Chandra*[1] which is quoted with approval in *Yusuf Sahib* v. *Durgi*[2] and followed in *Nagalla Kottappa* v. *Nagalla Mallappa*[3].

A perusal of *Woodroffe* J.'s judgment shows that he considered it an essential condition of the right of appeal that the appellant should be adversely affected in some way or other *by the decree itself.* This point is emphasised by *Abdur Rahim* and *KrishnasawmyAiyar* JJ. in the latest of these cases, wherein they say that the appeal "lies only against the decree, and not against a mere finding." Certainly, both in the Calcutta Weekly Notes and the Madras Weekly Notes cases, the learned Judges are at pains to explain most clearly in what way the mere existence of the decree apart from any finding in the judgment prejudiced the appellant. It may be admitted that this point is not so clear in the case reported in *Yusuf Sahib* v. *Durgi*[2] but on the other hand the opinion there expressed is a mere *obiter dictum* and the decree of the case proceeded on other grounds altogether.

The only case which has been quoted to us in which the right to appeal can be said to have been based on the findings behind the decree rather than on the decree itself is that reported in *Jamna Das* v. *Udey Ram*[4] and it is to be noted that the decision proceeded on the basis that the finding was necessarily implied in the decree.

Now in the present case, the only way in which it is suggested that the second defendant is adversely affected by the decree

1. (1905) 9 C.W.N. 584.
2. (1907) I. L. R. 30 M. 447.
3. (1910) M.W.N. 719.
4. (1899) I.L.R. 21 A, 117.

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is that if the finding on the second issue operates as *res judicata* against him it prevents him from setting up in future any proprietary rights to the fishery in the suit channels. The said issue runs: "whether the second defendant has the right of fishery in the two plaint channels."

It may be pointed out at once that the decree certainly does not necessarily imply this finding, to quote the wording of the Allahabad case. The Munsif recorded no finding on issues 2, 6 and 7, but based his dismissal of the suit on other grounds. The Subordinate Judge called for findings on all the three issues above named. The Munsif returned findings adverse to the plaintiff on all three, and the Subordinate Judge accepted them as well as the findings originally recorded on the other issues. The plaintiff's claim for damages had already been decided against him under issue No. 4 and the Subordinate Judge finds in addition (page No. 8 of his judgment) that "the loss sustained by reason of his non-enjoyment of the fishery is not separately ascertained and must be very slight." Under issues No. 6 and 7 the Subordinate Judge, agreeing with the Munsif, found (*a*) that plaintiff was out of possession and had no right to sue for an injunction; (*b*) that as a lessee of one year he had no right to ask for a permanent injunction. The decisions of these issues affords a perfectly independent basis for the dismissal of the suit apart from the question involved in issue No. 2. This circumstance at once distinguishes the case from that in *Jamna Das* v. *Udey Ram* [1] above quoted.

Again, the prejudice to the second defendant is solely dependent on the assumption that the decision of issue No. 2 will operate as *res judicata* against him in future litigations. The respondent's vakil has quoted more than one case to show that no appeal would lie even if the matter were *res judicata*—a view which seems to obtain a certain amount of support even from *Yusuf Sahib* v. *Durgi*[2]. But, as a matter of fact, we do not think that the decision in this case would operate as *res judicata*, and we may note, for what it is worth, that the learned vakil for the respondent himself argues that it would not, and even expressed himself as willing to undertake to raise no such contention in future litigations.

1. (1899) I. L. R. 21 A 117. 2. (1907) I. L. R. 30 M. 447.

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We have already given reasons for holding that the determination of issue No. 2 was not necessary to the decision of the suit: and an examinaiion of the pleadings and of the judgments of the lower court shows that it cannot be said that the question raised therein was directly and substantially at issue between the first defendant and the 2nd defendant. Paragraph No. 8 of the plaint, in putting forward the alternative claim against the 2nd defendant (that he should be liable to pay the said damages, Rs. 530) says: "For this reason the 2nd defendant is made party." The second defendant, while admitting the allegations in the plaint to the effect that the ownership of the fishery lies with him, puts the plaintiff to proof of damages, and simply prays that the relief claimed against him be dismissed with costs. So far as can be ascertained, the 2nd defendant adduced no evidence in the case; and, as the Munsif remarks in paragraph No. 11 of his judgment, "the suit is not one by or on behalf of Government; it is in fact one against Government." We must, therefore, hold that the second defendant is not adversely affected in any way by the decree in the suit or by any finding necessarily implied therein, and that he has no right of appeal.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Phillips.

V. Rama Das and others .. .. Appellants* (*Defendants*)

v.

K. Hanumantha Row. .. .. Respondent (*Plaintiff*).

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C.P.C. (Act XIV of 1882), S. 539 (New Code, S. 92)—Scheme suit—Effect of—Bar to subsequent suit by trustee to establish private rights—Hereditary right to trusteeship—Proof—Specific Relief Act, S. 42—Proviso—Consequential relief—Injunction when a consequential relief.

Where physical possession is outstanding in third parties (*e. g.* in tenants) who are willing to pay rent to whosoever is found to be the lawful Dharmakarta and not in defendant claiming adversely to plaintiff, a suit for a declaration and injunction as consequential relief is not barred by the proviso to S. 42 of the Specific Relief Act.] *Kunj Behari* v. *Keshar Lal Har Lal*[1] followed. *Govindan Nambiar* v. *Krishnan Nambiar*[2], *Sonachala* v. *Manika*[3], *Rathna Sabapathi* v. *Ramaswami Iyer*[4] distinguished.]

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* A. No. 264 of 1909. 21st September, 1911.

1. (1904) I.L.R. 28 B. 567.
2. (1882) I.L.R. 4 M. 146.
3. (1885) I.L.R. 8 M. 516.
4. (1910) I.L.R. 33 M. 45.

* The fact that the members of the plaintiff's family have held the office of Dharmakarta continuously since 1797 for over 100 years is enough to prove the hereditary right of the plaintiff's family to the office.

A scheme once settled under by court in respect of a public trust cannot be altered except by the court and then only on substantial grounds; and consequently, a scheme framed by a court under S. 539 (of Act XIV of 1882) is a bar to a subsequent suit by a trustee who was not a party to the scheme suit, to establish his private rights with reference to the trust, which if established, would interfere with a charitable scheme settled by court. The erroneous order of court refusing to make him a party to the previous scheme suit cannot give the private individual a right to sue which he otherwise would not have had. His only remedy, if any, would seem to be to induce the Collector to ask for a modification of the court's scheme under S. 92 of the new code.

Appeal from the decree of the District Court of Kistna at Masulipatam in O. S. No. 32 of 1908.

The Advocate-General (*P. S. Sivaswami Aiyar*) and *V. Ramadoss* for appellants.

P. Nagabhushanam for respondents.

The Court delivered the following

JUDGMENT:—The plaintiff's suit is for a declaration that he is the rightful Dharmakartha of the plaint temple and for reinstatement in the office and also for an injunction restraining the defendants from interfering with him in that office. The plaintiff's father was dismissed from the office of Dharmakartha in 1902 and died in 1905. In 1903 a suit was filed by the 1st defendant and another under S. 539, Civil Procedure Code, and a scheme of management was framed in December 1903 under which the defendants were appointed trustees of the temple (O.S. No. 10 of 1903 in the District Court of Kistna). The plaintiff has filed the suit on attaining majority. In this appeal three points arise for determination:—(1) Is the suit maintainable without a prayer for possession of the property belonging to the temple? (2) Can the plaintiff bring this suit in view of the scheme framed under S. 539, Civil Procedure Code? (3) Has the plaintiff a hereditary right to the office of Dharmakartha?

No definite issue was framed on the first point as it was not specifically taken in defendants' written statement, but there is an issue (No. 9) "whether the plaint is properly stamped"

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which is said to cover this point. We think from the District Munsif's reference to the rulings in *Govindan Nambiar* v. *Krishnan Nambiar*[1] and *Sonachala* v. *Manika*[2] that his attention was chiefly directed to the question of stamp duty and not to the question of maintainability of the suit, but the latter having been very definitely raised in appeal must now be decided. The Advocate-General, for the appellants, contends that the ruling in *Ratnasabapathi Pillai* v. *Ramasami Aiyar*[3] passed since the decree appealed concludes the question. We think, however, the present case is distinguishable. In *Ratnasabapathi Pillai* v. *Ramasami Aiyar*[3] the suit was for a declaration that the plaintiff's dismissal was invalid, for an injunction and for damages, the injunction being valued at a nominal sum of Rs. 10. In the present suit the plaintiff asks for reinstatement in office ; that is, he sues for the office and for an injunction and values his relief at Rs. 2,600 which is a very substantial relief. He further states in his plaint that the temple properties are in the possession of tenants "who will pay the rents to whosoever holds the office of Dharmakartha." This statement is not traversed in the written statement and must be accepted as correct. If therefore plaintiff gets possession of the office of Dharmakartha, the tenants will pay rent to him and the plaintiff will obtain all the possession to which he is entitled, *i.e.*, the right to collect rent. The cases relied on—*Ratnasabapathi Pillai* v. *Rangasami Aiyar*[3], *Abdul Kadir* v. *Mahomad*[4], *Narayana* v. *Shankunni*[5] and *Jagannadha Chary* v. *Rama Rayar*[6]—can all be distinguished from the present case as in all these cases the possession of the property may be said to have been adverse to the plaintiff and would have continued to be adverse even after the plaintiff had obtained the declaration sued for. Here it is admitted that the lands are in possession of persons who are willing to pay rent to the plaintiff as soon as he recovers the office of Dharmakartha and consequently the success of his suit for the office will involve his recovery of the temple property so far as it is possible for such recovery to be obtained. In a similar case (*Kunj Bihari* v. *Keshar Lal Haralal*[7]), *Jenkins* C. J. remarked : "How

1. (1882) I.L.R. 4 M. 146.
2. (1885) I.L.R. 8 M. 516.
3. (1910) I.L.R. 33 M. 452.
4. (1870) I.L.R. 15 M. 15.
5. (1891) I.L.R. 15 M. 255.
6. (1904) I.L.R. 28 M. 238.
7. (1904) I.L.R. 28 B. 567

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would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up?" and this is very applicable in the present case. The lands attached to a temple do not belong to the Dharmakartha who is merely the manager, but belong to the temple or idol, the Privy Council having held that an idol may be regarded as a juridical person capable of holding property—*Jagandindra Nath Roy* v. *Hemanta Kumari Debi*[1]. If the plaintiff in this suit were to get a decree for possession of the office and also of the lands belonging to the temple, what possession of the lands could be given by the court other than plaintiff will admittedly obtain on recovering the office, *i. e.*, the right to collect rent from the tenants in possession? Assuming also that the consequential relief referred to in S. 42, Specific Relief Act, is a relief against the defendants in the suit and not against third parties—vide *Subramaniam* v. *Parameswaram*[2]—the defendants in this suit could not give the plaintiff physical possession of the temple property as the physical possession is outstanding in the tenants. We think, therefore, that the proviso to S. 42 is no bar to the present suit.

As regards the third question we think the Subordinate Judge's finding that the office of Dharmakartha is hereditary in the plaintiff's family is correct. Members of the plaintiff's family have held the office continuously since 1797 and there is no evidence that it was ever held by any other family. This is, we think, sufficient to prove the hereditary right which was in effect put forward in 1870 (Ex. *A*.) and does not seem to have been denied.

The only remaining question is whether the plaintiff can bring this suit in view of the scheme framed in O. S. No. 10 of 1903. The plaintiff's guardian applied to be made a party to that suit but his application was opposed by the plaintiffs in the suit of whom the 1st defendant is one and was dismissed. In that suit, therefore, the defendant's claim to the office of Dharmakartha was not considered, but notwithstanding this, the Advocate-General contends that no suit will lie except one under S. 539, Civil Procedure Code, to modify the scheme already framed. The plaintiff's present suit is one to

1. (1905) I.L.R 33 C. 129. 2. (1887) I. L. R. 11 M. 116.

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enforce a private right and consequently is not one contemplated under the provisions of S. 539, Civil Procedure Code—*Budree Das Mukim* v. *Mhooni Lal Johury*[1]. Even if the suit could by a stretch of language be considered to allege a breach of the trust by the court which framed the scheme, the plaintiff could not bring the suit under S. 539, for he alone is interested in his own claim and under that section the suit must be brought by two or more persons having an interest in the trust and there is no reason to suppose that any one would join the plaintiff in a suit framed to benefit the plaintiff alone. In this view the plaintiff cannot sue under S. 539 merely to establish his suit as hereditary trustee. Then arises the further question whether the decree under S. 539 takes away the plaintiff's right to bring a suit which he could certainly have brought before such a scheme was framed. It is contended for the appellants that the scheme framed under S 539 is binding on the world or at least on all worshippers of the plaint temple. If by "worshippers" we mean all persons who may happen to worship in the plaint temple then the term will include not only the regular worshippers but a large number of outsiders who profess the same religion. If the scheme is binding on all worshippers it practically means that it is binding on the world. Can it be said that decrees under S. 539 have that effect? Reference has been made to the English Law on the subject and we were at first doubtful whether that law could be applied to suits under S. 539, but in *Prayag Dossji Varu Mahant* v. *Tirumala Srirangacharlu Varu*[2], we find the following observations (at p. 324): "The enactment of S. 539 was long after the passing of the English Trustees Act of 1850. Presumably therefore that section may be taken as intended to confer upon the courts in this country the same power that the courts in England possessed at the time of its enactment * * * That the High Courts and District Courts in this country to which the jurisdiction is confined possess the same practically unlimited jurisdiction as the Court of Chancery in matters relating to administration of public charities, religious or otherwise, was taken for granted in *Chintaman Bayaji Dev* v. *Dhondo Ganesh Dev*[3] and *Annaji* v. *Narayan*".[4] This case went upon appeal to the Privy Council (see *Prayag Dossji*

1. (1906) I. L. R. 33 C. 789.
2. (1905) I. L. R. 28 M. 319.
3. (1888) I.L.R. 15 B. 612.
4. (1896) I.L.R. 21 B. 556.

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Varu Mahant v. *Tirumala Srirangacharlu Varu*[1]) and no exception was taken to the above remarks in their Lordships' judgment. We may take it, therefore, that courts in India have the powers possessed by the Court of Chancery and we may apply the principle of English Law in this case. In *Attorney-General* v. *Worcester*[2] it was held that schemes settled by court are not altered except upon substantial grounds and in *In re Pelton's Charity*[3] it was held that a scheme remains in force only until further orders or the establisment of a new scheme. Provisions in schemes may also be varied such as the number of Governors (*Brown's Hospital* v. *Stanford*[4]) etc., and in *In re Sekeford's Charity*[5] it was held that a court will not, upon the motion of one of the interested parties, alter a scheme which it has settled with the approval of the Attorney-General. The principle adopted is apparently that a scheme once settled by court cannot be altered except by the court and then only on substantial grounds. This would seem to preclude suits between parties to establish a private right which, if established, would interfere with a charitable scheme settled by court. No doubt it seems a hardship that the plaintiff should be precluded from suing to establish his private right, for ordinarily every person can be granted the relief to which he is entitled, but this principle cannot override the claim of the public and a charitable scheme settled by court must be considered to have been settled for the benefit of the public. We must hold, therefore, that the plaintiff cannot maintain the present suit against the trustee appointed under the schedule. The District Judge ought not to have refused the plaintiff's guardian's application to be made a party to the scheme suit and the plaintiff may have been seriously prejudiced thereby. In any case his inclusion as a party would have finally decided his right to the trusteeship one way or the other. The erroneous order of the District Judge cannot, however, affect the plaintiff's right to sue, and although it may be prejudicial to the plaintiff it cannot give him a right to sue which he otherwise would not have had. If plaintiff's present suit were decreed it would have the effect of very materially altering a scheme framed by the court without

1. (1907) I.L.R. 30 M. 138.
2. (1851) 9 Hare. 228.
3. (1907) 77 L.J. Ch. 193.
4. (1889) 60 L.T. 281.
5. (1861) 5 L.T. 488.

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impleading the other persons interested in the scheme and would be as inequitable towards them as the refusal to entertain the plaintiff's suit is to him. The plaintiff's only remedy, if any, would seem to be to induce the Collector to ask for a modification of the Court's Scheme taking action under S. 539 or rather S. 92 of the new Civil Procedure Code. We therefore think that the plaintiff's suit is not maintainable in view of the scheme settled in O. S. 10 of 1903 and would in allowance of the appeal dismiss this suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

Khamarunnisa *alias* Bibijanbi and others .. Appellants*
v. (*Defendants*)
Shah Hazarath Saib .. .. .. Respondent
(*Plaintiff*).

Mahomedan Law—Transfer of property for a term in lieu of dower, validity of—Not a gift of life estate.

Bibijanbi v. Hazarath Saib.

A transfer of property to a Mahomedan lady for a term (here for her life) by the husband in consideration of dower must be regarded as a sale and not as a gift of a life estate [*Sahiba Begum* v. *G. Atchamma*[1], *Ghulam Mustafa* v. *Hurmat*[2], *Abbas Ali Shaikdar* v. *Karim Baksh Shaikdar*[3] referred to] and such a transaction is unimpeachable under the Mahomedan Law.

Second appeal from the decree of the Temporary Subordinate Judge's Court, South Canara, in A. S. No 129 of 1908 presented against the decree of the Court of the District Munsif of Kundapur in O. S. No 468 of 1907.

K. V. L. Narasimham for appellants.

K. Narayana Row for respondent.

K. V. L. Narasimham:—Life grants are unknown to Hanafi Law. Shafeis are a branch of Hanafis. Unless the contrary is shewn it must be taken to be their law. At p. 122, AMEER ALI'S *Muhammadan Law*, Vol. I (3rd Ed.), he says that Shafeis held different views on the subject at different times. Mr. Justice ABDUR RAHIM, at p. 122 of his book on *Muhammadan*

* S. A. 334 of 1910. 15th September, 1911.

1. (1868) 4 M. H. C. R. 115. 2. (1880) I.L.R. 2 A. 854.
3. (1908) 13 C. W. N. 160.

Jurisprudence, says that a life grant becomes an absolute grant under the Hanafi as well as Shafei Law, at p. 300. *Abdul Gafur* v. *Nigadin* [1] is a Shafei case, and there is the observation of the Privy Council that life grants are not known to Mahomedan Law. Counsel cited also *Mussamat Humeeda Mussamut Budlun*[2]; *Haji Mahamed Faiz Ahmud Khan* v. *Haji Ghulam Khan*[3]; *Neaz Begam* v. *Manzir Ahmed Khan* [4]; *Sokaura* v. *Sahib* [5].

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K. Narayana Row, submitted that this was not a gift at all but a transfer for consideration to which the conditions attaching to gifts do not apply—*Saheba Begum* v. *Atchamma* [6]; *Ghulam Mustapha* v. *Hurmat* [7]; *Abbas Ali Shaikdar* v. *Karim Baksh Shaikdar* [8]; *Mubarik Karim* v. *Nissa* [9]; *Nazir-ul-Haq* v. *Faiyaz-ul-Rahman* [10]. Or it is a mere gift of the usufruct which is valid under the Mahomedan Law. See Mr Justice ABDUR RAHIM'S book on *Muhammadan Jurisprudence*, p. 301, and *In the matter of the Petition of Kalil Ahmad*[11].

The Court delivered the following

JUDGMENT:—The question in this case is whether the plaintiff, the son of a Muhammadan named Shah Nurullah, is entitled to succeed to certain properties as heir on the death of Doolhum Bibi, Shah Nurullah's wife, in whose favour he executed the instrument which is marked as Exhibit I. According to the terms of the document Doolhum Bibi, the wife, was to enjoy the property till the end of her life, paying the assessment thereon but was not entitled to alienate it. It was executed in consideration of dower due to her. On her death the property was to go to the heirs of Shah Nurullah. It does not purport to be a deed of gift. The defendants, the daughter's daughters of Doolhum Bibi, who claim under a deed of gift executed by her, contend that she acquired an absolute right to the properties transferred to her under Exhibit *I*. The Subordinate Judge decided the question with reference to the law of gifts governing Mahomedans. He was of opinion that it was not shown that according to the Shafei School

1. (1892) I.L.R. 17 B. 1 (P.C.)
2. (1872) 17 W.R. 525.
3. (1881) 8 I.A. 25.
4. (1911) 11 I.C. 534.
5. (1911) 11 I.C. 513.
6. (1868) 4 M.H.C.R. 115.
7. (1880) I.L.R. 2 A. 854.
8. (1908) 13 C.W.N. 160.
9. (1910) I.L.R. 33 A. 421.
10. (1911) I.L.R. 33 A. 457.
11. (1908) I.L.R. 30 A. 309.

Bibijanbi v. Hazarath Saib.

of Mahomedan Law, by which admittedly the parties were governed, a gift for life should not be made. Before us the appellants' counsel contends that a life estate given to a Mahomedan under a deed of gift would enure as an absolute estate according to the Shafei School of Law. A passage from Mr. Justice *Abdur Rahim's* Law Lectures on *Muhammadan Jurisprudence* was relied on in support of the contention. We, however, consider it unnecessary to decide this question because, on the correct construction of Exhibit *I*, we are of opinion that it must be regarded not as a gift but as a transfer of property for a term for consideration. It has been decided both by this court and by other High Courts that a transfer of property to a Mahomedan lady for a term by her husband in consideration of dower must be regarded as a sale—see *Sahiba Begum* v. *G. Atchamma*[1], *Ghulam Mustafa* v. *Hurmat*[2], *Abbas Ali Shaikdar* v. *Karim Baksh Shaikdar*[3] and also BAILLIE'S *Digest*, p. 122. Such a transfer was regarded as unimpeachable in *Mubarak Karim* v. *Nissa.*[4] There is nothing in the Mahomedan Law, so far as we are aware, against the legality of such a transfer. On this ground we think the decree of the lower appellate court is right and dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Phillips.

Mahalakshmi Amma and another	..	Appellants* (*Plaintiffs*)
v.		
Lakshmi and others	..	Respondents (*Defendants*).

Mahalakshmi Amma v. Lakshmi

Landlord and tenant—Forfeiture for non-payment of rent—False plea of discharge—Period of grace—No relief.

Forfeiture for non-payment of rent when a period of grace is provided for in the lease cannot be ordinarily allowed, especially when the tenant falsely pleads discharge.

Second appeal from the decree of the Temporary Subordinate Judge's Court of South Canara in A. S. No. 394 of 1908 presented against the decree of the Court of the District Munsif of Mangalore in O. S. No. 446 of 1907.

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* S. A. 1073 of 1910. 14th September, 1911.

1. (1868) 4 M.H.C.R. 115.
2. (1880) I.L.R. 2 A. 854.
3. (1908) 13 C.W.N. 160.
4. (1910) I.L.R. 33 A. 421.

Mahalakshmi Amma v. Lakshmi

In this case, the plaintiff (the landlord) sued the defendant, a mulgeni tenant, for recovery of possession on the ground that the defendant had forfeited his lease by committing default in the payment of rent. The lease provided that the rent should be paid within the 15th March of each year, in default at least within the 15th of June, in default even then, the lease should be forfeited and the tenant was to lose his improvements. The defence pleaded discharge which was found false and the District Munsiff decreed delivery of possession to the plaintiff.

On appeal the Sub-Judge held that a period of grace would not absolutely preclude the court from relieving forfeiture but it was open to the court to relieve when the period of grace allowed is not reasonable; that in this case the period of grace was not reasonable; that the clause as to improvements also made it clear that it was penalty; and on all these grounds relieved against forfeiture and dismissed the plaintiff's suit. Hence the appeal.

B. Sitarama Rao for appellants

H. Balakrishna Rao for respondents

B. Sitarama Rao:—The principle on which relief is granted is only *in terrorem.* The clause as to forfeiture is inserted only *in terrorem* and therefore ought to be relieved against; this principle can have no application when the parties themselves have fixed a time by way of grace within which the default, if any, is to be set right. Reasonableness of the period is immaterial; even if it is, here the parties did not question it in the first court. It was the court in appeal that made the case for them. Moreover the period allowed here is 3 months while S. 114, T. P. A., allows only 15 days—*Naraina Naiker* v. *Vasudeva Bhatta* [1]; *Narayana Kamti* v. *Handu Shetty*[2]; *Adhiragi Shetty* v. *Billa Tyampu* [3].

H. Balakrishna Rao submitted that the court's jurisdiction cannot be taken away by a period of grace having been allowed and relied upon *Narayana* v. *Sanabhoghe*[4]; *Timmar a Puranik* v. *Kuppa Gouda* [5].

The Court delivered the following

JUDGMENT:—We think in this case the lower appellate court was wrong in reversing the judgment of the District

1. (1903) I. L. R. 28 M. 389. 2. (1901) 15 M. L. J. 210
3. (1910) 20 M. L. J. 944. 4. (1883) I. L. R. 6 M. 327.
5. (1865) 2 B. H. C. R. 66.

Mahalakshmi Amma v. Lakshmi.

Munsif which granted a decree for ejectment. The defendants failed to pay rent even within the period of grace allowed to them in the lease and falsely pleaded discharge in answer to the suit. The cases *Narayana Naicker* v. *Vasudeva Bhatta*[1], *Narayana Kamti* v. *Handu Shetty*[2] and *Adhiragi Shetty* v. *Billa Tyampu*[3] lay down that, when a period of grace is provided for and payment is not made within that period, forfeiture should not be relieved against. The reason for the rule is that a clause for forfeiture is regarded in equity as a penalty and when the tenant is given further time in the lease itself it cannot ordinarily be said that the condition of forfeiture on non-payment within the further period was intended to be *in terrorem*.

It also appears in this case that the defendants did not ask to be relieved against ferfeiture in the first court but insisted on their plea of discharge.

We therefore reverse the judgment of the lower appellate court and restore that of the District Munsif with costs in this court and the courts below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Phillips.

Sreevadhu Yerranna .. Appellant*
v. (*Plaintiff*)
Pontiva Kannamma and others ... Respondents
(*Defendants*).

Yerranna v. Kannamma.

Inam—Resumption, effect of—Extinguishment of incumbrances—Jadaba service—Madras Regulation VI of 1831.

Resumption of an inam consists in putting an end to the grant and remitting the services and requiring the holders to pay full assessment; and consequently resumption of inam lands in possession of mortgagees does not extinguish the mortgages.

Jadaba (bearer) service is a personal service and inams in respect of that service are not covered by Regulation VI of 1831.

Second appeals from the decrees of the Temporary Subordinate Judge's Court of Vizagapatam in A. S. Nos. 113, 120, 121 and 112, presented against the decrees of the Court of the District Munsif of Chodavaram in O. S. Nos. 41, 45, 42 and 44 respectively.

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* S.A. Nos. 1569 to 1572 of 1909. 12th September, 1911.

1. (1903) I.L.R. 28 M. 389.
2. (1901) 15 M. L. J. 210.
3. (1910) 20 M. L. J. 944.

S. Srinivasa Aiyangar for appellant. Yerranna v. Kannamma.

V. Ramesam for respondents.

The Court delivered the following

JUDGMENT:—In S. A. No. 1569 of 1909 the plaintiff (appellant) was the vendee of the 5th defendant and 6th defendant's deceased husband, who held the plaint lands as Service Inam. They mortgaged the lands to defendants 1 and 2 in 1892 and in 1898 Government resumed the inam and imposed full assessment. On the strength of his sale-deed patta was transferred in plaintiff's name.

Two main questions are raised in this appeal. It is first contended that the resumption by Government put an end to all prior encumbrances and that the issue of a ryotwari putta amounted to a re-grant. Admittedly Government have actually resumed possession of the land, which was in the possession of the mortgagees from the date of mortgage. We think, therefore, that the so-called resumption did not operate to extinguish prior incumbrances. In a somewhat similar case of resumption by a zemindar the Privy Council remarked: "The resumption consists in putting an end to the grant, remitting the services and requiring them to pay the full assessment." It does not appear that an absolute dispossession was either attempted or intended in *Umade Raja Raja Bommaranga Bahadur* v. *Pemmasawmi Venkatadri Naidu*[1]. A similar view was taken in *Gunnaiyan* v. *Kamatchi Ayyar*[2] and by the Full Bench in *Lakshmipati* v. *Bommireddipalli Chelamayya*[3] in the case of enfranchised inam. The case *Ekambara Iyer* v. *Meenatchi Ammal*[4] is only an authority in cases of forfeiture by a tenant and is inapplicable here. We must accordingly find this point against the appellant.

The second contention is that the mortgage to defendants 1 and 2 was invalid, the inam being inalienable under S. 2 of Regulation VI of 1831. This point was not taken in the first court, but was raised in the lower appellate court, because first defendant had proved in the trial that the original grant had been made for Jadaba (bearer) service and also for Kattakalva (repairs of channels) service. This plea had been put forward as an argument against the validity of the resumption by Government, and

1. (1858) 7 M. I.A. 128 at 142. 2. (1902) I.L.R. 26 M. 339.
3. (1907) I.L.R. 30 M. 434. 4. (1903) I.L.R. 27 M. 401.

Yerranna v. Kannumma

the applicability of Regulation VI of 1831 does not appear to have been considered in that court. It has been found that the original grant of the plaint inam, which was before the Inam Settlement, was for both services, and no doubt Kattakalva service partakes of the nature of a public service. In recent times, however, we find that the inam has been treated as one purely for Jadaba service. It was so treated by Government on resumption and it was so treated by plaintiff in his plaint. S. 2 of Regulation VI of 1831 runs as follows:" All emoluments derived from lands which have been annexed by the State of hereditary village and other officers of Revenue and Police Departments * * * are inalienable." Even if it can be said that the Kattakalva service is rendered by the holder of such an office, which is very doubtful, the Jadaba service is undoubtedly a personal service and outside the Regulation, and in this case the emoluments were originally granted for both services and have recently been treated as belonging to the Jadaba service alone. In our opinion, therefore, plaintiff has failed to prove that the plaint land comes within the provisions of Regulation VI of 1831. We may remark that this is not surprising as no evidence was let in on the point, which did not form part of plaintiff's original case.

In view of the above it is unnecessary to decide whether plaintiff's claim is barred by limitation as the alienation to defendants 1 and 2 is valid and binding on plaintiff.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Alying.

Sri Raja Ravu Venkata Kumara Mahipathi Surya Rao Bahadur Garu .. Appellant* (*Defendant*)

v.

Sir Raja Ravu Subbayamma Row Bahadur Garu .. Respondent (*Petitioner-Plaintiff*).

Surya Rao v. Subbayamma Row.

Mesne profits—Assessment of—Deductions for public taxes—Efficient management, uncollected taxes, etc.—Onus.

In the ascertainment of profits due for the period during which a defendant was in possession of plaintiff's lands decreed to the latter; *Held*, that the defendant cannot claim any deductions towards (1) any remissions he made voluntarily to tenants on grounds of their poverty and failure of crops as distinguished from sums, which he may show as irrecoverable from them; (2) any deductions (*e.g.*, 2½ p. c. paid to the Court Wards in this case) by way of contribution towards a specially effeetive mode of management adopted in his own interests; (3) or anything as uncollected rent.

The onus is in the first instance on the plaintiff to prove the amount of mesne profits, from his property, but if the defendant has it in his power to prove separately the income derived from plaintiff's property as distinguished from his own, the onus will be shifted on to him.

Obiter:—Ordinarily in calculating mesne profits, the person in possession is entitled to deduct the public taxes like the water-tax paid by him to Government; but where he is entitled to recoup himself by collecting it from the ryots in actual cultivation of the land and it is admitted he took muchilikas from them for the purpose, no such deduction can be made.

Appeal from the order of the Court of the Subordinate Judge of Cocanada in E.P. No. 67 of 1909 in O.S. No. 25 of 1899.

C R. Tiruvenkatacharir for appellant.

M. V. Ratnam Naidu, K. Srinivasa Aiyangar and *M Purushottam Naidu* for respondent.

The Court delivered the following

JUDGMENT:—This execution appeal relates to the mesne profits of certain lands for which the plaintiff obtained a decree against the defendant. While the litigation for the possession of lands was going on the defendant's estate was managed by the

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* A. A. O. 223 of 1909. 1st September, 1911.

Surya Rao v. Subba-yamma Row.

Court of Wards, the defendant being then a minor. The dispute relates to the mesne profits of Faslis 1306 to 1315 inclusive. The appellant is the defendant and the plaintiff has put in a memorandum of objections in which she impeaches the correctness of a portion of the order of the lower court.

The appeal relates to three points. The first of these raises the question whether the defendant is entitled to deduct the water-tax paid by him to Government while he was in possession, in calculating mesne profits due to the plaintiff. There is no doubt that ordinarily in calculating mesne profits public taxes paid by the person liable would be deducted, but in this case the defendant was entitled to recoup himself by collecting the tax from the ryots in actual cultivation of the land, and it is admitted that as a matter of fact the Court of Wards took muchilikas from the ryots agreeing to pay the tax. A portion of the tax payable by the ryots was remitted by the Court of Wards, and the question for decision is whether the defendant is entitled to credit for the amount so remitted. It was at first stated to us that the amount in question was written as irrecoverable from the ryots, but on examining the evidence as given by defence witnesses Nos. 2, 3 and 4, we find that as a matter of fact what happened was that the Court of Wards remitted a portion of the amount payable by the ryots. It does not appear that the amount in question was remitted on the ground that it was irrecoverable. The witnesses say that as the ryots were poor and as the crops failed, the amount was remitted. This would be no justification for the remission to the defendant as against the plaintiff. It is therefore unnecessary to consider whether, if the amount were actually irrecoverable from the ryots, the defendants would be entitled to credit for it. Mr. Tiruvenkatachariar contends that in any event, the defendant, who was a minor during the years in question, could not be made liable for more than the amount actually received whilst the estate was in the possession of the Court of Wards. But this question was not raised either in the lower court or even in the grounds of appeal to this court, and as it is impossible for us to say that, if the question had been raised, the plaintiff might not have had an answer to make to it, we have refused to allow the matter to be argued. The Subordinate Judge accepted the view of the Commissioner and based his

Surya Rao v. Subbayamma Row.

judgment on the ground that as the defendant took possession of the land which the plaintiff was entitled to have in her possession, she cannot claim credit for the water rate paid by him. But in the view we take of the case it is unnecessary to consider the correctness of this position. As we have found that the defendant has not shown that the whole water rate paid by him to Government could not have been collected from the ryots, we must disallow the appellant's contention.

The next point raised relates to the question whether the defendant is entitled to deduct the commission of $2\frac{1}{2}$ % paid to the Court of Wards under the Standing Orders of the Board of Revenue for the expenses of management over and above the cost of the establishment employed separately for the Pittapore Estate. The Subordinate Judge was of opinion that the defendant was not entitled to this deduction. There is no doubt that the management by the Court of Wards must have contributed considerably to efficiency, but it is difficult to hold that the defendant taking possession of the plaintiff's property is entitled to ask her to contribute towards a specially effective mode of management adopted in his own interests. We are of opinion that the Subordinate Judge was not wrong in disallowing the commission. The third and last point raised in the appeal relates to a small sum of Rs. 256 which the defendant claimed a deduction of as uncollected rent. We see no reason to differ from the view taken by the Subordinate Judge that the defendant is not entitled to credit for it. We must therefore dismiss the appeal with costs. The memorandum of objections relates to the correct amount of mesne profits which the plaintiff is entitled to recover for the Vemavaram village. A portion only of this village was included in the grant to the plaintiff made by the late Raja of Pittapore.

The remainder of the village was the property of the estate. The Court of Wards took possession of the whole village when it assumed management of the estate. The evidence shows that the lands in the whole village were leased together without any distinction between what belonged to the plaintiff and what formed a part of the estate. This continued to be the case until a division was made in execution of the plaintiff's decree and possession was delivered to her of her portion. The Subordinate Judge has allowed the plaintiff for the ten years in question a sum of about Rs. 900 a year. The plaintiff claims that she

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is entitled to profits at the rate of about Rs. 1,5co a year. Exhibit *LII* series, the Amarakom accounts for Faslis 1306, 1309, 1313, shows that the income during those years was between Rs. 2,8co and 2,900 for the whole village; and the account Exhibit *VI* shows that that was the the amount of income practically during the whole period in question. These accounts, however, do not enable us to fix the income of the portion belonging to the plaintiff. There is general evidence on the side of the defendant that the lands of the plaintiff and of the defendant were nearly equal in quality. The Subordinate Judge, accepting this view, proceeded on the footing that the total income must be rateably divided between the plaintiff and the defendant according to the average belonging to each. The plaintiff contends that this view is wrong and strongly relies on the fact that immediately after delivery was made to the plaintiff of her portion of the village she was able to lease it for about Rs. 1,500. Exs. *F* and *G* series are the muchilikas for Faslis 1316 and 1317, and they apparently bear out the plaintiff's contention that she was able to rent her lands for Rs. 1,500. The eleventh defence witness who is the kurnam of the village, in cross-examination by the plaintiff, said that the income in Fasli 1316 of the defendant's section of the village was about Rs. 1,400. This, added to the amount for which the plaintiff's portion was leased, brings up the toal income of the village in Fasli 1316 to about Rs. 2,900 which is the amount shown for the previous years by the defendant's accounts. This is strong evidence to show that the muchilikas taken by the plaintiff for 1316 were not got up for the purpose of helping her to swell the amount of mesne profits which she might be able to obtain in execution of the decree. The accounts show that there was practically no change in the income of the village from the year 1306 to the year 1316 and the income of the respective portions belonging to the plaintiff and the defendant in 1316 may be taken as *prima facie* evidence of the proportion in which they were entitled to the income of the village in previous Faslis. See *Bhawanee Deen Sahoo & another* v. *Mohun Sahoo*[1]. It was open to the defendant, and we are inclined to think it must have been in his power, to show what the actual income of

1. (1869) 1. N.W.P. H. C. R. 273.

the two sections of the village was in previous years. He has not adduced any such evidence. Although the onus of proof lay in the first instance on the plaintiff, the statement made by the kurnam in cross-examination must be taken to lend strong support to the plaintiff's case that the income of her section was Rs 1,500, more or less. The plaintiff has not got much evidence to prove the precise amount due to her. But we think, having regard to the kurnam's evidence already referred to, that she is entitled to not less than Rs. 1,400 a year. We shall therefore add to the amount allowed by the Subordinate Judge Rs. 500 a year, for the mesne profits for each year or Rs. 5,000 in all. We modify the order of the Subordinate Judge as indicated above. The appellant will pay three-fourths of the respondent's costs of the memorandum of objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Mathunsa Rowthan & others .. Appellants*
(*Plaintiffs*)

v.

Apsa Bin ... .. Respondent
(*Defendant No.* 3).

Execution sale—Purchaser's rights—Stranger purchaser—Value of improvements by purchaser—Eviction—Good faith—Test—Caveat emptor.

If one enters upon land as a stranger purchaser in execution sale and effects improvements thereon, he is entitled to compensation therefor upon a reversal of such judgment and sale irrespective of any question of his *bona fides*. *Zain-ul Abdin Khan* v. *Mahammad Ashgar Alikham* [1] explained *Mallikajun* v. *Narhari* [2] referred to. But even if the proposition so stated is too broad and good faith must be proved on the purchaser's part in making the improvements, the good faith required does not go beyond an honest belief in the purchaser in the validity of his title.

Where it was merely found by the lower appellate court that the auction purchaser in execution sale effected the improvements after an application was put in to set aside the decree for fraud, and there was no allegation that the auction purchaser was aware of the non-service of the notice which constituted the fraud:—

Held:—That there was no duty on the part of the purchaser to make due inquiries regarding the regularity of the sale proceedings and that he was entitled on eviction to the value of the improvements he has effected.

Obiter:—There is no covenant for title implied in a court sale, *i.e.*, the auction purchaser takes only the interest in the property sold, which his judgment-debtor had in law at the time of the sale. The scope of the doctrine does not extend to the consequences of defects or irregularities in the proceedings leading up to the sale, which might render it void or voidable.

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* S. A. 305 of 1910. 20th September 1911.

1. (1887) I.L.R. 10 A. 166.
2. (1901) I.L.R. 25 B. 357.

Mathunsa Rowthan v. Apsa Bin.

S. 51, Transfer of Property Act, is also inapplicable to a purchaser in court sale.

Second appeal from the decree of the District Court of Tanjore in A S No. 80 of 1909, presented against the decree of the Court of the District Munsif of Tiruvalur in O.S. No. 248 of 1907.

T. R. Ramachandra Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

T. R. Ramachandra Aiyar:—The purchaser is entitled to the value of improvements effected by him *bona fide*. He had a good title till it was displaced by an order of court. His case comes within the spirit of S. 51, Transfer of Property Act. American Encyclopædia, Practice and Procedure, VOL. 22, p. 21. He relied upon *Kandarpa Nath Ghose* v. *Jogendra Nath Bose*[1]; FREEMAN on *Execution*, p. 212; MOYLE'S *Commentaries on Justinian's Institutes*, p. 209.

T. V. Seshagiri Aiyar:—It is only a *bona fide* purchaser that is protected from the consequences of a reversal—*Zain-ul-Abdin Khan* v. *Mahammad Ashgar Alikhan*[2]. There is no *bona fides* without due inquiry *Abboy Churn Ghose* v. *Attamoni Dassee*[3]; *Ramsden* v. *Dyson*[4]; the observations of *Kings down*, L.J. An alienee from the widow with notice of the infirmity of her title is not entitled to improvements—*Vrijbhuvandas* v. *Dayaram*[5].

T. R. Ramachandra Aiyar cited *Nanjappa Goundan* v. *Peruma Goundan*[6] where negligence had been held consistent with *bona fides* and referred to the definition of *good faith* in the General Clauses Act, S. 3, Cl. (20).

The Court delivered the following

JUDGMENT:—In the suit which gave rise to this second appeal the plaintiffs claimed to recover from the defendants Rs. 800 as compensation for improvements made by them while they were in possession, as auction-purchasers, of a house from which they were subsequently ejected by the defendants. The house belonged to one Johnsa Levvai and one Ramachandra Sastriar. These two persons mortgaged the house to one Samboo Ammal, the 4th defendant in the suit. The latter instituted

1. (1910) 12 C.L.J. 391.
2. (1887) I. L. R. 10 A. 166 (P. C.)
3. (1908) 13 C. W. N. 931.
4. (1847) L. R. E. & I. 1 H. L. 129.
5. (1907) I. L. R. 32 B. 32.
6. (1909) I. L. R. 32 M. 530.

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a suit on the mortgage to which the defendants Nos. 1 to 3 in this suit were made parties as heirs of Johnsa Levvai; defendants Nos. 1 and 2 being his widows and the 3rd defendant his daughter. A decree was obtained on the mortgage and the properties were brought to sale. The plaintiffs became the purchasers at the sale and obtained possession of the house on the 7th August 1903. The 3rd defendant was a minor while the suit was going on and was represented by his uncle as guardian *ad litem*. Notice of the execution proceedings was issued to him. The process server could not find him as he had left for one of the islands beyond India. The process server's return stated that the 3rd defendant said that she had attained majority and was competent to accept service herself and received a copy of the notice. The process server, in addition, affixed the notice to the outer door of the house where the guardian *ad litem* used to reside, in token of serving it on him. The executing court apparently considered this service sufficient, for it proceeded to sale without taking any further steps to serve a notice on the guardian. After the plaintiffs had been in possession for about 15 months, the 3rd defendant's guardian *ad litem* put in an application on her behalf to set aside the sale on the ground of fraud. His application was dismissed by the District Munsif's Court and by the District Court on appeal. But on second appeal the High Court set aside the sale on the ground that the 3rd defendant had not been properly represented in the said proceedings as her guardian *ad litem* had not been properly served with notice. The 3rd defendant subsequently obtained an order for re-delivery of the properties.

The questions raised in the issues, so far as they are relevant to this second appeal, were whether the plaintiffs as purchasers in court auction could claim the value of the improvements made by them, and whether, if they could do so at all, they were entitled to succeed in the circumstances of this case, that is, whether they made the improvements *bona fide* and without notice of the circumstances invalidating the sale. With regard to the nature of the improvements made, the District Munsif's finding goes to show that they were accessory and urgent repairs required to make the house habitable. The District Munsif found that the plaintiffs were not guilty of any fraud and that they made

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the improvements before the guardian *ad litem* took steps to set aside the sale. He considered the plaintiffs entitled to recover the value of the improvements made by them and awarded them Rs. 512-1-6, making the amount recoverable by sale of the property in case of non-payment.

On appeal the District Judge held that the improvements were made after the 3rd defendant's guardian's application was put in and the plaintiffs had thereby been put on inquiry as to their position. He held also that the sale was held without jurisdiction on account of non-service of notice on the 3rd defendant's guardian *ad litem* and was void. He was of opinion that the principle of S. 51 of the Transfer of Property Act, could not be applied to an auction purchaser to whom the principle of *caveat emptor* would be applicable. In the result, he reversed the decree of the District Munsif and dismissed the plaintiff's suit. The plaintiffs have preferred this second appeal to this court.

Mr. T. R. Ramachandra Iyer, the learned vakil for the 1st appellant, contends (1) that the finding of the lower appellate court as to the time when the improvements were made does not show that the plaintiffs did not act in good faith in making the repairs and improvements and that it was sufficient that they acted honestly in the belief that the proceedings prior to the sale to which they themselves were no parties were conducted by the court regularly and properly ; (2) that the principle of *caveat emptor* has no bearing on the question of a purchaser's right to recover compensation for improvements made by him before the sale is set aside. He also impeached the finding of the District Judge as one not based on a proper consideration of the whole of the evidence on record.

For the respondent it is argued that as the rule of *caveat emptor* applies to an auction-purchaser he must be taken to buy with all risk, whether arising from irregularity in the conduct of the sale or defect of title in the judgment-debtor or otherwise, and that he could not, under any circumstances, claim any compensation for improvements made by him, and secondly, that in any case it was the duty of the plaintiffs to make inquiries regarding the regularity of the sale proceedings. When the sale was questioned by the guardian and as the improvements were found by the District Judge to have been made

feart the inception of the proceedings to set aside the sale, the plaintiffs could not sustain their claim in this case.

We are bound to accept in second appeal the finding of the District Judge that the plaintiffs had notice of the application to set aside the sale before they made the improvements and we must deal with the case on that footing. The question of an auction-purchaser's right to improvements made by him while in possession as such purchaser and the circumstances under which he would be entitled, if at all, to compensation, is one of considerable importance. No authority, either Indian or English, has been cited to us, nor are we aware of any directly deciding the question. The principle of *caveat emptor* has, in our opinion, no application to this case. It is no doubt well settled that there is no covenant for title implied in a court-sale. But this means nothing more than that the auction-purchaser takes only the interest in the property sold, which his judgment-debtor had in law at the time of the sale. The scope of the doctrine does not extend to the consequences of defects or irregularities in the proceedings leading up to the sale, which might render it void or voidable.

Section 51 of the Transfer of Property Act, it need hardly be said, is also inapplicable to a purchaser at a court sale. The rights of auction-purchasers in execution-sales held by courts are favoured by the law in the interests both of the judgment-debtors and judgment-creditors. It may be taken to be well established that the reversal of a decree for money, in pursuance of which a sale of the judgment-debtor's property has been held, would not by itself vitiate the sale, except where the purchaser is the judgment-creditor himself. In *Zain-ul-Abdin Khan* v. *Mahammad Ashgar Alikhan*[1], the question was decided by the Judicial Committee of the Privy Council. In that case some of the purchasers were the decree-holders themselves, while the others were strangers to the decree upon which execution issued and were *bona fide* purchasers. The High Court of Allahabad had dismissed the suit against both sets of purchasers—that is, both those who were the decree-holders and those who were not. But the Privy Council held that "there is a great distinction between the decree-holders who came in and purchased under their own

1. (1887) I.L.R. 10 A. 166.

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decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties and at a time when that decree was a valid decree, and when the order for sale was a valid order." A great distinction has been made between the case of *bona fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves. The purchases made by the latter class were held good. It is not quite clear whether their Lordships meant to lay down that stranger-purchasers, in order to be entitled to protection, should make their purchases *bona fide* or not. Their Lordships refer to a passage in Bacon's Abridgment, which does not seem to lay down any such requisite. The passage is in these terms: "If a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of *fieri facias*." The ground of the protection, according to this passage is that the sale is held in pursuance of an order of court while that order stands good. Possibly their Lordships meant no more than that purchasers who are no parties to the decree are therefore *bona fide* purchasers, as opposed to those who are parties to the decree. See *Malikarjun* v. *Narhari*[1].

This is apparently the view which has been taken in some of the more recent Indian cases where it was held that third party purchasers cannot be deprived of their purchase when the sale is held while the decree stands unreversed. See *Poresh Nath Mullick* v. *Haricharan Dey*.[2] In the American Cyclopædia of Law and Procedure, Vol. 22, p. 21, the writer of the article on 'Improvements' states the rule to be followed thus:—"If one enters upon land under a judgment and order for a conveyance thereof and makes permanent improvements, he is entitled to compensation therefor upon a reversal of such judgment and order." It would, in our opinion, be not wrong to hold that the protection of the interests of the judgment-debtors and judgment-creditors alike would be best served by accepting this statement of the rule, without any inquiry as to the *bona fides*

1. (1901) I.L.R. 25 B. (P.C.) 357. 2. (1911) 14 C.L.J. 300.

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of the purchasers making the improvements, especially when the sale has been confirmed by the court under the provisions of the Civil Procedure Code. But even if the proposition so stated should be regarded as too broad and *bona fides* must be proved on the part of the purchaser making the improvements, what is the test of *bona fides* required in such cases? The learned vakil for the respondent contends that in accordance with the view of the District Judge, that if the purchaser is put on inquiry regarding the facts leading up to the sale, he is bound to satisfy himself by proper inquiry regarding the true facts of the case. This is no doubt the equitable rule adopted by the courts where a person takes a transfer from a limited owner of property acting beyond the limits of his powers of disposition or from a trustee or other person entitled to dispose of property but acting beyond his power. But, in our opinion, this test of *bona fides* is not applicable to all cases. The expression means only good faith or 'honesty of dealing.' See S. 3, Cl: (20) of the Indian General Clauses Act X of 1897. In *Kandarpa Nath Ghose* v. *Jogendra Nath Bose* [1] and *Nanjappa Goundan* v. *Peruma Goundan*[2] it was held that the good faith required by S. 51 of the Transfer of Property Act did not involve proper inquiry. In the former case *Mookerjee* and *Teunon* JJ. held as follows: "As a general rule, in order to entitle an occupant of land to compensation for improvements, three things must concur. * * * Thirdly, he must have acted in good faith, that is under the honest belief that he has secured good title to the property in question and is the rightful owner thereof; and for this belief, there must be some reasonable ground such as would bar a man of ordinary prudence to entertain it"—*Stock* v. *Starr*[3]. These principles are substantially recognised in S. 51 of the Transfer of Property Act, and are based on obvious grounds of justice, equity and good conscience—*In re Thakur Chander Paramanick.*[4] The principle is, as Mr. Justice *Story* put it in his classical judgment in *Bright* v. *Boyd*[5] which has been followed by this court in *Dharmadass Kundu* v. *Anulaydhan Kundu*,[6] that no man should be allowed to enrich himself unjustly at the expense of another, and

1. (1910) 12 C.L.J. 391.
2. (1909) I.L.R. 32 M. 530.
3. (1870) I. Sawyer, 15, 22 India Fed. case 1084.
4. (1866) Beng. L. R. (F.B.) 595.
5. (1841-43) I Story 478, 2 Story 608.
6. (1906) I.L.R. 33 C. 1119.

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that consequently where the defendant has made the improvements in good faith as a *bona fide* occupant of the land, and in the belief that the land is his own, the plaintiff who obtains the benefit of the expenditure which has increased the value of the property, ought to reimburse the defendant for the expenditure so made. The learned Judge observes later on: "No doubt ordinarily the privileges of a holder of property in good faith cease when he has knowledge or notion of an existing title adverse to that under which he claims, but in the present case, that principle is inapplicable, because there was a substantial question in controversy as to the true effect of a testamentary instrument of an ambiguous character and the occupant ought not to be held disentitled to compensation for improvements unless they have been made after an adverse decision against him." It will be observed that the claimant of compensation did not derive his title in that case through any act of a court. The position of one who does so ought, in our opinion, to stand on a superior footing. In the Madras case *Munro* and *Abdur Rahim* JJ. laid down the same rules They say: " We are not prepared to say that good faith within the meaning of S. 51 of the Transfer of Property Act is necessarily precluded by facts shewing negligence in investigating the title." The right of a purchaser under a judicial sale to the costs of improvement made by him has been dealt with by Freeman in his book on " Void judicial sales." He refers to the case of *Vallis Heris* v. *Flemings Heris*" Judge *Nepton*, in his 'opinion' in that case, rested himself mainly upon the great judgment of *Story* J in *Bright* v. *Boyd* [1] where a person who has been evicted from land which he had held by a conveyance from an administrator on the ground that the administrator had failed to comply with the requirements of law essential to the validity of sale, filed a bill for the recovery of valuable and permanent improvements made by him in good faith believing that the deed from the administrator conveyed a good title to the premises. Justice *Story* " after great deliberation and research " gave the complainant the relief prayed for in the bill, and in the absence of any statutory provision on the subject held the broad doctrine that " a *bona fide* purchaser for valuable consideration without notice of any defect in

1. (1841-43) 1 Story 478, 2 Story 608.

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his title, who makes improvements and ameliorations upon the estate, has a lien or a charge thereon for the increased value which is thereby given to the estate beyond its value without them, and a court of equity will enforce the lien or charge against the true owner who recovers the estate in a suit at law against the purchaser". Judge *Nepton* observes: "It is quite immaterial whether this was done by paying off incumbrances or by making permanent and valuable improvements. In either case the value of the inheritance is increased by the expenditure and, as already observed, plainest principle of justice demands that the heir or devisee should repay the money thus innocently expended for his benefit, to the extent that he has been benefited thereby". The opinion of Judge *Story* in *Bright* v. *Boyd* [1] is exceedingly learned and able, and will well repay careful perusal and study. He traces the principle which he applied there to the Roman Law and demonstrates by reference to the writings of Cujacius, Brothes Grotius, Bell, Puffendorf, Rutherforth and others, and by arguments which seem conclusive of the question, "that such principle has the highest and the most persuasive equity as well as common sense and common justice for its foundation."

The principle enunciated by Justice *Story* and adopted in the American courts commends itself to us as eminently reasonable and we adopt it. The writer of the article on "Judicial Sales" in the American Encyclopædia of Law and Procedure, Vol. 24, p. 70, states the law thus: "It is generally held that when the proceedings are invalid so that the purchaser loses the land titles to which he would have had but for the defects in the proceedings he is entitled to recover back the purchase money paid by him, and to be reimbursed for money expended by him for taxes and on repairs and improvements that have increased the value of the land." It will be noticed that good faith is not said to be required in the passage though the succeeding statement relating to the purchaser's right to subrogation seems to require good faith in the purchaser to entitle him to the amount of liens on the property discharged by him. See also *Moyle's Institutes of Justinian* p. 209.

We feel satisfied at any rate that the good faith required does not go beyond an honest belief in the purchaser in the validity of his title. The District Judge does not find that the purchaser

1. (1841-43) 1 Story 478, 2 Story 608.

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was wanting in good faith in this sense but applied a wrong test by holding that the purchaser was bound to make due inquiries regarding the regularity of the proceedings. The 3rd defendant did not show or even allege in her written statement that the plaintiffs were aware of the fact that notice of the execution proceedings was not served on the guardian *ad litem*.

We hold, for the reasons mentioned above, that the plaintiffs were entitled to recover compensation for the improvements made by them. With regard to the value of the improvements the District Judge concurs with the finding of the District Munsif.

The decree of the District Judge must therefore be reversed and that of the District Munsif restored with costs both here and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Kasi Visvanathan Chetty .. .. Appellants* in A. A. O. No. 99 of 1910. (*Petitioner—2nd Defendant.*)

Chidambaram Chetty .. in A. A O. No. 139 of 1910. (*Petitioner—1st Defendant.*)

v.

Muthu K. R. Aranachellam Chetty .. Respondent (in both the appeals). (*Respondent—Plaintiff*).

Visvanathan Chetty v. Arunachellam Chetty.

Service of summons—Mode of effecting service—Defendant absent in foreign teritory,

Service ought primarily to be made on the defendant personally and every reasonable effort should be made to effect such service. But if it appears that reasonable efforts have been made to effect personal service but without success, the Code permits of the summons being affixed to the outer door of the residence of the defendant. When the officer is justified in taking the latter step, such service would not be open to objection. Where the officer was informed that the defendant had gone to a foreign teritory and that it was not known when he would return, it is not necessary that service should be taken to the defendant in the foreign territory, especially when the defendant was moving from vilage to village therein. [*Abraham Pillai* v. *Donald Smith*[1] doubted. *Sankaralinga Moodelly* v. *Ratna Sapapathi Moodelly*[2] approved.

Appeals from the orders of the Court of the Subordinate Judge of Ramnad in Interlocutory Applications No. 322 and 367 of 1910 in O. S. No. 256 of 1909.

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*A. A. O. Nos. 99 and 139 of 1910. 18th September, 1911.

1. (1906) I.L.R. 29 M. 324. 2. (1897) I.L.R. 21 M. 324.

Visvanathan Chetty v. Arunachellam Chetty.

L. A. Govindaraghava Aiyar for appellants.

C. V. Anantakrishna Aiyar for respondent.

L. A. Govindaraghava Aiyar for appellants.—There has been no declaration of sufficiency of service and therefore the service by affixture is bad. *Venkobachar* v. *Ragavendra*[1]. Any way, the place where the defendant (appellant) had gone to was known and therefore notice ought to have been taken to such place and mere sticking up of the notice to the outer door of his residence under such circumstances is bad. *Sami Pillai* v. *Krishnaswami Chetty*[2]; *Abraham Pillai* v. *Donald Smith*[3]. When it is found that the defendant is evading service then alone is substituted service the appropriate mode of service.

C. V. Anantakrishnier relied upon *Sankaralinga Mudaly* v. *Ratnasabapathi Mudaly*[4] where *Sami Pillai* v. *Krishnsami Chetty*[2] is distinguished. Service personally is not the only ordinary mode of service. Affixture equally is. Substituted service is contemplated only when one is evading service. When the party's return to his residence early is expected, there is nothing wrong in considering affixture of notice the proper service.

The Court delivered the following

JUDGMENT :—We think the learned Subordinate Judge is right in this case. It appears that when the summons was taken out on the first occasion the serving officer was informed by the agent of the defendants that they had gone to a village in Puducottah territory and the date when they would return was not known. He then affixed the summons to the door of the defendant's house. This was on the 14th November 1909. A second summons was issued in January 1910 and again the process server was informed by the agent of the defendants that they had gone 2 or 3 days previously to some place in the Puducottah territory and it was not known when they would return. The peon thereupon again affixed the summons to the door of the defendant's house. The court then declared the defendants *ex parte* and proceeded with the suit. It is argued on behalf of the appellants that there is no order of the Subordinate Judge who heard the case declaring that there had been a sufficient service. But the whole record is not before

1. (1908) 18 M.L.J. 96. 2. (1897) I.L.R. 21 M. 417.
3. (1906) I.L.R. 29 M. 324. 4. (1897) I.L.R. 21 M. 324.

Visvanathan Chetty v. Arunachellam Chetty.

us and the appellants did not take this objection before the lower Court and there is no statement to that effect in their affidavits. We are, therefore, unable to say that this contention is well founded in fact.

Upon the facts of the case, the lower Court was right in holding that there was due service of the summons on the defendants. No doubt service ought primarily to be made on the defendants personally and every reasonable effort should be made to effect such service. But if it appears that reasonable efforts have been made to effect personal service but without success the Code of Civil Procedure permits of the summons being affixed to the outer door of the residence of the defendants. When the officer is justified in taking the latter step such service would not be open to objection. Here the peon was informed that the defendants had gone to a village in the territory of Puducottah and he had no reason to disbelieve the statement of the defendants' agent that it was not known when they would return and the defendants' own affidavits show that they were about that time going from village to village in the territory of Puducottah. The peon relying on the statement of the defendants' Kariasthar was justified in affixing the copy to the outer door of the defendants' residence. It is argued by the learned vakil for the appellants, that summons ought to have been sent to Puducottah and he relies on *Abraham Pillai* v. *Donald Smith*,[1] as authority for this proposition. But S. 89 of the Code of Civil Procedure, 1882, on which reliance is placed in that case, deals with cases in which the defendants reside out of British India and if the learned Judge meant to lay down a general proposition to the effect that when summons is taken to a defendant's place of residence in British India but he is away in a foreign territory for a temporary purpose, then the court must act under the section of the Code which lays down the mode for effecting service in a foreign territory, we should, with all respect, dissent from such a view. On the other hand, the ruling in *Sankaralinga Mudali* v. *Rathnasabapathi Mudali* [2], in our opinion, lays down the law correctly.

It also appears that the defendants knew as far as back as the 6th November 1909, all about the institution of the present suit.

The appeals are dismissed with costs.

1. (1906) I. L. R, 29 M. 324. 2. (1897) I.L.R. 21 M. 324.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmanya Aiyar and Mr. Justice Benson.

Ponnambalath Parapravan Bavotti Haji, Karnavan and Manager of the Tarwad and others .. Appellants* (*Defendant and his representatives*)

v.

Karoth Sankaran Nair, Karnavan and Manager of the Tarwad .. Respondent (*Plaintiff.*)

Haji *v.* Sankaran Nair.

Evidence Act. S. 90—*Scope of—Presumption, application of, were copy only is produced.*

The presumption as to the genuineness of an ancient document under S. 90 of the Evidence Act can be applied even where the original is not produced, but only a copy is produced. [*Khetter Chunder Mookerjee* v. *Khetter Pant Sreeterutro*; [1] *Ishir Prasad Singh* v. *Lalijas Kunwar*[2] followed.]

Appeal from the decree of the Subordinate Judge's Court of North Malabar in O. S. No. 13 of 1902.

The chief point for determination in this case was whether the copy of Exhibit *Z* (the original of which had been lost) could be admitted in evidence. The Subordinate Judge held that it could, against which this appeal was preferred. The purport of Exhibit *Z* and the observations made by the Subordinate Judge on it are given *infra.*

Exhibit *Z* purports to be an attested copy of a jenm deed executed by Porathe Mampilath Valia Nambiar to an ancestor of plaintiff named Ryrappan Nair in Vrischigam 967 (1792). The properties conveyed under this deed are described therein as appertaining to two temples, Poothadi and Perinhodi, and their boundaries are the following:—East river, South Nalupilamapara (Rock split in four) Chirukolatha and Mampilomta Otta thenghu, and North, Mayayakunnu Kallamundri, Kammunda (Karii manda) Shoda. The jenm deed comprises some hills which are admittedly in the possession of the plaintiff's tarwad to the west of the plaint property and consequently the western boundary and a portion of the northern boundary will not appear in the plan. The original deed purports to be in the handwriting of a Mopla, a circumstance which accounts for the spelling mistakes to be found in it. In O. S. No. 81 of 1885 (Exhibit O), O. S. No. 588 of 1885, (Exhibit 64) and O. S. No. 399 of 1897 (W) the original appears to have been filed. It was destroyed with the records of the latter suit (Exhibit *X*). Without the original I am not in a position to say

* A. 139 of 1903. 9th August 1907.

1. (1880) I.L.R. 5 C. 886.

2. (1900) I.L.R. 22 A. 294.

Haji v. Sankaran Nair.

whether the jenm deed is genuine or not. The Munsiff before whom it had been filed had expressed no opinion one way or the other, but the District Judge concluded from the silence of the Munsif who decided O. S. No. 588 of 1885 that he had formed no high opinion about it (Exhibit 64). The other evidence in this case leads to the conclusion that the jenm deed must be genuine or at any rate the property is the jenm of the plaintiff's *tarwad*. This view is also confirmed by the total absence of evidence as to title on the defendant's side.

J. L. Rozario for appellant.

P. R. Sundara Aiyar and *C. V. Anantakrishna Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—Mr. Rozario on behalf of the appellant contended that as the Jenm deed of 1792, of which Exhibit *Z* purports to be a copy, was not produced in evidence in this case, it is not competent to the courts to draw any presumption as to its genuineness. In support of this contention he relies on S. 90 of the Indian Evidence Act; but we agree with the view taken in the cases of *Khetter Chunder Mookerjee* v. *Khetter Pant Sreeterutro*[1] and *Ishir Prasad Singh* v. *Lallijas Kunwar*[2] that this section should not be construed in the narrow sense contended for.

In the case of *Appathura Pattar v. Gopala Panikkar*[3] this court refrained from expressing any opinion on the point. Whether the court should presume the genuineness of the last document is a matter that depends on the special circumstances of each case ; and having regard to the circumstances proved in regard to the present document (Exhibit *Z*) we think the Subordinate Judge was right in admitting it as evidence and in presuming that the original of it was genuine. We see no reason to distrust the evidence of the pensioned Sheristadar who proves the production of the original in 1865 during an escheat inquiry when he was a clerk attending to escheat work in the Sub-Collector's office.

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[Their Lordships after dealing with the other questions that arose in the case dismissed the appeal with costs.—ED.]

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1. (1880) I. L. R. 5 C. 886.
2. (1890) I. L. R. 22 A. 294.
3. (1902) I. L. R. 25 M. 674.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Ragunatha Chariar .. Appellant* (*Plaintiff*)
v.
Sadagopa Chariar .. Respondent (*Defendant*).

Ragunatha Chariar *v.* Sadagopa Chariar.

Assignor and assignee—Direction to pay consideration to third party—Non-payment—Assignor's right to sue.

Where a person assigns property (decrees) in favor of another for an ascertained value te be paid by the assignee to a third party, such a direction is *prima facie* intended for the benefit of tbe assignor; and if the assignee does not pay it to the third party as agreed upon, the assignor will be entitled to reeover the same irrespective of the fact whether he (the assignor) was compelled to pay it or was otherwise damnified.

Obiter:—It may be otherwise where the assignee is himself interested in the payment to the third party or has entered into direct relations with the third party on the faith of the original direction and has rendered himself liable to make the payment to him. [*Sivasubramania* v. *Gnanasambanda Pandara*[1]; *Bachu Chenchu Ramaiyar* v. *Apparaju Subbaramaiyar*[2] referred to *Dorasinga Tevar* v. *Arunachellam Chetti*[3]; *Daswant Singh* v. *Syed Sham Ramjan Ali*[4] approved. *Pandia Doraisawmi Tevar* v. *Lakshmana Chetty*[5]; *Thangamma Nachiar* v, *Subbammal*[6]; *P. Narayana Moorti Iyer* v. *Marimuthu Pillai*[7]; *Kumara Nath Bhattacharjee* v. *Nabakumar Bhattacharjee*[8]; *and Izat-un-nissa Begam* v. *Kunwar Pertap Singh*[9] distinguished.]

Second appeal from the decree of the District Court of Tanjore in A. S. 760 of 1908 presented against the decree of the Court of the District Munsif of Valangiman in O. S. 212 of 1907.

The plaintiff assigned certain decrees which were in his favour to the defendant for Rs. 2,400, the document being as follows:—" I assign to you my two decrees; since I have received this Rs. 2,400 by your having agreed to satisfy and discharge two of my debts amounting to Rs. 2,400, you will in consideration of this assignment satisfy and settle my said debts." The defendant did not pay one of the debts which amounted to Rs. 1,500 but the creditor enforced payment through court's process from the

*S. A. No. 238 of 1910. 2nd August, 1911.

1. (1911) 21 M.L.J. 359.
2. (1910) 9 M.L.T. 79.
3. (1899) I.L.R. 23 M. 441.
4. (1907) 6 C.L.J. 398.
5. (1903) 14 M.L.J. 284.
6. (1905) 16 M.L.J. 20.
7. (1902) I.L.R. 26 M. 322.
8. (1898) I.L.R. 26 C. 244.
9. (1909) I.L.R. 31 A. 553 (P.C.)

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plaintiff's brother who, the plaintiff alleged, paid on his account under an agreement between them. The plaintiff brought this suit for recovering damages, alleging that he paid his brother. The lower courts finding that plaintiff did not pay his brother and that the arrangement was false, dismissed the suit, holding that plaintiff did not sustain any damage so as to entitle him to bring a suit for damages for breach of contract. Plaintiff filed this second appeal.

The Advocate General (P. S. Sivaswami Aiyar) and *T. Rangaramanujachariar* for appellant.

S. Srinivasa Aiyangar and *N. R. K Thathachariar* for respondent.

Advocate General:—The defendant has broken his contract by not paying the plaintiff a portion of the consideration. The contract is not a mere contract to indemnify. It is a mandate by the plaintiff to the defendant asking the defendant to pay certain sums to his creditors which he can revoke—*Dorasinga Tevar* v. *Arunachela Chetty*[1] Mayne on Damages, 6th Edn., p. 334; *Thangamma Nachiar* v. *Subbammal*[2] T. *Rangaramanujachariar* continued *Dorasami Tevar* v. *Lakshmana Chetty*[3]; *Kumar Nath Bhuttacharjee* v. *Nabokumar Bhuttacharjee*[4] [*Sundara Aiyar* J.—The last is only a case of indemnity and not of sale and money due therefor.] C. M A. 119 of 1908 unreported which follows *Dorasinga Tevar* v. *Arunachela Chetty*[1]; see also *Daswant Singh* v. *Syed Sham Ramjam Ali*[5].

S. Srinivasa Aiyangar:—The view taken in the above cases is not correct as is clear from *Izzat-un nizza* v. *Partab Singh*[6] [*Sundara Aiyar* J—.That is a case of sale of equity of redemption only and not a sale for a certain amount which the vendee agrees to pay to the vendor's creditor]. Assignments which are not for direct payment to the assignor are only cases of indemnity. There is no difference between a covenant to indemnify and a covenant to pay off—Mayne on Damages pp. 224, 226. As the assignor says in the assignment that he has received payment in a certain way, how can he now sue especially since he had not to pay his creditors [*Rahim* J.—Why

1. (1899) I. L. R. 23 M. 441, 444.
2. (1905) 16 M. L. J. 20, 21.
3. (1903) 14 M. L. J. 285.
4. (1898) I.L.R. 26 C. 241.
5. (1907) 6 C. L. J. 398.
6. (1909) I.L.R. 31 A. 553 (P.C.)

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not he say "since *you* did not pay my creditor as agreed you must pay me"?] No; the liability is taken off the shoulders of the debtor by the assignment. [*Court.* Cannot the debtor countermand the next day after the assignment?] He cannot, where the agreement to pay others is undertaken. If the money is deposited with the assignee on behalf of the assignor to pay his creditors, then he can. A power of revocation must exist expressly or impliedly, otherwise no right to countermand will exist. *Bachu Chenchu Ramaiyar* v. *Apparaju Subbaramaiyar* [1] shows that no question of agency can arise as the portion of the debt remitted was held not to go to the mortgagor; see also *Ansur Subba Naidu* v. *Bathula Bee*[2] and *Putty Narayanamoorthi Aiyar* v. *Marimuthu Pillai* [3]. The case of *Sivasubramania Mudaliar* v. *Gnasambanda Pandara Sannadi* [4] is only a case of deposit or retaining. *Webb* v. *Macpherson*[5] shows the difference between an agreement to pay and a deposit. [*Sundara Aiyar* J.—If an agreement to execute a mortgage will not destroy the lien, as was there held, much more so an agreement to pay a creditor will not]. There the mortgage was agreed to be executed on the same date, but it was not. The judgment says that the form of conveyance is to be looked at. As to damages; since plaintiff has not paid and as his brother's payment was not on his behalf, no damage is incurred.

The Court delivered the following

JUDGMENT:—In this case the plaintiff instituted a suit for the recovery from the defendant of a sum of money which the latter had agreed to pay to two persons, Alamelu Ammal and Sreenivasa Gopala Chariar, as consideration for the transfer to him by the plaintiff of two decrees in O. S. 61 and 62 of 1902 in the District Munsif's Court of Valangiman. The plaintiff alleged that the defendant failed to pay the amounts due to the two persons named above and that he himself had to pay them. The contract of assignment was dated 28th January 1904 and this suit was instituted on the 16th July 1907. The amount due to the said two persons was in fact paid by the plaintiff's brother and not by the plaintiff himself. The plaint alleged that the plaintiff had made good the amount to his brother by some adjustment with him. Both the lower courts have disbelieved the adjustment and

1. (1910) 9 M.L.T. 79.
2. (1910) 8 M.L.T. 188.
3. (1902) I.L.R. 26 M. 322.
4. (1910) 21 M.L.J. 359.
5. (1903) I.L.R. 31 C. 57 at 73 (P.C.)

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dismissed the suit holding that the plaintiff has no cause of action to recover the amount as he has not yet sustained any damage by the defendant's breach of his contract. The defendant also raised the contention that the assignment of the decrees in O. S. 61 and 62 of 1902 was brought about by fraud on the part of the plaintiff and that the consideration for the assignment subsequently failed. But these questions have now been set at rest and have not been argued before us.

The main contention in this appeal by the plaintiff is that the nature of the plaintiff's right against the defendant has been misunderstood and that the lower courts have wrongly proceeded on the footing that the defendant's obligation under the contract Exhibit A, was to indemnify the plaintiff against any claims by the two persons to whom he himself owed the debt which the defendant had agreed to discharge under the contract. Mr. S. Sreenivasa Ayangar who argued the case at great length for the respondent (defendant) argued that the defendant's obligation was to pay the consideration for the assignment to certain other persons than the plaintiff and that the plaintiff had no right to claim the amount himself in variance of the contract and as he had not proved that he sustained any actual damage by the defendant's failure to perform the contract in the manner stipulated no decree could be passed in the plaintiff's favour. If we understand him aright he also maintained that the plaintiff's right was only to be indemnified against his creditors' claims. We are by no means sure that the two contentions are not the same in substance though expressed in different forms. It is perfectly clear to us that the amount mentioned in the contract was agreed upon as consideration for the assignment of the decree in defendant's favour and the plaintiff is entitled to insist that the defendant should pay it in some form or other. It is no doubt conceivable and possible that an assignment of property may be made in consideration merely of the assignee agreeing to indemnify the assignor against some claim by a third party. But this is not the natural interpretation to be placed where the value of the property assigned is ascertained between the parties and the assignee is directed to pay that value to a third party. Such a direction is *prima facie* intended for the benefit of the assignor. We think it would have been perfectly open to the plaintiff in

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this case to pay off his two creditors himself and to claim the payment of the consideration for the assignment direct to himself. Where the assignee is himself interested in the payment being made to a third party, there might be reason to hold that the assignor could not alter the mode of payment prescribed by the assignment deed. It may also be conceded that when, on the faith of the original direction, the assignee has entered into direct relations with the third party and rendered himself liable to make the payment to him, the assignor could no longer require the assignee to pay the consideration to himself. See *Sivasubramania Mudaliar* v. *Gnasambanda Pandara Sannadi*,[1] to which one of us was a party, and *Bachu Chenchu Ramaiyar* v. *Apparaju Subbaramaiyar*[2]. But these instances do not affect the general nature of the right possessed by a person who for a certain sum of money executes a conveyance in favour of another, and agrees that the money should be paid to third persons. In the decision in *Dorasinga Tevar* v. *Arunachalam Chetty*,[3] with which we agree, *Subrahmanya Aiyar* and *Moore* JJ. held that where a person executes a lease to another and the lessee agrees in consideration thereof to discharge the debt due by the lessor to a third person but fails to do so within a reasonable time, the lessor is entitled to recover the amount although he had not paid the debt himself.

The same view was adopted in C. M. A. 119 of 1908, to which one of us was a party, and in *Daswant Singh* v. *Syed Sham Ramjan Ali*[4]. It is also in accordance with the rule in England where a vendee of property makes a promise in consideration of the sale to discharge certain incumbrances on the property sold. The judgment of *Boddam* and *Bhashyam Aiyangar* JJ. in *Pandi Dorasami Tevar* v. *Lakshmana Chetty*[5] does not support the respondent's contention. The suit there was not to recover the amount which the vendee had promised to pay to the vendor's creditor but to recover as damages the amount for which the vendor had executed to his creditor a promissory note on account of interest due to him for a period of one year in consequence of the vendee not having paid the amount immediately.

1. (1911) 21 M. L. J. 359. 2. (1910) 9 M. L. J. 79.
3. (1899) I.L.R. 23 M. 441. 4. (1907) 6 C. L. J. 398.
5. (1903) 14 M. L. J. 285.

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There can be no doubt that the vendor was entitled only to recover the consideration for the sale which the vendee failed to pay to the former's creditor. He could not claim any further damages which he had not actually sustained. *Thangamma Nachiar* v *Subbammal*[1], decided by *Moore* and *Sankaran Nair* JJ., was a similar case. On the other hand in S. A. No. 133 of 1907, to which *Sankaran Nair* J. was a party, *Dorasinga Tevar* v. *Arunachala Chetty*[2], *Putty Narayanamoorthi Aiyar* v. *Marimuthu Pillai*[3], and *Kumar Nath Bhuttacharjee* v. *Nabokumar Bhuttacharjee*[4] the suits were for contribution and the plaintiff's right in such cases is undoubtedly only to recover the defendant's portion of the money actually paid by the plaintiff.

The case on which the learned vakil for the respondent mainly relied was *Izat-un-Nissa Begam* v. *Kunwar Pertap Singh*[5]. But in our opinion it affords him no help whatever. There a mortgagee, in execution of a decree on his mortgage, purchased the mortgagor's equity of redemption subject to two prior mortgages stated to be for certain sums. It afterwards turned out that those mortgages were valueless. The mortgagor sued to recover from the mortgagee-purchaser the amounts stated in the sale certificate as the value of those mortgages. The Judicial Committee held that the claim was unsustainable. According to their Lordships' view what was sold was the equity of redemption of the mortgagor. The fact that it turned out to be more valuable than it was supposed to be at the time of the auction sale could give no right of action to the mortgagor. They observed: "On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be—whether the price be settled by private bargain or determined by public competition—together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be expressed or implied. If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the encumbrances turn out to be invalid the vendor has nothing

1. (1905) 16 M. L. J. 20.
2. (1899) I. L. R. 23 M. 441.
3. (1902) I. L. R. 26 M. 322.
4. (1898) I. L. R. 26 C. 244.
5. (1909) I.L.R. 31 A. 553 (P. C.)

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to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property."

It is perfectly clear that the Judicial Committee was dealing with a case where a vendee pays a certain price for the equity of redemption and agrees to indemnify the vendor against the claims of the encumbrancers, and not one where he agrees to pay a certain sum of money for the land sold to him and undertakes to pay a portion thereof to encumbrancers. Their Lordships observe that in such a case an express promise to discharge encumbrances, against which the purchaser covenants to indemnify the vendor, does not change the nature of the vendor's right which is only to be indemnified against certain claims and not to have a certain sum of money belonging to him paid to another.

For these reasons we are of opinion that the plaintiff is entitled to recover the amount which the defendant agreed to pay to third parties. Mr. Sreenivasa Aiyangar invites us to refer the question for decision to a Full Bench, contending that the cases of *Pandi Dorasami Tevar* v. *Lakshmana Chetty*[1] and of *Mangamma Nachiar* v. *Subbammal*[2] are in conflict with *Dorasinga Tevar* v. *Arunachalam Chetty*[3], and draws attention to the observation of *Miller* J. in *Ansur Subba Naidu* v. *Bathula Bee*[4] that there is such conflict. But we do not think, for the reasons already mentioned by us, that there is any real conflict of authority, and we must decline to accede to his request.

It is next contended that as the debts due to the plaintiff's creditors have been actually paid by the plaintiff's brother and as there is nothing to show that the brother could or would proceed against him, the plaintiff ought not to be given a decree. It is not clear to us that the plaintiff's brother would not be entitled to proceed against him. Assuming, however, that he could not, that does not affect the plaintiff's right in the view we have expressed above.

We must finally refer to another contention of Mr. Sreenivasa Aiyangar that the defendant had difficulties in executing the

1. (1903) 14 M. L. J. 285.
2. (1905) 16 M. L. J. 20
3. (1899) I.L.R. 23 M. 441.
4. (1909) 8 M. L. T. 188.

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decrees which were assigned to him and that he could not be held to be guilty of default in the payment of the money which he agreed to pay. There is, in our opinion, no substance in this argument. The defendant's contract was to pay the consideration for the assignment to the two persons referred to above, and he was bound to do so within a reasonable time. Moreover it was he himself that tried to repudiate the assignment on grounds which were found to be unsustainable.

The plaintiff is entitled to a decree for the sum of Rs. 1,375 with interest at 6 per cent per annum from the date of plaint to this date and further interest at the same rate. The defendant must pay the plaintiff's costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Spencer.

T. Venkatachalla Reddi .. .. Appellant*
(*Plaintiff.*)

v

T. Rangiah Reddi & others .. .. Respondents
(*Defendant*-1 *to* 4).

Venkatachalla Reddi v. Rangiah Reddi.

C.P.C., Sch. II, para 17—Scope of—O. 23, r. 3—Adjustment—Bare agreement to refer to arbitration not an adjustment—Decree—Appeal—Order under S. 523 of the Old Code.

Orders whether under S. 525 or under S. 523 of the Old Code are decrees and are appealable.

A reference to arbitration of a matter which is the subject of litigation in a civil court does not fall within the scope of paragraph 17 of Sch. II, C.P.C. The classification contained in *Gulam Khan* v. *Mahommed Hussain* [1] holds good even under the new Code.

A mere agreement to refer to arbitration is not an adjustment within the meaning of the word in O. 23, r. 3, C.P.C.

Appeal from the order of the District Court of North Arcot in M. P. No. 491 of 1908 in O. S. No. 8 of 1907.

This was a suit for partition. Plaintiff, 1st defendant and the 4th defendant are brothers. Defendants 2 and 3 are the sons of the 1st defendant. There were two other defendants who were joined as they were said to be in wrongful possession of some of the family properties. On 6th April 1908 plaintiff and 1st defendant entered into an agreement in writing to refer the matter to five arbitrators. The signature of the 4th defendant was

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* A.A.O. 22 of 1910 3rd August 1911.

1. (1902) I.L.R. 29 C. 167 (P.C.)

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obtained subsequently. The exact date of it is in dispute. On the 7th April plaintiff withdrew from the suit and sent a registered notice to that effect to one of the arbitrators. The notice was received on the 9th April. On the 14th April the issues were settled. But on the 17th September 1908 on behalf of defendants 1 to 4 a petition was filed under Ss. 523 and 375, Civil Procedure Code, stating that the parties had entered into an agreement to refer the matter in dispute to arbitration. This was opposed by the plaintiff on the grounds that the 4th defendant did not sign the agreement along with 1st defendant, that the two minors and defendants 5 to 7 were not parties to the agreement and that S. 523 had no application to pending suits. On the 24th January 1910 the District Judge found that there was such an agreement. Although he minors were not actually parties to the reference, yet permission of the court was applied for on their behalf afterwards and hence, holding that the agreement and the petition constituted a bar to the further hearing of the suit, he referred this matter to the five named arbitrators. Against this order the plaintiff appeals.

T. R. Ramachandra Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

T. R. Ramachandra Aiyar:—There was no agreement to refer because such an agreement means an executory contract to come into force in future. Here there was an actual submission to the arbitrators. Only if there is an agreement could an application be made to file the agreement and make a reference. If it is an agreement, S.523, C.P.C., has no application. S. 523 does not apply to agreements entered into *pendente lite*. If the court is seized of a case and if all parties agree to refer and put in an application to refer the matter to arbitration the court will be bound to refer—*Ghulam Khan* v. *Mahammad Hussain*;[1] *Tincowry Deo* v. *Fakir Chand*[2] (per *Maclean* C. J.) Schedule II of the new Civil Procedure Code deals with arbitration under three heads. The present case cannot come under the 1st head because defendants 2, 3 and 5 to 7 are not parties to the so-called agreement. S. 506 requires that the application must be with the concurrence of all parties. 'Interested' has been newly added in the corresponding provision of the new Code. Minors

1. (1902) I.L.R. 29 C. 167 (P. C.) 2. (1902) I.L.R. 30 C. 218.

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are certainly interested parties. So also are defendants 5 to 7. Further, S. 506 cannot apply as the application was opposed by plaintiff. Under the new code it is clear that Schedule II, Para 17, contemplates only agreements antecedent to suit. Para 18 makes it so beyond dispute. The order of the District Judge was in January 1910. The new code applies. The bar under the proviso to S. 21 of the Specific Relief Act has been removed by the new Act. Therefore S. 21 has no application. Para 18, Schedule II, makes provision for stay of proceedings. The section refers only to cases where there is an agreement before suit and there is a refusal to perform the agreement. Only in that case can the party aggrieved proceed under S. 523. There is a similar provision in S. 19 of the Arbitration Act. *Salig Ram* v. *Jhumma Kuar*,[1] *Sheo Amber* v. *Deodat*[2] and *Sheo Dutt* v. *Sheo Amber Singh*[3] are against me. But they are rulings under S. 21, Specfic Relief Act; see also *Harivala Das* v. *Utamchund*[4]. If a suit is brought after the agreement by one of the parties another may apply to the court to enforce the agreement and the court may stay the proceedings pending arbitration. Here the agreement was after the institution of a suit; for institution of a suit in para 18 means future institution. *Shivalinga Rao* v. *Rango*[5] is relied on by the lower court. There are no direct rulings of this court on this point. *Nagasami Naik* v. *Rangasamy Naik*[6] and *Perumalla Satyanarayana* v. *Perumalla Venkata*[7] have no bearing. The law on the subject is clearly laid down in *Ghulam Khan* v. *Mahamad Hussain*[8]. Agreements pending suits are not within the purview of S. 523—*Tincowry Deo* v. *Fakir Chand*[9]: the refusal to perform must be before action—*Ramjidas Poddar* v. *House*[10]. Then as regards minors permission of the court under S. 462 should have been obtained previous to the application. Without determining the share of the minors the partition would not be complete—*Lakshmama* v. *Chinnathambi*.[11] The reference is illegal. All are not parties to the agreement and the petition—*Indra Subbarama Reddy* v. *Kannadi Rajamannar*[12]. The agreement has been signed by only two of the co-parceners. Further there was a revocation subsequently.

1. (1882) I.L.R. 4 A. 546, 548.
2. (1887) I.L.R. 9 A. 168.
3. (1904 I.L.R. 27 A. 53 55.
4. (1880) I.L.R. 4 B 1.
5. (1906) 8 Bom L.R. 777.
6. (1875) 8 M.H.C. R. 46.
7. (1903) I.L.R. 27 M. 112.
8. (1901) I.L.R. 29 C. 167 at 182-23.
9. (1902) I.L.R. 30 C. 218.
10. (1907) I.L.R. 35 C. 199.
11. (1896) I.L.R. 23 C. 956.
12. (1900) I.L.R. 24 M. 326, 331.
13. (1902) I.L.R. 26 M. 47.

T. V. Seshagiri Aiyar, raised a preliminary objection that no appeal lay. The old code did not provide for appeals in such a case, *vide* S. 588, C. P. C. Since the application under S. 523 was made when the old code was in force the right of appeal given by the new code cannot be availed of by the plaintiff—S. 104, Cl. (*d*), new Code. When proceedings have been started under the old code the new code can have no application—*Vajeechand* v. *Nand Ram*[1]. A vested right of appeal cannot be taken away by the new enactment. See *Colonial Sugar Refining Co.* v. *Irving* [2]; *Kalinga Hebbara* v. *Narasimha Hebbara* [3]; C.M.A 197 of 1909. The other party had no right of appeal against me. That privilege of mine cannot be taken away by the new code—*Nana* v. *Sheku*[4]; *Chinto Joshi* v. *Krishnaji Narayan*[5]; *Hurosundari Deh* v. *Bhojokari das Manji*[6]. The converse also should hold good—MAXWELL p. 321. The implication of S. 89 is that the operation of S. 104, Cl. (*d*) is excluded. So, this is not a matter of mere procedure. S. 523 clearly applies to pending suits—S. 17, Cl. (4), 2nd Schedule, C.P.C. *Ghulam Khan* v. *Mohamad Hussain*[7] is no authority. This case has been considered in *Suryanarayana* v. *Sarabayya*[8]. See the observations of *V. Krishnasawmy Aiyar* J. re. *Colonial Sugar Refining Co.* v. *Irving* [9] Then as regards the muchilika, the burden of impeaching it on the question of signature lies on the plaintiff. The muchilika presupposes an oral agreement. [*T.R.R. Aiyar.*—That was never the case. S. 523 says the 'agreement shall be in writing.'] That is only a mere matter of formality—*Lukhmibai* v. *Hajamidina Cassur*[10]; *Abdul Hamid* v. *Riajuddin*[11]. Then as regards the minors. A father in a joint Hindu family represents the minor sons—*Balaji* v. *Nana*[12]; The permission of the court can be obtained under S. 462, C.P.C., subsequently. The plaintiff has admitted the muchilika to be an agreement. Further the agreement can be regarded as an adjustment under S. 375—*Lakshmana* v. *Chinnathamby* [13] *Progdas* v. *Girdari Das* [14] *and Projodhar Lal* v. *Ramnath* [15].

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1. (1907) I.L.R. 31 B. 545.
2. (1905) A.C., 369.
3. (1919) 21 M. L.J. 631.
4. (1908) I.L.R. 32 B. 337.
5. (1879) I.L.R. 3 B. 214.
6. (1886) I.L.R. 13 C. 86, 89.
7. (1902) I. L. R. 29 C. 167 (P.C.
8. (1909) 21 M. L. J. 263 (F. B.)
9. (1901) L. R. A. C. 495
10. (1899) I. L. R. 23 B. 629.
11. (1907) I. L. R. 30 A. 32.
12. (1903) I.L.R. 27 B. 287.
13. (1900) I. L. R. 24 M. 326.
14. (1907) I.L.R. 26 B. 76.
15. (1897) I.L.R. 24 C. 908.

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See also S. 21 Specific Relief Act. 'Sues' means ' continues to sue.

T. R. Ramachandra Aiyar in reply:—S. 89, C.P.C., expressly provides that the new code applies to arbitration proceedings. The substantive rights will not be affected. The general principle laid down in cases cited by the other side is untouched. Under the code of 1877 a right of appeal was allowed—see *Harbuns Sahai* v. *Bhai Pershad Singh*[1]. An order under S. 523 is a decree —*Ghulam Khan* v. *Mahamad Hussan*[2]; *Ponnusami Mudali* v. *Mandi Sundara Mudali*[3]; *Mahomed Wahabuddin* v. *Hakiman*[4]; *Thiruvangadathan* v. *Vaidhinathan*[5]; *Gowdur Majati* v. *Gowdur Bhagavan*[6]; see also *Suryanarayana* v. *Sarabhiah.*[7] S. 2, C.P.C., defines a decree. An appeal lies under S. 540. My appeal can be treated as a revision in case no appeal lies. See *Krishnasamier* v. *Saminathier.*[8]

The Court delivered the following

JUDGMENT :—This is an appeal against an order of the District Judge of North Arcot under Schedule II, aragraph 17, Civil Procedure Code, filing an agreement to arbitrate presented by certain parties to O. S. 8 of 1907 on its file and making an order of reference thereon.

The learned vakil for the respondent took the preliminary objection that under the old C.P. C., no appeal lay against such an order and that, although the order was passed after the new code came into force, yet in as much as the application to file was presented under the old code S. 104 (*d*) of the new code cannot be given retrospective effect.

It is unnecessary to discuss the somewhat knotty point involved in the latter part of this contention, in as much as we are clearly of opinion that there was a right of appeal even under the old code. This is laid down by their Lordships of the Privy Council in *Gulam Khan* v. *Muhammad Hussan*[2], which

1. (1879) I.L.R. 5 C. 259.
2. (1902) I.L.R. 29 C. 167, 183.
3. (1903) I L. R. 27 M. 255 (F.B.)
4. (1898) I.L.R. 25 C. 757.
5. (1905) I.L.R. 29 M. 303.
6. (1898) I.L.R. 22 M. 299.
7. (1910) 21 M.L.J. 263.
8. (1908) 18 M.L.J. 568.

has been followed by a full bench of this court in *Suriyanarayana* v. *Sarabiah*[1], and also in *Tiruvangadathiengar* v. *Vaithinatha Aiyar*[2]. This latter case deals with an order filing an award under S. 525 of the old Code of Civil Procedure (paragraph 20 of Schedule II) but orders on such an application and an application under S. 523 (paragraph 17 of Schedule II) are dealt with on the same footing by the Privy Council in *Gulam Khan* v. *Muhammad Hassan*[3], and the opinion is expressed that the order in each case is a decree. If a decree, it is indisputably appealable. This disposes of the preliminary objection.

Passing to the merits of the appeal, the chief objection taken to the order of the District Judge is that as the proposed arbitration related to the subject-matter of the suit then pending between the parties to the agreement, the latter does not come within the scope of paragraph 17 and should not have been ordered to be filed. This objection was taken before the District Judge but overruled.

It should be stated that the application cannot be treated as one under paragraph 1 (old Code of C.P., S. 506) inasmuch as the plaintiff did not join in it. We have simply to determine whether it is covered by paragraph 17.

As pointed out by the learned District Judge there has been a direct difference of opinion on this point between the Allahabad and the Bombay High Courts on the one hand and the Calcutta High Court on the other, but all doubt as to which view should prevail is dispelled by the decision of the Privy Council in *Gulam Khan* v. *Mahommad Hassan*[3] (which has been already quoted in another connection). We cannot follow the District Judge in his statement that the Privy Council gives no distinct opinion as to the applicability of S. 523 when there is a pending litigation. Their Lordships of the Privy Council in their judgment very carefully analyse the provisions relating to arbitration and classify arbitrations under 3 heads numbered I, II, and III. A comparison of this analysis with the words of the old code leaves no doubt whatever that

1. (1909) 21 M.L.J. 263.
2. (1905) I.L.R. 29 M. 303.
3. (1902) I.L.R. 29 C. 167.

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these three heads correspond to arbitrations initiated by applications under Ss. 506, 523 and 525 respectively. Head II is defined to cover cases where parties *without having recourse to litigation* agree to refer their differences to arbitration. * * * * * It is not suggested that paragraph 17 is any way wider in scope than S. 523.

We think there can be no doubt whatever of the meaning of the Privy Council's exposition of the law and it has been interpreted in precisely the same way by the Calcutta High Court in *Tincowry Dey* v. *Fakir Chand Dey*[1]. It is just as applicable to the new Schedule II as to the provisions of the old code and is in our opinion conclusive of the question.

It is suggested on behalf of the respondent that even if paragraph 17 of Schedule II be held inapplicable, the application of agreement may be dealt with under Order 23, Rule 3, and treated as an adjustment of the suit. This is entirely a new suggestion and it is clear that neither the parties to the petition nor the court itself in disposing of it ever contemplated that it should be dealt with under the rule in question or under S. 375 of the old code which corresponds to it. Respondent's vakil relies on the rulings reported in *Pragdas* v. *Girdar Das*[2], *Projodar Lal Sinha* v. *Ramanath Ghose*[3] and *Lakshmana Chetty* v. *Chinna Thambi*[4]. The Calcutta case deals with an ordinary agreement to settle the matter in dispute without reference to arbitration. In both the other cases the basis of their adjustment was not only an agreement to refer to arbitration but also an award of arbitration consequent thereon. No doubt an agreement to refer coupled with the award resulting from the reference may be treated as an adjustment, but an a simple agreement to refer be so treated ? We are of opinion that it cannot. This is the view taken by *Maclean* C. J. in *Tincowry Dey.* v. *Fakir Chand Dey*[1]. It is true that the other two judges in that case hesitated to concur in the opinion of *Maclean* C.J. that a simple agreement to refer could under no circumstances be treated as an adjustment under S. 375. They did not, however, express an adverse opinion and the reasoning of *Hill* J. (in

1. (1902) I.L.R. 30 C. 218.
2. (1907) I.L.R. 26 B. 76.
3. (1897) I.L.R. 24 C. 908.
4. (1900) I.L.R. 24 M. 326.

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which *Stevens* J. concurred) for refusing to accept the agreement in that case as an adjustment applies with equal force to the present case. *In Rukma Bai* v. *Adamji*,[1] *Beaman* J. took the same view as *Maclean* C. J. in *Tincowry Dey* v. *Fakir Chand Dey*[2] observing that mere submission to arbitration was not an adjustment of a suit but only a step towards it. We are clearly of opinion that the agreement to refer in this case cannot be treated as an ajustment under Order 23, Rule 3.

The order of the District Judge will be set aside with costs in both courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Koola Naikan *alias* Rama Naickan .. Appellant* (*1st Defendant*)

Muthayammal and others ..Respondents (*Plaintiff* & *Defts.* 2 & 3)

Rama Naickan v. Muthayammal.

Co-tenants—Suit for possession—Decree, form of—Suit in exclusive right.

The plaintiff, a co-widow, sought to recover possession of properties from her husband's brother, the first defendant, in her own exclusive right. The second defendant, the other widow, supported the first defendant. She had received Rs. 400 under an arrangement with him. The first defendant's contention of non-division was found against him.

Held, that under the circumstances plaintiff was entitled only to a decree for her half share of the properties.

If one of two co-tenants sues on behalf of the other co-tenant also, the plaintiff is entitled to recover the whole; otherwise he is entitled to recover his share unless the suit is based on allegations of prior possession and dispossession. [*Durjan Singh* v. *Durbijoy Singh*[3] referred to.]

Second appeal from the decree of the Court of the Additional Sub-Judge of Coimbatore in A. S. 182 of 1909 presented against the decree of the Court of the District Munsif of Erode in O. S. 224 of 1908.

T. M. Krishnaswami Aiyar for appellant.

T. Narasimha Aiyangar for 1st respondent.

T. M. Krishnaswami Aiyar :—The co-widow who sues is entitled only to her share. She does not bring the

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* S. A. No. 1486 of 1910. 11th August, 1911.

1. (1902) I.L.R. 33B. 69.
2. (1902) I.L.R. 30. C. 218.
3. (1909) 9 C.L.J. 623 at 626.

Rama Naickan *v.* Muthayammal.

suit on behalf of the other co-widow. She denies her title. The other co-widow has settled her claims with the brother of her husband on the footing that the family was undivided and her right was only to maintenance. This would estop her from claiming herself as plaintiff. That must equally estop plaintiff who claims in that matter in the right of the other widow. Co-widows are only tenants-in-common—*Durga Dat* v. *Gita* [1] and the cases cited therein. In this case, a gift by a co-widow was upheld. In *Kanni Ammal* v. *Ammakannu Ammal* [2] an alienation by the co-widow was upheld and the alienee's right to enforce partition recognised. The tenant-in-common can get only his share, especially when he does not sue on behalf of others.— WARWELLE on *Ejectment*, p. 128; *Mahabala Bhalter* v. *Kunma Bhetter* [3].

T. Narasimha Aiyangar contended that the parties went to issue only on the plaintiff's absence of title by reason of unchastity and not on the plaintiff's right to represent the other widow. It has been taken to be such an action. The interested party, *viz.*, the other widow, though a party, has not objected to it. One of the tenants-in-common is entitled to maintain by himself against a trespasser.

The Court delivered the following

JUDGMENT :—The question of law urged before us arises under the following circumstances. The plaintiff and the second defendant are the widows of the man who originally owned the property in dispute. The first defendant alleged that he was an undivided co-parcener of the plaintiff's husband and therefore entitled to the property. Both the courts below have found against the first defendant's plea. The second defendant supported the first defendant's allegation and it appears that she had entered into an arrangement with him by which she recognised the 1st defendant who agreed to give her a certain amount in lieu of maintenance. The plaintiff claimed to recover the entire property, alleging that the second defendant had, by reason of unchastity, lost her rights as a co-widow and the first defendant made similar allegations of unchastity against plaintiff. It has been found that the 2nd defendant's charges against the plaintiff are not made out, and the plaintiff apparently never thought

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1. (1911) 8 A.L.J. 220. 2. (1899) I.L.R. 23 M. 504.
3. (1898) I.L.R. 21 M. 373 at 381.

Rama Naickan *v.* Muthayammal.

of pushing her charges against the second defendant to an issue. The position therefore is this : the plaintiff, who is entitled to a co-widow's estate, seeks to recover possession of the entire property not on behalf of herself and her co-widow, the second defendant, but in her own exclusive right. Both the lower courts have decided in her favour, and her learned vakil has tried to support the decree on the principles applicable to rights of a tenant-in-common and has argued that the right of a co-widow against a trespasser in possession is even higher than that of a tenant-in-common. As regards the nature of a co-widow's estate it is settled that it is a joint tenancy in so far that on the death of one the entire estate goes to the survivor but each widow is entitled as against the other to a half share and is further entitled to alienate her husband's estate. As regards the right of a co-tenant to recover more than his share we think the law is correctly stated in WARWELLE on *Ejectment* (S. 123, p. 128.) If the suit is on behalf of the other co-tenant also, the plaintiff is entitled to recover the whole; otherwise he is entitled to recover only his share unless the suit is based on allegations of prior possession or dispossession. In *Dursan Singh* v. *Durbijoy Singh* [1] it is laid down that a co-parcener of a Mitakshara family is entitled as against a trespasser to recover only his share. We see no good reason why a co-widow should have a higher right. Besides, in this case, it is alleged that the second defendant has received from the first defendant Rs. 400 under the arrangement already alluded to, and so it is possible that there might be equities in favour of the first defendant against the second defendant in case the latter sought to recover her share. In our opinion the plaintiff was entitled to recover only a half-share in the property and the decree of the lower courts will therefore be modified accordingly. There will also be a decree for division. Each party will bear his or her own costs of this appeal.

1. (1909) 9 C.L.J. 623 at 626.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Spencer.

Mira Mohidin Rowthen and another .. Appellants* (*Plaintiffs*)

v.

Nallaperumal Pillai and another .. Respondents (*Defendants*).

Mohidin Rowthen *v.* Nallaperumal Pillai.

Limitation Act, Ss. 4, 14—*Not to be cumulatively read—Computation of time—Suit filed in wrong court—Tacking on of time during recess of wrong court.*

Where a plaintiff filed a suit in a wrong court, the time for filing it having expired during the recess of that court on its reopening day and the plaint was returned subsequently to be presented to the proper court: *Held* that the plaintiff would not be entitled to deduct the time between the expiry of the limitation period and the day of the reopening of the court in which he wrongly filed the suit first, even though he may be entitled to invoke the benefit of S. 14 by reason of a *bona fide* mistake as to the time during which his suit was pending in the wrong court after having been filed there once and also to deduct the time during which the proper court was closed.

Appeal under S. 15 of the Letters Patent from the Judgment and order of the Hon'ble Mr. Justice *Sankaran Nair*, in C. R. P. 154 of 1910, presented against the decree of the Subordinate Judge at Tuticorin in S. C. S. No. 263 of 1909.

The plaint in this small cause suit was first filed in West Sub-Court, Madura, on 6th July 1908, on the first day after reopening of that court after 2 months' summer holidays, the cause of action being stated in the plaint to have arisen on 14th June 1905. That court returned the plaint on the ground of want of jurisdiction for presentation to proper court on 17th February 1909; then as 18th February 1909 was a public holiday the plaint was presented on 19th February 1909 in Tuticorin Sub-Court. This latter court which opened earlier than 6th July 1908 decreed the claim holding that the suit was not barred by limitation, that the plea of discharge was false and that the suit was *bona fide* filed in Madura Sub-Court at first. Against this decree this revision petition was filed on the ground of limitation.

Mr. Justice *Sankaran Nair* held that the suit was barred by limitation on the ground that the plaintiff was entitled to deduct only the period during which the suit was pending in Madura Sub-Court and not that during which that court was closed for summer holidays. Against this order this Letters Patent Appeal was filed by the plaintiff.

* L. P. A. 4 of 1911. 22nd August, 1911.

Mohidin Rowthen *v.* Nalla-perumal Pillai.

N. Rajagopalachariar for appellants.

S. Ramaswami Aiyar for *K. Srinivasa Aiyangar* for respondents.

N. Rajagopalachari :—The plaint is within time. The period before the reopening of the Madura Sub-Court must also be deducted under S. 4 of the Limitation Act. Section 3 of the Act says that S. 4 must be read subject to the provisions contained in sections 4 to 25. In this case the limitation is subject to the rules in S. 4 and S. 14. The word "subject" has been defined and considered in *Jawahir Lal* v. *Narain Das*[1] and *Siyadat-un-nissa* v. *Muhammad Mahmud*[2]. I am entitled to cumulative deduction. Such deduction has been allowed in *Swaminatha Iyer* v. *Venkatasubba Iyer*[3] and *Silamban Chetty* v. *Ramanadhan Chetty*.[4]

S. Ramaswami Aiyar :—I admit that cumulative deduction can be allowed. But the period covered by the long vacation of the Madura Sub-Court cannot be allowed for two reasons : (1) the 'court,' in S. 4, means that court which actually has jurisdiction, not any court or a wrong court—*Abhoy Churn Chackerbutty* v. *Gowar Mohan Dutt*.[5] Only the time occupied b y the vacation of the court which has jurisdiction can be deducted. (2) The Tuticorin Sub-Court in that year opened earlier than the Madura Sub-Court as has been found.

N. Rajagopalachariar in reply :—My *bona fides* in instituting the suit in Madura Sub-Court has been found. There is nothing in S. 4 to limit the word court to the 'right court.' Where the Code wanted to say 'proper court' it has specifically said so as in Article 182, 5th column, in the case of an application to take a step in aid of execution.

The Court delivered the following

JUDGMENTS:—*Ayling* J.—In this case the plaintiffs wish to exclude the period from the 14th June 1908 (expiry of 3 years from date of cause of action) to the 6th July 1908 (date of filing the plaint in the Madura Sub-Court as well as the period from the 6th July 1908 onwards and it is necessary for them to do so in order to save limitation admittedly. S. 14 of the Limitation Act, cannot be extended to cover the period from the 14th June 1908 Ayling J.

1. (1878) I.L.R. 1 A. 644, 646.
2. (1897) I.L.R. 19 A. 342.
3. (1903) I.L.R. 27 M. 21.
4. (1910) I.L.R. 33 M. 526.
5. (1875) 24 W.R. 26.

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Ayling, J.

to 6th July 1908. It is contended on behalf of the plaintiffs that it is covered by S. 4 and it is argued, apparently with reason, that the concessions awarded by the different sections of the Limitation Act are independent and cumulative. On the other hand, it is not denied that the proper court in which the suit should have been filed re opened before the 6th July 1908 and respondents' vakil quoted the decision in *A. C. Chackerbutty* v. *G. M. Dutt*[1] as authority for holding that in such circumstances S. 4 cannot operate in plaintiff's favour. Appellants' vakil does not attempt to distinguish this case but merely argues that the decision is wrong. I am not only prepared to follow the ruling in question but entirely concur in it.

I consider that the only effect of S. 4 is to extend the period of limitation from the 14th June 1908 to the date of reopening of the proper courts. When that date expired and no plaint was presented the suit became effectively time-barred, and S. 14 cannot assist plaintiffs, inasmuch as it could only take effect from the 6th July, 1908.

I would dismiss the appeal with costs.

Spencer J.—The cause of action for this small cause suit arose on 14th June 1905, and June 14th of 1908 was therefore the last day on which the plaintiffs' suit could ordinarily be filed.

They actually filed their suit on July 6th 1908, in the Madura West Sub-Court. On June 5th that court was closed for the recess and July 6th was the reopening day. On an objection being taken by defendants to the jurisdiction of the Madura West Sub-Court the plaint was returned on February 17th, 1909, for being presented to the Tuticorin Sub-Court and it was so presented on the next court day, *viz.*, February 19th.

It has been found that the plaintiffs' action in going first to the Madura West Sub-Court was *bona fide* and not a mere device to save the limitation. The learned Judge who heard this revision petition held that plaintiffs' were entitled under S. 14 of the Limitation Act to deduct the period from July 6th to February 17th during which they were prosecuting their suit with due diligence in Madura Court, but not the period from June 15th to July 5th during which the Madura Court was

1. (1875) 24 W.R. 26.

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closed. It is conceded that if this last mentioned period is deducted the suit will have been filed in time but not otherwise. The appellants (plaintiffs) invoke the aid of S. 4 of the Limitation Act of 1908 (S. 5 of Act XV of 1877). Their pleader points out that the institution of every suit is by S. 3 of the Act made subject to all the provisions contained in Ss. 4 to 25 and argues therefrom that the effect of the concessions in these sections may be cumulative. He quotes the decisions in *Jawahir Lal* v. *Narain Das* [1]; *Siyadat-un-nissa* v. *Muhammad Mahmud* [2]; *Tukaram Gopal* v. *Pandurang Sadaram* [3]; *Saminatha Iyer* v. *Venkatasubba Aiyar* [4]; *Silamban Chetty* v. *Ramanadhan Chetty* [5] and *Banee Kant Ghose* v. *Haran Kisto Ghose* [6] to illustrate that all the provisions of the above sections that are appropriate to the suit concerned may be applied; that courts have been wont to put a fair and liberal construction on the law of limitation and in many cases have allowed the provisions of more than one section to operate in the calculation of time in a particular suit, *e. g.*, if the time for presenting an appeal expires on a day when the court is closed an appellant who has not obtained copies of the decree and judgment appealed against may by applying for copies on the date when the court reopens obtain an extension of time for filing his appeal by the period requisite for obtaining copies and thus reap the benefit both of S. 4 and S. 12.

I am not at variance with the principles enunciated in these decisions, but I observe that none of them deals with the case of proceedings instituted in the wrong court except the last on the list which related to an execution application made in a court not competent to execute the decree; that in this case the section, upon a reading of which the decision turned, was S. 15 of Act IX of 1871, and that the law has since been altered so as to include applications as well as suits.

The only decision to which our attention has been directed, in which the facts were similar to the present, is that of *Abhoya-churn Chukerbutty* v. *Gowar Mohan Dutt.* [7] In that case a suit was filed in a District Munsif's Court and was finally decreed, but

1. (1878) I.L.R. 1 A. 644.
2. (1897) I.L.R. 19 A. 342.
3. (1901) I.L.R. 25 B. p. 584.
4. (1903) I.L.R. 27 M. 21.
5. (1910) I.L.R. 33 M. 526.
6. (1875) 24 W.R. 405.
7. (1875) 24 W. R. 26.

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Spencer J.

in appeal it was discovered that the District Munsif had no jurisdiction and the suit was ultimately returned for being filed in a Small Cause Court. The plaintiff sought to exclude not only the time occupied by the prosecution of his suit in the two courts of original and appellate jurisdiction, but also the period during which the District Munsiff's Court was closed for vacasion before his suit was first instituted, and the period between the appellate court decision and the return of his plaint by the lower court. The circumstances of that case differed from those of the case which we are considering in that an appeal intervened between the proceedings in the court in which the suit was wrongly instituted and the proceedings in the proper court and also because there was in that case a second ground for declaring the suit to be time-barred owing to the plaintiff's negligence in not applying for the return of his plaint as soon as the appeal was decided. The intervention of an appeal will, however, make no difference under Explanation II to S. 14. The Calcutta High Court decided both points against the plaintiffs and I am not prepared to hold that the view taken by them was unsound. I agree with the learned Judge who decided the revision petition that the prosecution of the suit in the Madura Sub-Court can only be deemed to have commenced on July 6th when the plaint was presented.

Although the word "court" in S. 4 is not qualified by the adjective "proper" as it is in other parts of the Act, it could not be reasonable to take accouut of the closing and reopening of any other court than that in which the suit was recently instituted. It seems to me that after June 14th the plaintiffs' claim to recover money from defendants was no longer alive, as a plaint presented in the court having jurisdiction to entertain it would have been rightly rejected as time-barred and that nothing that plaintiffs could do after that date would have the effect of reviving a time-expired claim.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Phillips.

Patibandala Sitaramaiya .. Appellant*
v. (*Defendant*)
Patibandala Pichaiya .. Respondent
(*Plaintiff*).

C.P.C., S. 104 (1), *Cl.* (*f*)—*Sch. II, Cl.*(21)—*Appeal from decree in terms of award converted into one from order filing award—Arbitration—Estoppel—Internal procedure.* Sitaramaiya *v.* Pichaiya.

Though no appeal lies from a decree in terms of the award *qua* decree except in so far as it is in excess of or not in accordance with the award, yet their Lordships treated an appeal so filed as one from the order filing an award under S. 104, Cl. (*f*), C. P. C.

Where one of the parties consented to the proceedings before the arbitrator being of an informal character, he cannot afterwards seek to impeach the award upon the ground of irregularity in the conduct of the proceedings.

Appeal from the decree of the District Court of Guntur in O. S. No. 47 of 1909.

T. Prakasam for appellant.

L. A. Govindaraghava Aiyar for respondent.

The Court delivered the following

JUDGMENT:—*Chief Justice.*—A preliminary objection was taken in this case on the ground that no appeal lay. The appeal is from the judgment of the District Judge which directs that a certain award shall be filed and gives the plaintiff a decree in accordance with that award. S. 21, cl. (1)—of the arbitration section in the second schedule to the Code—provides "where the court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in para 14 or para 15 is proved the court shall order the award to be filed and shall proceed to pronounce judgment according to the award." Then sub-section 2:—"Upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award." Consequently *qua* decree it seems to me the contention that no appeal lies is well founded. Then we have S. 104, Sub-S.(1), cl. (*f*):—

* A. No. 60 of 1910. 22nd August 1911.

Sitaramaiya v. Pichaiya.

Chief Justice.

"An appeal shall lie from an order filing an award". It is quite true that the memorandum of appeal is framed as if it were an appeal against a decree and the stamp is paid on the footing that it is an appeal against a decree, and under the second schedule there is no appeal against a decree unless it is in excess of or not in accordance with the award. But the judgment appealed from is not only a decree but it is also an order that the award be filed; and I think we may treat this appeal, although the appellant himself does not so treat it in the memorandum of appeal, as an appeal against an order filing an award. Therefore, the preliminary objection must be overruled. It is therefore open to the appellant to impeach the award on any ground which it is open to him to take in opposing an application that an award be filed.

The learned counsel for the appellant impeaches this award on four grounds. He says (1) that the matter which was determined was not included in the submission to arbitration; (2) that the award was given without notice to the defendant; (3) that inquiries were made behind the back of the defendant; and (4) that there is illegality on the face of the award.

Now I take the fourth ground upon which the award is attacked first as that seems to me the most important. The total amount of the irrecoverable items as found in the award is, to put it in round figures, Rs. 16,000. The question is what proportion of that amount is the plaintiff entitled to recover from the defendant. The plaintiff says he is entitled to recover the sum of Rs. 8,000, that is half of Rs. 16,000, on the ground that as between him and the defendant there was a sub-partnership with regard to the amounts advanced by the plaintiff.

The defendant's argument is based on certain words which are to be found at the beginning of the submission to arbitration. These words are:— "Both of us and A. E. Andrews have jointly arranged four shares" and the defendant's case is that there are four shares in the partnership of which Andrews has two and he and the plaintiff one each, and that, therefore, his liability to the plaintiff must be assessed upon the footing of his only being liable to pay Rs. 8,000 and not Rs. 16,000 and consequently the ratio which the plaintiff is entitled to recover against him is one half of Rs. 8,000 and not half of Rs. 16,000. It seems

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Chief Justice.

to me impossible to read that into the terms of the submission to arbitration. It must be borne in mind that the award is impeached upon the ground that the illegality is apparent on the face of the award itself; it seems to me it is impossible to say, reading the award by the light of the terms of the submission to arbitration, that there is an apparent illegality on the face of the award upon the ground suggested. I say nothing as to whether or not the defendant can recover as against Andrews by virtue of his partnership agreement with him. The only question I have to consider is the defendant's liability to the plaintiff in respect of the advances made by the plaintiff which have been held to be irrecoverable and I think the District Judge's view that the relations between the plaintiff and the defendant were those of sub-partners and that they are liable in equal shares in respect of those advances is the right view.

The other three grounds I think I may deal with together. No doubt the proceedings before the arbitrator were somewhat of an informal character. They seem to have consisted chiefly in the examination of accounts. But it seems to me the District Judge was not right in holding that that was the course to which the two parties to the arbitration—the plaintiff and the defendant—had consented. He holds that the award was made in accordance with the wish of the parties as evidenced by certain letters which are exhibits *C*, *D*, *F* in the case. It seems clear from the terms of these letters that defendant was content that his proceedings should be of an informal character. Having so expressed his consent I do not think it is open to him now to seek to impeach the award upon the grounds of suggested irregularity such as has been put forward by the learned counsel for the appellant.

On these grounds I think the judgment of the court below was right and accordingly I would dismiss the appeal with costs.

Phillips J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Spencer.

Pitty Thyagaraya Chettiar .. Appellant* (*Plaintiff*)

v

Sivapada Mudally and others ..Respondents (*Defendants*).

Thyagaraya Chettiar *v.* Sivapada Mudally.

Landlord and tenant—Rent sale—Adjournment—Inadequacy of time—Court's duty to raise issue on absence of allegation of injury—Madras Acts—Rent Recovery Act.

The adjournment of a rent sale under the Rent Recovery Act by the selling officer from the date fixed for the sale, whether valid in law or not, is at the most only an irregularity and cannot invalidate the sale in the absence of substantial injury to the defaulter. Though it is open to a court to consider any question of irregularity in a rent sale, even though the point has not been raised, yet in the absence of any allegation of consequent substantial injury, it should be presumed there was none and the framing of an issue on the point is unnecessary and improper.

Second appeal from the decree of the District Court of Chingleput in A. S. 165 of 1908, presented against the decree of the Court of the District Munsiff of Tiruvellore in O. S. 649 of 1906.

T. V. Seshagiri Aiyar for Appellant.

V. Visvanadha Sastri for 1st respondent.

The Court delivered the following

JUDGMENT:—In the suit out of which this appeal arises the plaintiff, as purchaser of certain lands at a rent sale under Madras Act VIII of 1865, sued to get possession of the said lands with mesne profits from his daughters who had remained in occupation. The District Munsif dismissed the suit on the ground that the sale having been held two days after the advertised date was illegal and invalid. The District Judge on appeal took the same view.

The case quoted by the District Judge *Venkata Chellapati Iyer* v. *Robert Fischer*,[1] as well as the case *Ramanasari* v. *Muthusami Naick*[2] are good authorities for holding that in a suit of this description the defendent may plead illegality of the sale as a defence even although he may have taken no previous steps to get the sale set aside and that, if the sale is found to be invalid, the suit must be dismissed. But it certainly does not follow that every irregularity in the sale proceedings will have

* S. A. No. 1379 of 1909. 22nd August 1911.

1. (1907) 17 M.L.J. 294. 2. (1906) I.L.R. 30 M. 248.

the same effect, vide *Subramania Aiyar* v. *Rangappa Kalakka Thola Udayar* [1]. In the first of the cases quoted above the sale was held in pursuance of an illegal demand, in the second a statutory provision of law in S. 18 of the Madras Rent Recovery Act had been violated. The present case is very different. The sale irregularity on which the District Munsif proceeded is the adjournment of the sale from the advertised date, 14th May 1900, to the 15th, and again to the 16th on which date the plaint properties were sold. These adjournments were due to the fact that it was not found possible to complete the sale of all the items notified for sale on the first or even the second day. Whether the selling officer was empowered to adjourn the sale under the these circumstances is open to argument and is a point on which no express authority has been quoted. But in any case it is not an infringement of any provision of law; and is, in our opinion, at most, merely an irregularity which might or might not justify setting aside the sale. In the absence of any provision on the point in the Madras Rent Recovery Act, we may follow the analogy of S. 311 of the old Civil Procedure Code, Act XIV of 1882, which was in force at the time of the sale, and hold that it would only invalidate the sale, if it were shown to have caused substantial injury to the defaulter in the shape of a lower auction price.

There are two other alleged irregularities to which our attention is drawn. The first of these, dwelt on by the District Judge, is the fact that the items were not put up for sale in the order in which they stand in the sale list; while the second, to which our attention is drawn for the first time in this court by the respondent's vakil, is that the sale notice, Exhibit *P*, includes the properties of 29 different defaulters. He argues that there should have been a separate sale notice for each. No authority is quoted for the last mentioned position and the former irregularity stands on the same footing as the one we have already dealt with. It has not been found that the sale price fetched by the suit properties was inadequate, although an issue (No. 5) was framed, covering the point. The District Munsif has recorded no distinct finding but says that the value of the properties was problematical, by which he presumably meant

1. (1900) I.L.R. 24 M. 307.

Thyagaraya Chettiar v. Sivapada Mudally.

that he found it impossible to say whether the price was or was not fair. The District Judge has recorded no finding on the point. We do not propose to call for one, as in our opinion no issue should ever have been framed on the point. We say this for the simple reason that no allegation of limitation of sale price or other substantial injury has ever been made by the defendants. Their written statement makes no reference whatever to any irregularity in the conduct of the sale, much less to any substantial injury consequent thereon; and from para 4 of the District Munsif's judgment, it appears that the irrugularity of the postponement of the sale was discovered by the District Munsif himself when he began to write his judgment. It was in consequence of this discovery that he framed a fresh issue which ran thus:—

"V. Whether the plaint lands were sold in the rent sale for a fair price? If not, whether the sale is invalid or illegal?

Whether the irregularity discovered amounted to an illegality which would necessarily invalidate the sale was a question which it was open to him to consider although the point had not been raised; but in the absence of any allegation of consequent substantial injury it should have been presumed that there was no such injury and the framing of an issue on the point was unnecessary and improper.

The dismissal of the suit on the 5th issue was wrong. The decrees of the lower courts must be set aside and the suit remanded to the District Munsif's court for disposal on its merits. The costs will be the costs in the cause.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Phillips.

Pamulapati Authivedu & another	..	Appellants*
v.		(*Defts.* 1 & 2)
Samulapati Subbiah & others	..	Respondents
		(*Pl'ff.* & *Defts.* 3 to 6.

Mortgage—Redemption—Clog on—Lease and mortgage—Single transaction—Lease to last beyond the discharge of mortgage.

* A. No. 292 of 1909. 24th August 1911.

Anthivedu v. Subbiah.

• Leases between a mortgagor and a mortgagee to last during the pendency of a mortgage are not bad in themselves. (*Mahomed* v. *Ezekiel* [1] referred to), but where the documents (the lease and the mortgage) form one transaction and contemplate the continuance of the lease after the discharge of the mortgage, the transaction is a fetter on the equity of redemption which the court ought not to enforce.

The fact of the existence of two documents does not by itself show that the transactions were independent of each other.

Appeal from the decree of the District Court of Guntur in O. S No. 66 of 1908.

A mortgage was stipulated to last for a certain number of years. On the same day as the mortgage, a lease was executed to run for 20 years after the period of mortgage.

The Advocate-General (*P. S. Sivaswami Aiyar*) for appellants (defendants) :—Though a clog on the equity of redemption is bad yet any collateral advantage stipulated is good—FISHER on *Mortgages* S. 226 ; *Stanley* v. *Wilde*[2]. A stipulation for a perpetual lease after redemption of the mortgage is bad. This is only a lease for 20 years and the transaction is reasonable.

V. Viswanatha Sastri for respondents :—Redemption contemplates not only the right to pay but also the right to get back possession. If possession cannot be got, it will be a fetter on the equity of redemption. There are no words in S. 60 to the effect that it is in the absence of a contract to the contrary—*Ramasami Pattar* v. *ChinnanAsari*[3] ; *Hiralal* v. *Narsilal*[4] ; *Bhiwat Jati* v. *Biranja Kuar*[5]. Even a lease was construed as a mortgage. A clog on the equity is bad—*Mahomed* v. *Bagas*[6]; *Morgan* v. *Jeffreys*[7]. Any collateral advantage would be enforced only during the continuance of the mortgage. After payment it cannot be enforced—COOTE on *Mortgages*, 7th Edn., Vol, I, pp. 15, 17. Lease is specifically referred to in p. 20—*Ramasami Pattar* v. *Chinan Asari* [8]. *Mahomed* v. *Ezekiel* [1] is a case of lease. [Their Lordships stopped further argument.]

The Advocate-General replied, distinguishing the cases cited by the respondents and submitted that the two transactions were separate. as evidenced by the fact of there being two deeds. On clog, see *Samuel* v. *Jarrah Timber Corporation Ltd.* [8]

1. (1905) 7 Bom. L.R. 772, 779.
2. (1899) 2 Ch. 474, 479.
3. (1901) I.L.R. 24 M. 454.
4. (1909) 11 Bom. L.R. 326.
5. (1900) I.L.R. 22 A. at 241.
6. (1908) I.L.R. 32 B. 569.
7. (1910) 1 Ch. 620, 626, 627.
8. (1904) A.C. 323 at 325.

Authivedu *v.* Subbiah.

The Court delivered the following

JUDGMENT:—As regards Exhibit *II* it is not contended that under that instrument the plaintiff is not entitled to pay off the mortgage debt at any time. He has in fact paid it, and we understand that the mortgagee has received it, but the Advocate-General has contended that notwithstanding this the mortgagee is entitled to remain in possession until the expiry of the 12 years, the period of the mortgage as provided in the deed. The question of whether the provisions of the deed are unenfoceable on the ground that they fetter the right to redeem, of course, only arises if the parties intended, when they executed the deed, that the mortgagee should be allowed to remain in possession in the event which has in fact happened in this case, *viz.*, discharge of the debt by the mortgagor. On the construction of Exhibit *II* we do not think the parties so intended. The Advocate-General relies on the provision in the deed that as soon as the debt is discharged the mortgagee shall pay rent to the mortgagor. The contingency contemplated in the deed was the satisfaction of the mortgage amount out of the property before the expiry of the 12 years. In this event the mortgagee was to be entitled to remain in possession until the expiry of the 12 years on payment of the rent provided in the deed.

The deed contains no express provision under which the mortgagee can claim to remain in possession if the mortgagor himself discharges the debt. In our opinion, so far as Exhibit *II* is concerned, on payment of the mortgage debt by the mortgagor, the mortgagor is entitled to redeem. Even if on the true construction of the instrument the parties intended that the mortgagee should remain in possession after the payment of the mortgage debt, we think such an agreement would be unenforceable as fettering the right to redeem.

As regards Exhibits *III* and *IV* (*a*), which were executed on the same day and which must undoubtedly, in our opinion, be read together, the case stands on a different footing. Under these instruments the mortgagee claims the right to be in possession as from 1915. The question of his right to possession under these instruments has therefore not yet arisen and will not arise until 1915. In any view it seems to us that, so far as these documents are concerned, he has no right to possession now.

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When Exhibit *III* was executed the mortgagor could not put the mortgagee into possession since on that date the mortgagee, under Exhibit *II*, was already in possession. This is probably the reason why it was thought necessary to execute two documents. The fact that there were two documents does not of course in itself show there were two independent transactions. The lease (Exhibit *IV a*) is a lease for 20 years as from 1915. It recites the mortgage and expressly provides for the payment of the mortgage-debt by the mortgagor. It contemplates the mortgagee remaining in possession notwithstanding this payment and provides that after deducting expenses the balance shall be paid to the mortgagor as rent. We do not think the lease can be regarded as an independent transaction. It is part and parcel of the mortgage transaction and its effect is to keep the mortgagor out of possession of the mortgaged property notwithstanding the discharge by him of the mortgage debt. Leases between a mortgagor and a mortgagee to last during the pendency of a mortgage are not bad in themselves—*Mahomed* v. *Ezekiel*[1]. But in the case before us the documents expressly contemplated the continuance of the lease after the mortgage-debt. We think this is a fetter on the equity of redemption which the court ought not to enforce. See *Ramasami Pattar* v. *Chinnan Asari*[2] ; *Morgan* v. *Jeffreys*[3].

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

M. Venkata Raghavalu Chetty .. Petitioner in both*
v (*2nd Defendant*).
A. N. Sabapathy Chetti & another .. Respondents in both
.. (*Plaintiff* & *1st Deft.*)

Pronote, suit on—Onus—Admission in pleadings or evidence—Defendant's case and plaintiff's case both disbelieved—Practice—Procedure—C.P.C., S. 115.

Raghavalu Chetty v. Sabapahhy Chetty.

Plaintiff brought a suit on a pro-note. The defendant admitted execution but denied consideration. The judge disbelieved the defendant's evidence, but, without giving a decree to the plaintiff at once, examined the

* C. R. P. Nos. 59 and 60 of 1910. 25th August 1911.

1. (1905) 7 Bom.L.R. 773.
2. (1901) I.L.R. 24 M. 449.
3. (1910) 1 Ch. 620.

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plaintiff on the question of consideration, but disbelieved his evidence also and found a consideration not set up by the plaintiff himself.

Held per *Abdur Rahim* J.—The onus being on the defendant to prove want of consideration and the same not having been discharged, the fact that the plaintiff, in order to rebut the defendants' evidence, gave an untrue account as to the form of consideration cannot be taken as an admission or proof of want of consideration; especially where neither the pro-note nor the plaint stated any particular form of consideration.

Pes *Sundara Aiyar* J.—The question of onus has absolutely no bearing on the case. It can make no difference whether the plaintiff's statement as to consideration was made in the plaint or in his evidence. An admission made by a party in his evidence unretracted and adhered to by him as the truth is as binding on him as one contained in the pleadings or in the negotiable instrument itself. It is not open even to the Judge or to the High Court to ignore the conclusion of the Judge that the plaintiff's case was false; but the error committed by the Judge in giving the plaintiff a decree was a mere error of law and the High Court cannot interfere in revision.

Petition under S. 115 of Act V of 1908 praying the High Court respectively to revise the decree of Sir V. C. Desikachariar, a Judge of the Court of Small Causes, Madras, and the decision of the Full Bench of the said Court in S. C. S. No. 4813 of 1908.

K.R. Subrahmania Sastri for petitioner.

G. Krishnasawmy Aiyar for respondents.

K. R. Subrahmania Sastri submitted that the Small Cause Court Judges were wrong in decreeing the suit when plaintiff's case as to consideration was disbelieved. Making a new case for the party was a question of jurisdiction—*Grakh Babaje* v. *Vithal Narain* [1].

G. Krishnasamy Aiyar cited S. A. 424, 425 of 1909 as to the use of persumption and on the question of jurisdiction; also *Amir Hussain's case*[2]; *Kristamma Naidu* v. *Chapa Naidu*.[3]

The Court delivered the following

JUDGMENTS :—*Abdur Rahim* J.—By these petitions we are asked to revise the judgments of Sir V. C. Desikachari, a Judge of the Presidency Court of Small Causes, Madras, decreeing the plaintiff's claim on a promissory note for Rs. 1,000 (Exhibit *A*) and of the Full Bench of that Court dismissing an application made to it by the petitioner for a new trial. The question is, accepting the findings of fact by the court of first

1. (1887) I.L.R. 11 B. 435. 2. (1884) 11 I.A 237.
3. (1894) I.L.R. 17 M. 410.

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Rahim J.

instance, as we are bound to do, is there a proper case for revision? The defendant admitted the execution of the note and pleaded want or failure of consideration under S. 118 of the Negotiable Instruments Act XXVI of 1881. The court is bound to presume, until the contrary is proved, that a pro-note was made with due consideration. It was incumbent on the defendant, therefore, to make out his plea. The learned Small Cause Court Judge has disbelieved the story set up by the defendant in support of his plea. Upon that finding the plaintiff was entitled to judgment, but after the evidence of the defendant was taken the plaintiff gave evidence to show how the consideration for the pro-note was made up. The learned judge has also disbelieved the plaintiff's account as to what happened and he thinks that the true consideration for the pro-note was something other than that spoken to by the plaintiff in his evidence. The latter finding does not appear to be supported by evidence and may be discarded for the present purpose. It is contended that, both the parties having gone into evidence and the plaintiff's evidence as to what was the nature of the consideration being disbelieved, it must be taken that the defendant has shewn that there was no consideration. To my mind there is no force in such argument. The plain effect of the learned judge's estimate of the evidence is that he is not satisfied that there was no consideration or there has been a failure of consideration for the pro-note, or in other words, defendant has failed to make out his plea. But it is suggested that we must treat the fact that the plaintiff in his evidence alleged a particular form of consideration as an admission that there was no other consideration and the particular form of consideration spoken to by the plaintiff having been disbelieved, the presumption under S. 118 of the Negotiable Instruments Act was rebutted and the defendant was relieved from proving that there was no consideration. This sort of reasoning is, in my opinion, open to two objections. In the first place, I am not aware of any authority and none has been referred to during argument which would justify us in extending the rule relating to admissions to such a far-fetched inference as that on which the argument is based, and the next objection is that the argument requires us to regard the events from a wrong point of view. Neither the pro-note nor the plaint states any particular form of consideration, and I fail to see how, when the

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defendant failed to prove want of consideration, the fact that the plaintiff, in order to rebut the defendant's evidence, gave an untrue account as to the form of consideration, can be taken as admission or proof of want of consideration.

At the close of the defendant's case the learned judge might at once have passed a decree in favour of the plaintiff and it cannot possibly make any difference that the plaintiff afterwards deposed to a story which the judge was unable to believe. Of course, after hearing the plaintiff's evidence, it was open to the judge to say, on considering the evidence of both sides, that the falsity of the plaintiff's story made the defendant's version of what occurred more probable, but here the judge rejects the defendant's case as false. It was also argued that the property in the pro-note was not intended to pass to the plaintiff until the happening of certain events, but such a defence was never put forward in the Small Cause Court and the facts found by the learned judge do not go sufficiently far to support such a plea.

I would, therefore, dismiss the petition with costs.

My learned brother agrees in the result. The petition is therefore dismissed with costs.

Sundara Aiyar J. :—The facts have been stated with sufficient fullness in the judgment of my learned brother, and I do not think it necessary to repeat them. But I may refer to the petitioner's plea on the basis of which his learned vakil has urged the contention that no liability accrued on the pro-note Exhibit *A* at all, as it was not delivered to the plaintiff and delivery was not to be made to him and he was to have no right to enforce it unless he fulfilled certain obligations on his own part. The plea as set out in the judgment of Sir V. C. Desikachariar was in these terms: "C. P. Mangiah Chetty handed all the four documents to K Ramachandra Iyer for safe custody. Hence Exhibit *A* not executed for cash received, and there has been failure of consideration." It will be noticed that there is no distinct statement that the whole transaction was an escrow, and that Exhibit *A* was to have no operation until the plaintiff did what he had undertaken to do. The agreement between the parties might be either that Exhibit *A* was a completed and effective instrument, but, as a security for the plaintiff's performance of his

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part of the agreement, it was deposited with a third party, or that Exhibit *A* was to be regarded as an incomplete transaction altogether until the plaintiff carried out his own obligations. In the former case, the suit would not be unmaintainable though the defendent might plead that the plaintiff ought not to have a decree as he failed to fulfil his part of the contract. The defendant's statement, in his written statement, was that there was failure of consideration, and not that the plaintiff never acquired the right to enforce Exhibit *A*. The full court, on the application for a new trial, was of opinion that the written statement did not raise the contention that the defendant never incurred the obligation to pay the amount secured by Exhibit *A*. I am unable to say that the learned judges were wrong in their view.

On the merits I have come to the conclusion that, on the findings of fact arrived at by him, the learned judge who tried the suit was wrong in his conclusion. The presumption with regard to every negotiable instrument, no doubt, is that it was drawn for consideration and the onus of proving absence of consideration would be on the defendant. Sir V. C. Desikachariar found that the defendant failed to prove want of consideration for Exhibit *A*. After the defendant had adduced his evidence, the plaintiff also let in evidence, and stated on oath that the consideration for Exhibit *A* was Rs. 800, due by the defendant as book-debt and Rs. 200 paid in cash. The learned Judge found that this statement was absolutely false. Neither the plaintiff nor any one else on his behalf stated that there was any other consideration for Exhibit *A*. The result is that the only consideration put forward for Exhibit *A* is false. On these facts, I am clearly of opinion that the question of onus has absolutely no bearing on the case. To my mind it could make no difference in this case whether the plaintiff's statement as to the consideration was made by him in his plaint or in his evidence as his own witness. No doubt where an admission is made by a party in the pleadings he would be absolutely estopped from going behind it, unless he obtains leave to amend his pleading, while it is possible that when he makes the admission in his evidence, he may adduce other evidence to prove other consideration and it may be that the court would be legally entitled to act on such other evidence, though I should consider it very unlikely that it would do so. I can, however, see no reason why an admission

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made by a party in his evidence unretracted and adhered to by him as the truth should not be as binding on him as one contained in the pleadings or as a statement contained in the negotiable instrument itself. No doubt it was open to the learned judge to pass a decree in favour of the plaintiff as soon as the defendant had closed his case, and it might have been open to him also not to pronounce on the truth or falsity of the plaintiff's case as disclosed in his evidence. But I fail to see how we or the learned judge himself could ignore the conclusion arrived at that the plaintiff's case was false. I do not see further how in the state of the record the plaintiff could be permitted to set up a case of some other possible consideration. I am of opinion that the learned judge should have dismissed the suit. This being my view I have to decide the question whether this court has power to interfere in the case under S. 115, C.P.C. I am obliged to hold that it has not. My conclusion already stated is that on the facts found by the lower court, it ought to have held that Exhibit *A* was not supported by any legal consideration. The learned judge arrived at the opposite conclusion, and in doing so he committed, according to my view, an error of law. The Privy Council has laid down conclusively that we have no power to correct a mere error of law in revision. I cannot say that the learned judge acted with any material irregularity in trying the case. I agree that the petitions must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Mohideen Kuppei and another ... Appellants*
(*1st and 2nd Petitioners*)

v.

Maria Kami and others .. .. Respondents
(*Respondents Nos.* 2, 5, 4, 6, 8, 9, 10 & 12)..

Mohideen Kuppei v. Maria Kami.

Decree—Appeal decree—Execution—Time fixed for payment—Jurisdiction of executing court to extend.

Specific directions contained in the decree or order of an appellate court (*e.g.*, directions to pay money within a certain time) are beyond the judicial discretion of the lower court and hence must be implicitly followed by the latter court; Consequently the first court cannot in execution extend the time fixed by the appellate court in its decree (*e.g.*, for the payment of money).

Appeal from the order of the District Court of Tanjore in A. No. 836 of 1909, presented against the order of the Court

* A. A. A. O. 56 of 1910. 30th August, 1911.

Mohideen Kuppei v. Maria Kami.

of the District Munsif of Patukota in O. S. 291 of 1900 (E. P. No 1/133 of 1909.)

In this case, the decree of the High Court provided that "the defendant do deliver possession on the plaintiff paying Rs. 50 within three months to the defendant." There was no further provision that the suit should stand dismissed if the payment was not so made.

K. Bhashyam for *S. Srinivasa Aiyangar*, for appellant, relied on C.M.S.A.81 of 1907, *Baswant Rao* v. *Kashibai* [1], to show that the payment was not a condition precedent ; *Peria Muthirian* v. *Karapanna Muthirian*[2] to show that the time could be extended. He cited Annual Practice, Order 64, Rule 7 ; DANIEL'S *Chancery Practice*, pp. 628, 1139.

T. V. Gopalasawmy Mudaliar, for respondent, submitted that it was a condition precedent and cited *Ramasami* v. *Sundaram*[3]; *Shilabati Debi* v *Rodrigues*[4].

The Court delivered the following

JUDGMENT :—The only direct authority available to us on the question whether the District Munsif, who was asked to execute the decree, had the power to extend the time allowed for payment in the decree which was passed by the High Court, is C.M.S. A. No. 29 of 1909 in which it was held that the appellate court which passed the decree was the proper court to which the application should be made for extending the time. We are not propared to lay down a different rule. The ruling is in accordance with the dictum of *Bahshyam Aiyangar* J. in *Vedapuratti* v. *Vallabha Valia Raja*[5] where that learned Judge points out that extending the time fixed by the judgment of an appellate court for the performance of a condition amounts to an amendment of it. The general rule is that " specific directions contained in the mandate of the appellate court are beyond the judicial discretion of the lower court and hence must be implicitly followed by the latter court." See American Cyclopædia of Law and Procedure, Vol. III, p. 481.

1. (1887) I. L. R. 12 B. 26.
2. (1906) I. L. R. 29 M. 370.
3. (1907) I. L. R. 31 M. 28.
4. (1908) I. L. R. 35 C. 548.
5. (1901) I.L.R. 25 M. 300 at p. 313.

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It also seems to us that the direction to pay the amount of Rs. 50 must be read as a condition precedent. The decision in *Ramasami* v. *Sundaram*[1] supports this view.

The petition must therefore be dismissed with costs. We do not decide the question whether the court should extend the time if a proper explanation is made to it for the purpose.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Phillips.

Narasaya Hegade .. .. Petitioner *

v.

Vitlaprabhu and others .. Respondents.

Narasaya Hegade v. Vitlaprabhu

C. P. C., Ss. 48, 115—" *Failure to exercise jurisdiction*"—*Dismissal of application as barred—Limitation of twelve years from the date of decree—Appellate decree.*

If a Court rejects an application under an erroneous view that it is barred, it fails to exercise a jurisdiction vested in it within the meaning of S. 115, C.P.C.

Where an appeal is preferred from a decree, it is from the date of the appellate decree that limitation runs for the purposes of S. 48 of the Code of 1908.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif of Mangalore in R. E. P. 435 of 1910.

B. Sitarama Rao for petitioner.

K. Narayana Rao for respondent.

B. Sitarama Rao submitted that the lower court was clearly in error. The only decree that is capable of execution is the appellate decree, where there has been an appellate decree, no matter whether varying or affirming the decree of the lower court and no matter whether the appeal is by the party himself or by some other. Order XLI, r. 33, gives an extended power to the appellate court—*Manavikaraman* v. *Unniappan*[2]; *Krishnamachari* v. *Mangammal*[3]; *Pichu Aiyangar* v *Sesha Aiyangar*[4]; *Ram Churn* v. *Luchmikant Purnick*[5]

K. Narayana Rao submitted that the language of S. 48 was conclusive as altered. Arguments based on general

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* C. R. P. 701 of 1910. 15th August, 1911.

1. (1907) I.L.R. 31 M. 28.
2. (1891) I.L.R. 15 M. 172.
3. (1902) I.L.R. 26 M. 91.
4. (1894) I.L.R. 18 M. 214.
5. (1871) 16 W.R. 1 (F.B.)

principles could not be available in the face of the language. Anyhow, he submitted that no question of jurisdiction was involved in the case. Narasaya Hegade v. Vitla-prabhu.

B. Sitarama Rao cited in reply, *Har Prasad* v. *Jaffer Ali*[1]; *Mulchand* v. *Govind*[2]; *Thiruvenkata Chariar* v. *Desika Chari*[3]; *Thiruchilambala* v. *Sheshayyangar*[4]; The new code gave effect to the decisions and deleted the superfluous words.

The Court delivered the following

JUDGMENT:—A preliminary objection is taken that no question of jurisdiction within the meaning of S. 115, Civil Procedure Code, arises, but it is contended that as the Munsif held that his jurisdiction was ousted by limitation he failed to exercise a jurisdiction vested in him by law, and I think this contention is sound. The execution petition was filed more than 12 years from the date of the original decree but within 12 years of the date of the appellate decree confirming the same. The District Munsif has held that as S. 48, C. P. C., prescribes only 12 years from the date of decree and omits the words "or of the decree (if any) on appeal affirming the same" which were in S. 230 of the old code, the period of limitation must run from the date of the original decree. There has, however, been a series of decisions that the appellate decree, whether confirming or modifying the original decreee, is the only decree susceptible of execution—vide *Wannu Narain Singh* v. *Lala Raghunath Sahai*[5], *Abdul Rahiman* v. *Moidin Saiba*[6], *Manavikraman* v. *Unniappan*[7], *Mohamad Mehdibulla* v. *Mohini Kanta Saha Chowdhury*[8]—and it was held by a Full Bench of this Court that under S. 230 the period of limitation runs from the date of appellate decree even where only a portion of the original decree was appealed against. If the only decree capable of execution is the appellate decree the words in S. 230 "or of the decree in appeal affirming the same" became unnecessary and consequently were omitted in S. 48 of Act V of 1898, the word "decree" alone being used as there is only one decree susceptible of execution, either the original decree in cases where

1. (1885) I.L.R. 7 A. 347.
2. (1906) I.L.R. 30 B. 575.
3. (1908) I.L.R. 31 M. 532.
4. (1881) I.L.R. 4 M. 384.
5. (1895) I.L.R. 22 C. 467.
6. (1898) I.L.R. 22 B. 500.
7. (1891) I.L.R. 15 M. 170.
8. (1907) I.L.R. 34 C. 874.

Narasaya Hegade v. Vitla-prabhu.

there is no appeal or the appellate decree where there is one. In this view the order of the District Munsif is wrong and execution must be allowed.

The petition is allowed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Malaiyya Pillai	... ..	... Appellant*
v.		(4th Defendant)
Thirumalai Perumal Pillai and others	..	Respondents (Plaintiff & 1st to 3rd defendants).

Malaiyya Pillai v. Perumal Pillai.

Specific Relief Act, S. 42 — Proviso—Suit for declaration in respect of property in the possession of Magistrate, but to possession of which plaintiff was entitled.

The property in suit was in the possession of the Magistrate in virtue of an order of attachment under S. 146, Cr. P. C., which was subsequently set aside by the High Court. But before delivery was obtained by the defendant a co-trustee, plaintiff brought the suit for declaration of his title to co-trusteeship without asking for possession.

Held :—That the suit was not barred by the proviso to S. 42 of the Specific Relief Act.

Suit appeal from the decree of the Subordinate Judge's Court of Tuticorin in A. S. 262 of 1907 presented against the decree of the Court of the Additional District Munsif of Tinnevelly in O. S. 171 of 1906.

Plaintiff and defendant were trustees of a *chatram* who, under an arang ment between themselves, had to manage by turns. Defendant contended that the plaintiff had committed default under the terms of the document and thereby forfeited his right to trusteeship. There were disputes as to possession when the Sub-Divisional Magistrate, acting under S. 146, attached the property and appointed a Receiver. His order was set aside by the High Court on the ground that he had found that the defendant was in possession and under these circumstances he had no jurisdiction to appoint a Receiver. After the order of the Magistrate was set aside, but before any steps were taken by the

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* S. A. 631 of 1909. 16th August 1911.

defendant to take delivery from the court, the present suit was instituted by the plaintiff to have his rights declared. Objection was taken that the suit was not maintainable without a claim for possession. Both the courts below overruled the plea and allowed the plaintiff's suit. Hence the appeal.

Malaiyya Pillai v. Perumal Pillai.

T. Rangachariar for appellant.

V. C. Seshachariar for respondent.

T. Rangachariar:—The possession of the receiver in this case must be taken to be the possession of the defendant. If the order appointing him remained undisturbed, no doubt the property could have been said to be *in custodia legis* and a merely declaratory relief might have sufficed. As it was, at the date of the plaint, the order appointing the receiver had been set aside; the possession of the receiver was at sufferance; the defendant had only to apply and the court would have had no discretion but to direct the handing over of possession to the defendant. It has been held that for purposes of limitation such possession counts in favour of the party from whom possession was taken by court though the possession of such person was wrongful. The principle is that an act of court should injure none. Symbolical delivery of possession can be had. Counsel cited *Raj Narain Das* v *Shaha Annando Das Chowdhuri* [1]; *Narayana Chetti* v. *Kannamma Achi* [2].

V. C. Seshachariar was not called upon.

The Court delivered the following

JUDGMENT:—The first contention urged before us is that the Magistrate's order under S. 146, Civil Procedure Code, putting the chattram in the possession of the Tahsildar being set aside by the High Court which directed possession to be given to the defendants, the plaintiff's suit could not be maintained for mere declaration of his right. But we do not think that this contention should prevail. The defendant was not at the date of the suit in possession of the chattram though he was entitled to obtain possession under the order of the High Court. It is true that the possession of the Magistrate would not be deemed to be adverse within the meaning of the law of limitation, but in order that a suit can

1. (1899) I. L. R. 26 C. 845. 2. (1905) I. L. R. 28 M. 338.

Malaiyya Pillai v. Perumal Pillai.

be held to be unmaintainable by the application of S. 42 of the Specific Relief Act it must be shewn that the defendant was in possession and as against him the plaintiff could have obtained an order for delivery of possession. It is true that the Magistrate, after the order of the High Court, was bound to deliver possession to the defendant, but he had not yet delivered possession to him when the suit was instituted. Supposing that the plaintiff asked for recovery of possession and obtained a decree before the defendant obtained possession from the Magistrate, it is difficult to see how such a decree could be effectively executed against the defendant. There is no authority covering this question and the cases in *Raj Narain-Das* v. *Shahu Annado Das Chowdhuri*[1] and *Narayana Chetti* v. *Kannammai Achi*[2] do really throw no light in this connection. As regards the lands, it was found that the plaintiff was in possession of them at the date of the suit and that finding is not open to any legal objection. The next contention is that because the land revenue was not paid punctually on the due date, the plaintiff forfeited his right to manage the charities although, as a matter of fact, no damage was caused thereby to the trust property. We are unable to place such a narrow construction on the agreement Exhibit *A*. Besides, apart from the agreement of the parties, we have to see whether there is sufficient cause for removing the plaintiff from the trusteeship or the charities, and no such case has been made out. In our opinion the plaintiff has not forfeited his right and is entitled to the management of the charities and the properties belonging thereto, according to the terms of the Exhibit *A*.

We dismiss this second appeal with the costs of the first respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Spencer.

V. Andiappa Chetty .. .. Plaintiff *

v.

P. Devarajulu Naidu deceased, by his son & legal representative Alagasinga Naidu and another .. .. Defendants.

Limitation Act, S. 19—Acknowledgment, what is.

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1. (1899) I. L. R. 26 C. 845.
2. (1905) I. L. R. 28 M. 338.

* Ref. Case 13 of 1910. 22nd August, 1911.

Andiappa Chetty *v.* Devarajulu Naidu.

Held, that a letter which ran as follows "with reference to you letter, I have to inform you that I wish to examine the accounts, as my accounts do not show such an amount mentioned in your letter" was no acknowledgment within the meaning of S. 19 of the Limitation Act.

Obiter :—S. 19 of the Limitation Act is so worded as to suggest that where there is an acknowledgment for starting a fresh period of limitation, the right acknowledged must be of the same description as the right which is the subject of the suit. In a suit for the balance due upon taking accounts an admission that accounts must be taken and settled would be a pertinent acknowledgment, but it might be taken otherwise in a suit brought to recover a definite sum of money.

Case stated under S. 69 of Act 15 of 1882 by the Registrar of the Court of Small Causes in Small Cause Suit No. 19117 of 1909.

Ebrahim Sahib for plaintiff.

M. Kunjunni Nair for *T. Ranga Chariar* for defendants.

The Court delivered the following

JUDGMENT.—Two letters marked Exhibits *A*, *B*, in the Small Cause Suit No. 19117 of 1909 have been referred by the Court of Small Causes, Madras, under S. 69 of the Presidency Small Cause Courts Act, for our opinion whether they constitute acknowledgments of liability within S. 19 of the Limitation Act. The letters run as follows :—

Exhibit A.

"*Madras, 10th June* 1908.

To

R. V. SESHAGIRI RAO, B.A., B.L.,

High Court Vakil,

MADRAS.

Sir,

With reference to your letter dated 2nd instant I request you be to so good as to furnish me with a copy of a statement of accounts."

Exhibit B.

"*Madras, 18th June* 1908.

To

M. R. Ry. R. V. SESHAGIRI RAO, B.A., B.L.,

High Court Vakil,

MADRAS.

Dear Sir,

With reference to your letter of the 2nd instant on behalf of V. Andiappa Chetty, landing contractor, Madras, I have to inform you that I wish to examine the accounts as my accounts do not show such an amount mentioned in your letter. I therefore request you will please forward the copy of the account or instruct your client to send his gumasta with his account books."

Andiappa Chetty v. Devarajulu Naidu.

The cases cited at the Bar and referred to in the judgments of the Judges of the Small Cause Court are *Quincey* v. *Sharp*[1]; *Seethaiya* v. *Renga Reddi*[2], *Jogeshwara Rai* v. *Raj Narayan Mitter*[3] and *Maniram Seth* v. *Seth Rup Chand*[4]. The circumstances of those cases seem to be all distinguishable from the present, but before proceeding to discuss them we may say at once that we agree with the observation of *Maclean* C. J. in *Jogeshwara Rai* v. *Raj Narayan Mitter*[3] that unless the language of the document be identically the same, a decision upon the construction of one document is not of much assistance to the court in construing another.

In *Quincey* v. *Sharp*[1] the debtor took the initiative by asking his creditor for an account for work done before he received any demand to pay; thus implying that some work had been done and that it would have to be paid for.

In *Seethaiya* v. *Renga Reddi*[2] the accounts which had to be taken were mutual, open and current accounts to which Article 85 of the Limitation Act applied; and in *Maniram Seth* v. *Seth Rup Chand*[4] the accounts were open and current though the Privy Council, in the view that they took, found it unnecessary to decide whether they were also mutual, and the learned Judges contented themselves with observing that the dealings were not the ordinary ones of banker and customer but rather in the nature of mutual accommodation.

Section 19 of the Limitation Act is so worded as to suggest that where there is an acknowledgment of liability in respect of a right and it is sought to use such acknowledgment for starting a fresh period of limitation, the right acknowledged must be of the same description as the right which is the subject of the suit. Thus in a suit for the balance due upon taking accounts an admission that accounts must be taken and settled would be a pertinent acknowledgment, but it might be otherwise in a suit brought to recover a definite sum of money.

So also it is not difficult to see that asking for an account in response to a creditor's demand may be a very different thing from acknowledging the necessity of settling accounts when a

1. (1876) I, Ex. D. 72.
2. (1887) I. L. R. 10 M. 289.
3. (1903) I. L. R. 31 C. 195.
4. (1906) I L. R. 33 C. 1047 (P.C.)

creditor bases his right upon accounts. The decision in *Jogeshwara Rai* v. *Raj Narayan Mitter*[1] is quoted in support of the view taken by the majority of the judges who made this reference. There a house-owner who received from a contractor a bill for building work done by him wrote that the bill was incorrect in parts and that the work was unfinished but promised to examine the work and the estimates and see what was due. It was held that this was not an acknowledgment of liability within the meaning of S. 19 of the Limitation Act.

Andiappa Chetty v. Devarajulu Naidu.

In point of fact, however, none of these cases really stand on parallel footing to that with which we are now dealing. Each case must be treated on its own merits. From a consideration of the wording of Exhibits *A* and *B* we are of opinion that they do not contain any acknowledgment of liability sufficient to save limitation. We think there is much force in the comparison made by the Chief Judge of the Small Cause Court between the request of the 1st defendant in Exhibit *A* for a copy of a statement of accounts and the case of a tradesman who sends a bill for a certain sum with the words "to account rendered" to which the customer replies: "please send me a detailed bill." We agree with him in thinking that such words would not amount to an admission of liability.

The expression by the second defendant in Exhibit *B* of a wish to examine the contractor's account does not carry the matter further. The question referred to us must, therefore, be answered in the negative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

Ankepeti Subba Reddi (died) and others.. Appellants*
v. (*Plaintiffs*)
Tippana Narayana Reddi & Gani Subba Reddi .. .. Respondents
(*Defendants*).

Idol—Worship, right of—Proof—Worship at particular place.

Where worship to an idol is offered at places other than the temple it should not be inferred, without distinct evidence or circumstances necessari-

* S. A. 1151 of 1909. 11th October 1911.

1. (1903) I.L.R. 31 C. 195.

Subba Reddi v. Narayana Reddi.

ly leading to the conclusion that any right exists to offer it at the particular place.

The right of worship, including any special right of worship a person may possess, is a civil right; but the mere fact that a person has offered worship at a particular place for a number of years would not necessarily give him a right to do so. [*Nagiah Bathadu* v. *Muthachari* [1] considered.]

Second appeal from the decree of the District Court of Cuddappa in A. S. 94 of 1908 presented against the decree of the District Munsif of Nandalur in O. S. 204 of 1907.

T. V. Seshagiri Aiyar for appellants.

C. V. Ananthakrishna Aiyar for respondents.

T. V. Seshagiri Aiyar.—The question in this case is the right to worship an idol in front of plaintiff's house. If an idol is taken in procession along a particular street, any of the residents may acquire a right to have an idol stop in front of his house by prescription. A right to worship includes the right to make offerings. My right is a right cognizable by the civil courts. I have been enjoying the right for several years. I am entitled to compel the trustees of the temple to make the deity stop in front of my house. The following cases were cited:—*Nagiah Bathadu* v. *Muthachari*[1]; *Davies* J. at p. 225—*Subbaraya Gurukkal* v. *Chellappa Mudali*[2]; *Krishnasawmi Aiyangar* v. *Rangasawmi Aiyangar*[3]; *Vengamuthu* v. *Pandeswara*[4]; *Vaidhyanatha* v. *Chandra Sekhara*[5]; *Anandrav Bhikaji Phadke* v. *Shanka Daji's*; *Charya*[6]; *Venkatachalapathi* v. *Subbarayudu*[7].

C. V. Ananthakrishna Aiyar cited *Nagiah Bathadu* v. *Muthachari*[1].

The Court delivered the following

JUDGMENT:—This is a suit to establish the plaintiff's right to worship the idol of a temple at his house, the idol being required to go in procession to the place for the purpose. The defendant denies that the plaintiff has any such right enforceable in a court of law.

The facts as found by the Munsif are that there used to be a procession called "kantakorika" conducted by the authorities of

1. (1900) 11 M.L.J. 215.
2. (1881) I.L.R. 4 M. 315.
3. (1909) 19 M.L.J. 743.
4. (1882) I.L.R. 6 M. 151.
5. (1905) 15 M.L.J. 458.
6. (1883) I.L.R. 7 B. 323.
7. (1890) I.L.R. 13 M. 293.

the temple. The "shadai" and "chamarams" belonging to the idol used to be placed in a palanquin and the palanquin was taken in a procession with the paraphernalia belonging to the temple along the street where the plaintiff's house was situated. The terminus of the procession was in front of the plaintiff's house. There the weaver community, living apparently in adjoining villages, used to bring presents of betel nut and other things. After the temple authorities had finally accepted them, distribution of thamboolam (*i.e.*, betel and nut) used to take place and the palanquin would then be taken back to the temple. Certain honours were usually done to the plaintiff called 'rajani thamboolam." Honors were also done to certain other persons. The distribution of the honours used to take place either in front of the plaintiff's house while the palanquim was detained there, or after it returned to the temple. Coming to the dispute between the weavers and the temple trustees (the defendants) the procession has not taken place regularly during the last seven years, and according to the District Munsif's finding, it would appear that during five out of seven years the procession did not move out of the temple at all.

Now, proceeding on these findings we can see absolutely no ground for concluding that the plaintiff received any honours or performed any worship in front of his house as a matter of right Apparently the "kantakorika" procession was a part of the ceremonial of the temple 'ootsavam' immediately preceding the ceremonial of marriage or 'kalyanam' of the idol. It is most natural that when the palanquin was stopped for a while all persons near that place should offer worship. In the circumstances some evidence should be required to show that the plaintiff's offer of worship was anything more than a natural act of devotion on his part as a Hindu to show respect to the idol. There is no such evidence forthcoming. The receipt of "rajani thamboolam" did not always take place in front of the plaintiff's house and there is nothing to show that it is necessarily connected with the plaintiff's right to worship.

According to the District Judge the right to have the procession called "kantakorika" was one belonging to the weavers and the plaintiff merely took advantage of the opportunity of the palanquin stopping in front of his house to offer worship.

Subba Reddi v. Narayana Reddi.

It is unnecessary to decide whether the weavers really had any right to have the procession conducted, because it seems to us clear that the plaintiff has failed to establish, by any evidence, that he used to offer worship at the place in question as a matter of right. Where worship is offered at places other than the temple it should not be inferred, without distinct evidence or circumstances necessarily leading to the conclusion, that any right exists to offer it at the particular place.

The cases cited by Mr. Seshagiri Aiyar no doubt show that besides the ordinary right of worship at the temple, a person may possess the right to worship an idol at particular places when it is carried in procession or otherwise. *Nagiah Bathadu* v. *Muthachari*[1], *Subbaraya Gurukkal* v *Chellappa Mudali*[2] and *Krishnasawmi Iyengar* v. *Rungaswmi Iyengar*[3] do not establish anything more. It is not disputed for the respondents that the right of worship, including any special right of worship which a person may possess, is a civil right, but the question is whether worship usually offered at a certain place—it may be for a long time—was offered as a matter of right at that place. We do not think that the observations of *Davies* J. in *Nagiah Bathadu* v. *Muthachari*[1] were intended to lay down that the mere fact that a person has offered worship at a particular place for a number of years would necessarily give him a right to do so. *Mamool* or usage should, no doubt, be examined to determine whether any special right of worship exists. If the observations were intended to go further, we would not be prepared to agree with them. We have no hestitation in holding that the plaintiff has not proved the right which he seeks to establish in this case. We should be slow to recognise, without proper evidence, claims of right which would materially interfere with the rights of trustees to regulate the worship and ceremonial of temples in the interests of the whole community.

We dismiss the second appeal with costs.

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1. (1900) 11 M.L.J. 215. 2. (1881) I.L.R. 4 M. 315.
3 (1909) 19 M.L.J. 743.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. Batchu Raju v. Raja Rao.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Abdur Rahim.

Batchu Raju Abbayi *alias* Bapiraju and others .. Appellants* (*Defendants*)

v.

Sri Raja Rao Venkata Kumara Mahipati and others .. Respondents (*Plaintiffs*).

Landlord and tenant—Zamindar and farmer—Water cess—Liability for—Right of suit against farmer for water cess.

A farmer cannot apply for sanction under S. 11 of Act VIII of 1865 for enhancement of rent due in respect of any increase in produce to the ryots by water supplied from Government source; the zamindar only can do so; and consequently the zamindar cannot maintain a suit against the farmer for money due in respect of such use of water by the ryots when he has not applied for sanction for the increase of rent on that score.

Appeal from the decree of the Subordinate Judge's Court of Cocanada in O. S. No. 52 of 1906.

S. Srinivasa Aiyangar and *S. G. Srinivasa Raghavaiyar* for appellant.

T. Prakasam and *P. Narayanamurthi* for respondents.

S. Srinivasa Aiyangar:—As to water cess: (i) his submission was that on the lease, the izaradar was bound to collect and pay it; (ii) being a farmer, he was himself a landlord bound to pay under the Act—*Vellayan Chetty* v. *Tiruva Kone*[1]; *Gouse* v. *Sundara*[2]. No doubt as between the zamindar and ryot, the zamindar is bound to pay, but the zamindar is entitled to recover it when the tenant derives benefit and no sanction of the Collector is necessary. The question here is, as between the landlord and the izaradar who is to pay it? Section 70 is applicable to the case. The izaradar it is who derives benefit and can derive benefit, and therefore it is he that is liable. The payment must be taken to be at his request—*Narayanasami Naidu* v. *Sri Raja Vellanki Srinivasa Jagannatharao*[3]; *Raja of Venkatagiri* v. *Vudutha Subbarayudu*[4];

* Appeals 140, 172 and 177 of 1908. 19th October 911.

1. (1882) I. L. R. 5 M. 76, 87.
2. (1884) I.L.R. 8 M. 394.
3. (1909) I. L. R. 33 M. 189.
4. (1907) I. L. R. 30 M. 277.

Batchu Raju v. Raja Rao.

Giridhari Singh v. *Maharajah Luchmessur Singh Bahadur*[1].

P. Narayanamurti submitted that the application for water was not made at the instance of the izaradar, but of the landlord's own motion; that it was impossible for the izaradar to collect the cess as no localisation had been made, and the landlord had not, in spite of repeated applications, put the izaradar in possession of the necessary information; that finally the zamindar had set up the tenants, when sued, to say that water cess was not payable. He had given him no notice of his intention to collect water cess from him. The izaradar had derived no benefit from it. Under those circumstances, his submission was that the izaradar was not bound to pay the water cess. As to interest, his submission was that there was no written notice to him making a demand on him; there was also the fact that the landlord himself had put a construction on the document which involved no payment by the izaradar, and was estopped under those circumstances from claiming interest.

The Court delivered the following

JUDGMENT:—The late Rajah of Pithapuram granted the village of Karappa on an Izara Patta (Exhibit *A*) to one Madhava Rao, the predecessor in title of the defendant, in 1885. Madhava Rao executed the Muchilika (Exhibit *A*). The Rajah died in 1890 and the estate was under the Court of Wards till the institution of the suit. The present Rajah has since attained majority. The suit was brought by the Court of Wards in 1906 for the recovery of the amount due under Exhibit *A* from the death of the late Rajah. Exhibit *A*, so far as it is now material, is in the following terms:—"You should continue to enjoy Karappa village, with the exception of Devabramana Mirasi Inamulu and Salabadu Khatamanyamulu, paying Rs. 3,976-11-0, the amount fixed till the last 1294 fasli, on the remaining jerayathi, etc., yourself enjoying a remission of Rs. 1,026 just as your father Karapa Rao Venkata has been enjoying; deducting this amount of Rs. 150 for Mamulu Mujamulu and Rs. 184 for Maniyapalasayani, total Rs. 1,360. Out of the balance of Rs. 2,616-11-11, Rs. 209 should be continued to be paid for Seri under you, according to the kists obtaining in the village, and Rs. 534 should be enjoyed till you continue in our good graces,

1. (1882) 9 C.L.J. 412.

till you wait upon me, and till you are of help in my business transacted. You should continue to pay from fasli 1295 in your line of heirs, by the son and grandson Rs. 1,873-11-11, being the half-yearly beriz of my village according to the undermentioned instalments and shall continue to obtain receipts. You should also continue to pay interest at one per cent. per annum on the amounts remaining unpaid after the expiry of the due dates. You should yourself collect from the ryots all the taxes such as the local cess, etc., which the Government may levy on the lands of this village and shall continue to pay it to the Divanam." The questions in issue are whether the defendants were bound to pay to the plaintiff annually the sum of Rs. 209 and Rs. 534 referred to in Exhibit *A* and whether the plaintiff is entitled to recover from the defendant the money which the plaintiff paid to the Government for water which, according to him, the defendants were bound to have collected from the ryots and paid to him under the last clause in the above extract.

[After dealing with the other questions relating to the construction of Exhibit *A* in the case, *i.e.*, the izara lease, their Lordships proceeded as follows:—ED.]

The next question is whether the plaintiff is entitled to recover from the defendants the water cess imposed by the Government on the lands in the village and paid by the plaintiff to the Government, which according to the contention of the plaintiff the defendants were under the terms of Ex. *A* to collect from the ryots and pay to the plaintiff.

Water cess is not expressly mentioned in Ex. *A*. It is undoubtedly more important than the local cess which is mentioned therein. Whenever water was used for second crop the zamindar used to take an application from the ryots, levy the second crop water cess himself, and pay it to Government instead of leaving it to the defendants to recover the cess from the ryots and pay it to him. The words in Ex. *A* are ambiguous and the conduct of the zamindar seems to show that he did not recognise any liability on the part of the defendants to collect the cess. Exhibits *G*, *H* and *J* series only show that the izaradar was taking steps to protect himself in case he had to pay the cess to the zamindar. But when the defendants endeavoured to collect the cess by including it in the patta, the Deputy Collector ordered

Batchu Raju v. Raja Rao.

the pattas to be amended by expunging the clause relating to the water cess (Ex. *XIX*). The defendants' tenants were then acting under the advice of the Estate Manager. For these reasons, we are inclined to think that the defendants were not bound under Ex. *A* to collect the cess from the ryots.

Assuming, however, that the clause in Ex. *A* is wide enough to cover the water cess, the question remains whether there was any loss recoverable by the defendants from the ryots. The area of the total jerayathi lands in the village was about 900 acres. Of this, an extent of about 500 acres was mamool wet, *i.e.*, for 500 acres of land not localised water had to be supplied by Government free of any cess. If the area cultivated as wet land in any area exceeded this extent allowed as mamool wet, water cess was leviable by the Government under Madras Act VII of 1865. If the zamindar or the ryot applied for water it was then supplied by the Government on conditions more favourable than when it was used without any prior sanction. From Fasli 1300 to the Fasli of 1313 it was found that in each year, land greater in extent than what was allowed for mamool wet was cultivated without the permission of the Government and the Government levied the water cess for such cultivation from the zamindar. It is this amount which the plaintiff seeks to recover from Government.

The claim is not based on any implied contract. The plaintiff does not seek to recover from the defendants any amount which the latter ought to have paid and which the plaintiff had to pay. The only question is whether under Ex. *A* the defendants were entitled to recover the amount from the ryots.

To establish their claim to recover water cess from the Raja the Government had only to show that an extent larger than that agreed upon as mamool wet had been cultivated. But for the zamindar to recover any water cess from any individual ryot, he has to show that the latter has cultivated any portion of his holding which was not mamool wet. In other words, the 500 acres of mamool wet lands had to be localised to determine whether any ryot had cultivated any land and what extent of land which was not mamool wet. Further, it has now been settled by a series of decisions that if the zamindar wants to enhance the rent in consequence of any increase in the produce by water

supplied from any Government source, he must previously obtain the sanction of the Collector under the Rent Recovery Act. No ryot is therefore bound to pay anything on this account to the defendants before the Collector gives his sanction. It was argued by the plaintiff's pleader that the defendants were bound to apply to the Collector for sanction to enhance the rent payable by the ryots. The Izara (Ex. *A*) does not impose any such obligation on them in express terms. *Prima facie* it is the person on whom the Government imposes the assessment, *i. e.*, the zamindar, who is entitled to apply to the Collector for sanction for enhancement which became necessary on account of such imposition. Under S. 9 of Act VII of 1865, the engagement with the Government for exemption from water-cess could be made by the zamindar or other landholder. It does not appear that a farmer could apply under that section. On this question we see no reason to differ from the judgment of this court in S. A. No. 939 of 1894. We are, therefore, of opinion that the Subordinate Judge is right in holding that the plaintiff was bound to obtain the sanction of the Collector for any enhancement of rent before calling upon the defendants to collect such rent from the ryots. We confirm the decree of the Subordinate Judge on this point.

It is conceded that the fourteenth defendant is only liable for any cist that may have fallen due since his purchase, *i. e.*, from 20th November 1900. Appeal No. 177 is dismissed with costs. The decree will be modified so as to make him liable only for such cist for his one eighth share. In the other appeals parties will pay and receive proportionate costs as in these appeals. Fourteenth defendant will get separate set of costs.

Raja of Kalahasti. v. Varada-chariar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

The Rajah of Kalahasti .. Appellant*
v. (*Petitioner : Attaching Creditor*)

Rajah Kumara Venkata Perumal Raj Bahadur Varu, Minor, by guardian Mr. W. A. Vardachariar, and another .. Respondents
(*Counter-Petrs : Defts. & Plffs.*)

Decree—Mortgage decree—Form of—Combined decree—Legality.

Per Curiam.—A mortgage decree containing both a direction for sale as well as a personal decree, though irregular in form according to the provisions of the Transfer of Property Act is not a nullity; and if allowed to remain unimpeached cannot be called in question in execution.

Per *Abdur Rahim* J.:—A direction that the defendant do pay a certain sum of money, *prima facie* imposes a personal liability, though no doubt the words are not conclusive of the question. It may be that other clauses of the decree, if read together without direction, might show that all that was meant by what is *prima facie* such direction, was to declare the amount for which the defendant was liable and the only immediate remedy intended to be given was against the mortgaged property. But where a decree is clear in its terms there can be no reason for such a construction.

Appeal from the Order of the District Court of North Arcot in E. P. N. No. 63 of 1908 in O. S. No. 27 of 1884.

C. V. Ananthakrishna Aiyar for L. A. *Govindaraghava Aiyar* for appellant.

T. Rangachari and *A. Ramachandra Aiyar* for respondent.

C. V. Ananthakrishna Aiyar:—If a mortgage decree says that the defendants 'do pay,' etc., it is a personal decree—*Muthana Kone* v. *Kumarasami Pillai* [1]; *Arunachollam Iyer* v. *Atmakumar Row Mohan Rai* [2]; *Venkatramana Iyer* v. *Gompertz* [3]; *Luchmi Dai Koosi* v. *Asman Singh* [4]; *Dinanath Mitter* v. *Bejoy Krishna Das* [5]; and C.M.A. 168 of 1902 (unreported); form No. 128 of the Old C.P.C. (New C.P.C., Appendix D, No. 4).

T. Rangachari:—The suit is upon a mortgage and the decree is a mortgage decree. The court has no jurisdiction to pass anything but a mortgage decree.

* C. M. A. 41 of 1910. 4th October 1911.

1. (1904) 15 M.L.J. 6.
2. (1911) 10 M.L.T. 213.
3. (1908) I.L.R. 31 M. 425, 429.
4. (1876) I.L.R. 2 C. 213, 221.
5. (1903) 7 C.W.N. 744.

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There is no absolute direction to pay. In construing a mortgage decree we ought to have regard to what ought to have been the proper decree. The former portion is only a declaration of what the defendant will have to pay and the latter portion is what interest will have to be paid in addition and how to realize the whole. The liability is confined to the mortgaged property. A decree contrary to this is a nullity if it gives a personal decree even in the first instance, the condition precedent to give such a decree not having occurred—*Kamalamma* v. *Komandur Narasimhacharlu*[1]. The decision in *Abbakki* v. *Krishnaya*[2] is based upon the view that the parties asked for such a decision.

This is a decree of 1884 just after the Transfer of Property Act and it is wrongly worded. After the T. P. Act the decree should be as in the form in the Civil Procedure Code and execution can be allowed only against the property in the first instance, even if the decree casts a personal obligation on the judgment-debtor such as 'do pay.' I refer also to *Lalla Tishini Sahai* v. *Lalla Hurrak Narain*[3]; *Annah Pillai* v. *Thangathammal*[4]; *Kourmachi Kathar* v. *Pakker*[5]; as to the form of old decrees. See also *Magbul Fatima* v. *Lalla Prasad*[6]. Such construction ought to be given to the decree as will make it in accordance with law. In *Manti Kamaji* v. *Chodimulla Ramamurthy Pantulu*[7] a similar direction 'do pay' was held to be one as in a proper mortgage decree. Similarly in a maintenance decree in *Doraisami Bouch Packiri* v. *N. Idangapiranthan*[8] the words 'do pay' were construed as merely declaratory. C.M.A. 168 of 1902 is a case of consent decree. Form No. 7 in Schedule D in the New C.P.C. *Muthana Kone* v. *Kumarasami Pillai*[9] is a decree of 1876. *Arunachalam Iyer* v. *Atmakumar Row Mohan Rai*[10] is a case of decree for unpaid purchase money. *Venkatarama Iyer* v. *Gompertz*[11] gives only a suggestion. *Lachmi Dai Koosi* v. *Asman Singh*[12] says that the construction in favour of a personal decree ought to be followed as a stranger had become the purchaser and as it would be inequitable to disturb him.

1. (1907) I.L.R. 30 M. 464.
2. (1909) I.L.R. 32 M. 534.
3. (1893) I.L.R. 21 C. 26, 27.
4. (1896) I.L.R. 20 M 78.
5. (1896) I.L.R. 20 M. 107.
6. (1898) I.L.R. 20 A. 523.
7. (1907) 3 M.L.T. 335.
8. (1905) 1 M.L.T. 69.
9. (1904) 15 M.L.J. 6.
10. (1911) 10 M.L.T. 213.
11. (1908) I.L.R. 31 M. 425, 429.
12. (1876) I.L.R. 2 C. 213.

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C. V. Ananthakrishna Aiyar distinguished the cases quoted by the respondent on the wording of decrees in those cases. The decree in this case gives both remedies, *i. e.*, 'do pay' in the first portion *and* "that the mortgaged properties be liable."

The Court delivered the following

JUDGMENTS:—*Abdur Rahim* J:— There can be no doubt that the appellant's contention, that the decree in question is a decree for payment of money, must prevail. The decree directs "that the defendant do pay plaintiffs Rs. 91,288-9-11 with interest at one per cent. per mensem from date of plaint (7th November 1884) to date of payment if payment be made within six months from this date, *viz.*, on or before 17th June 1885; that if payment be not made within six months from this date (17th December 1884) then up to the 17th June 1885 from date of plaint interest shall be at one per cent. per mensem, and thereafter at ½ per cent. per mensem; that the plaintiffs shall have their costs with interest at ½ per cent. per mensem from this date and that the property mortgaged be held liable to this decree." It was passed in 1884 after the passing of the Transfer of Property Act. Under the Act the proper form of a mortgage decree is that given in Form No. 75, Schedule D, of the Civil Procedure Code. The decree which we are asked to interpret is not in that form, and the question is what is the proper meaning of the decree. It seems to us that the plain meaning of the decree is that the defendant shall be personally liable for the amount of the decree, and also that the property mortgaged shall be sold in satisfaction of the decree.

We do not think that in construing this decree we can derive much help from the cases in which decrees couched in different language have been construed on previous occasions. A direction that the defendant do pay a certain sum of money, *prima facie*, imposes a personal liability, though no doubt the words are not conclusive of the question. It may be that *other* clauses of the decree, if read together with such direction, might show that all that was meant by what is *prima facie* a direction was to declare the amount for which the defendant was liable, and the only immediate remedy intended to be given was against the mortgaged property. But it seems to be

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impossible to put such a construction on the decree with which we are concerned in this case. The words clearly give concurrent remedies against the judgment-debtor personally and the mortgaged properties, and the language does not, in our opinion, admit of our saying that the only remedy given is against the mortgaged properties. Mr. T. Rangachariar argues that we must read the decree in the light of the provisions of the Transfer of Property Act. If there was anything ambiguous about the decree, no doubt Mr. Rangachariar's contention would have force, but such a principle of interpretation has no application where the decree in dispute is worded in perfectly clear language and there is no difficulty in ascertaining what was meant.

There is yet another contention of Mr. Rangachariar which remains to be noticed, *viz.*, that the decree not being in accordance with the provisions of the Transfer of Property Act is a nullity and cannot be given effect to in execution. This argument, in our opinion, is absolutely untenable. No doubt the decree is not in accordance with the Transfer of Property Act, which contemplates that under a proper decree for sale the hypothecated property ought to be ordered to be sold first, and if the proceeds be insufficient a further order should be obtained for sale of the other properties of the judgment-debtor. The present decree gives concurrent remedies against the mortgaged property and the judgment-debtor personally. The defendant ought to have got the decree corrected in appeal or otherwise, if he thought he was prejudiced by the form of the decree; but he was content with the decree as passed. It is too late for him to complain of it now, when the decree is sought to be enforced against him. It was pointed out in *Abbakki* v. *Krishnaya*[1] that a decree such as in the present case, which is not in conformity with the Transfer of Property Act, cannot be said to be null and void. It is only irregular in form, and, if allowed to remain unimpeached, cannot be called in question in execution.

The decree of the District Court must be reversed and the case will be remitted to it for disposal according to law. The respondent will bear the costs of the appeal.

Spencer J.:—I concur with my learned brother. As at first I felt some doubt, I have taken time to examine the decisions

1. (1909) I.L.R. 32 M. 534.

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cited at the bar. Amongst them I find that of *Lalla Tirhasi Sahai* v. *Lalla Hamuk Narain*[1] is to some extent in respondent's favour, but in *Dinanath Mitra* v. *Bejoy Krishna Doss*[2], *Komachi Kather* v. *Pakker*[3], *Muthia Kone* v. *Kumarasawmi Pillai*[4], *Sivasubramania Naicker* v. *Lakshmana Chettiar*[5], *Atmakumari Row* v. *Mohan Ram*, decrees containing the words "the defendant do pay to the plaintiff" have been construed as money decrees executable against the person of the mortgagor or against his other property not subject to the mortgage. In the decree under our consideration we have in addition the words "and that the property mortgaged be held liable to this decree," which seems to imply that two remedies were intended to be provided in the decree, one a personal and the other a decree for the sale of the mortgaged property. In *Kamachamma* v. *Komandur Narasimhacharlu*[7], this court had before it a petition for the amendment of a decree so as to bring it in comformity with the judgment. The court was thus in a position to decide whether a decree under S. 88 of the transfer of Property Act should contain an order against the defendants personally to pay the costs. Also the judgment was before the court which dealt with the petition.

Here we have only to consider what was intended to be the effect of the original decree and to enforce it accordingly, seeing that no attempt has been made at any time to correct it so far as it does not conform to the form of decrees given in Schedule 2 of the Civil Procedure Code and that on its face it does not appear to be a decree incapable of execution. We have not the light of the pleadings and the judgment to read it by. As it stands I cannot accede to Mr. Rangachariar's contention that it was enforced solely against the mortgaged property. The appeal must be allowed with costs and the case sent back for disposal.

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1. (1893) I.L.R. 21 C. 27.
2. (1903) 7. C.W.N. 744.
3. (1896) I.L.R. 20 M. 107.
4. (1904) 14 M.L.J. 6.
5. (1902) C.M.A. 168 of 1902.
6. (1911) 10 M.L.T. 213.
7. (1907) I.L.R. 30 M. 464.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Doraisawmi and another .. Appellants*
v. (*Plaintiffs*)
Nondisawmy Saluvan and others .. Respondents
(*Defendants*).

Doraisawmi *v.* Nondisawmy Saluvan.

Limitation Act, Ss. 8, 7, Art. 44—Whether Art. 8 controls Art. 44—Hindu Law—Guardian's alienation of minor co-parcener's property—Right of each co-parcener to recover property alienated, distinct—Alienee from co-parcener, rights of.

Per *Abdur Rahim*, J. :—S. 8 of the Limitation Act applies to a suit to which Art. 44 would be applicable.

S. 8 is applicable to a case where the property sought to be recovered belonged to more than one plaintiff as Hindu co-parceners, all of whom were minors at the date of alienation but one or more of whom attained majority more than three years before the suit.

Obiter:—It is a well established rule of construction of the Limitation Act that the sections control the application of the articles in the schedules except so far as the language of any particular article precludes the application of any section.

Per *Sundara Aiyar*, J. :—Ss. 7 and 8 are inapplicable except where the starting point fixed by the schedule is postponed by reason of disability; and consequently Ss. 7 and 8 are inapplicable to cases to which Art. 44 applies.

Where a guardian for two minor Hindu co-parceners alienates property, the cause of action for each to recover his share of the alienated property is distinct from the others, and S. 8 of the Limitation Act has no application to the case.

Where one of the plaintiff-co-parceners is barred, in respect of his right to sue to recover the alienated properties and his right to recover his share is extinguished, the other co-parcener can sue to recover only his share of the alienated properties.

Obiter:—The proposition that a Hindu co-parcener has no right to a definite share of the property is only true in the sense that his share is liable to fluctuations of increase and decrease as between him and his co-parceners and also in the sense that until partition he cannot claim, as between himself and his co-parceners, exclusive title to any particular item of the family estate or any definite share of the income of the estate. An alienee's position is quite different and he obtains title to the alienor's share in the property transferred as it stood on the date of the alienation.

Appeal under S. 15 of the Letters Patent from the judgment of the Honorable Mr. Justice *Krishnaswami Aiyar* in S.A. No. 1458 of 1910 presented against the decree of the Subordinate

* L.P.A. No. 13 of 1911. 21st September, 1911.

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Judge of Mayavaram at Kumbakonam in A. S. No. 837 of 1909 presented against the decree of the District Munsif's Court of Mannargudi in O.S. No. 1 if 1909.

The facts of the case appear fully from the judgment of *Sundara Aiyar* J.

S. Varadachariar for *T. R. Venkatrama Sastri* for appellant.

The Advocate-General (*P. S. Sivaswami Aiyar*) for respondent.

S. Varadachariar :—Sections 7 and 8 have no application to Article 44. These sections have reference only to cases where at the starting point one or all of the persons jointy entitled is under a disability. Under Art. 44, the starting point for limitation is after the disability has ceased. As the cause of action is a joint one, neither of the two brothers is barred.

The Advocate-General (*P. S. Sivaswami Aiyar*), cited *Vigneswara* v. *Bapayya*[1] and *Ahinsabibi* v. *Abdulkader Saheb*[2] and argued both under S. 8 and under the general law which gives the manager power to act on behalf of the family, when the senior most member is barred. *Balakrishna Iyer* v. *Muthusami Iyer*[3] shows that the manager is not liable to account and that he represents the family. As to the meaning of 'discharge' in S. 8, he cited *Bunwari Lal* v. *Daya Sunker Misser*[4]. He submitted that if one was barred the other also was necessarily barred—*Gopalsawmi* v. *Periasawmy Thevar*[5].

S. Varadachariar, replied.

The Court delivered the following

JUDGMENTS.:—*Abdur Rahim J*:—This appeal raises two questions relating to the construction of S. 8 of the Limitation Act—(1) whether the section has any application to a suit to which Article 44 of the same Act would be applicable, that is, a suit to recover possession of properties from a person holding them under invalid alienations made by the plaintiff's guardian during his minority, and (2) whether the section in question is applicable to a case where the property sought to be recovered belonged to more than one plaintiff as Hindu co-parceners, all of whom were minors at the date of alienation, but one or more of whom attained majority more than three years before the institution of the suit. As regards the first, the contention is that under Article 44 the time

1. (1893) I.L.R. 16 M. 436.
2. (1931) I. L. R. 25 M. 26.
3. (1908) I. L. R. 32 M. 271.
4. (1909) 13 C.W.N. 815.
5. (1895) 6 M.L.J. 28.

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from which the period of limitation provided for by the article begins to run is the date of attainment of majority by the minor, while S. 8 contemplates cases in which time would have run during minority but for the disability, that is to say, cases in which the running of time is suspended owing to disability, or in other words the period of disability is excluded from computation. In cases falling within the scope of Article 44 time runs only from the date of attainment of majority and there can therefore, it is argued, be no question of exclusion of the period of minority or suspension of running of time during minority. The argument appears at first sight to have some plausibility, but once we realize the proper place and scope of Article 44 in the scheme of the Act the unsoundness of the contention becomes apparent. The fallacy of the arguments consists in treating the article as if it stood by a itself and there were no other provision of the Act applicable to the case to which that article applies. A suit by a minor to set aside a sale by his guardian and a suit to recover possession of the property so sold from the vendee is regarded as standing substantially on the same footing as far as the applicability of Article 44 is concerned and as one to which in the first place not only is this Article applicable but also Article 144 and S. 28 of the Limitation Act. This has been so held by the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[1] and the reasons for it are obvious. Suppose a case in which the plaintiff attained majority within less than nine years from the date of alienation, could it then be said that if he did not sue within three years after attaining majority his suit would be barred and he would not be allowed 12 years from the date of alienation? Clearly not. It is well established that the Limitation Act does not deprive persons under disability of any advantages which other persons have under the provisions of the Act, but on the other hand the Act makes certain concessions in their favor because of the disability (See MITRA on *Limitation*, 4th Edn., pp. 295, 315-7, 696). S. 28 also applies, as it is only after 12 years of adverse possession against the minor by the alienee, but not less, even if the 3 years after attainment of majority expired within 12 years from the commencement of adverse possession, that the rights of minor would be extinguished. Then if we read Article 44 along

1. (1900) I.L.R. 23 M. 271 at 279.

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with Article 144 and S. 28 the result clearly is that Article 44 must be understood as extending—in the case of suits of a particular class by minors—the period of limitation provided for in Article 144, the general residuary Article, to three years after cessation of the disability. In other words the running of time is suspended in such cases so long as minority lasts and that after cessation of his minority the plaintiff shall have 3 years from such date or 12 years from the commencement of adverse possession, whichever period is the longest.

Now let us see what relation Article 44 bears to Sections 7 and 8. It is a well established rule of construction of the Limitation Act that the sections in the body of the Act govern and control the application of the articles in the two schedules except so far as the language of a particular article clearly precludes the application of any such section. If the proper meaning and scope of Article 44 be what I have stated, it is exactly what S. 7 lays down; only the latter lays down the rule generally for all forms of disability and in all descriptions of suits, while the former enunciates the rule only in one form of disability, *viz.*, minority, and for one class of suits—suits to set aside sale by guardian. So far, Article 44 is but a mere illustration of S. 7. It has, however, been held that S. 7 applies to suits where there is one plaintiff and he is under disability, or where there are more than one plaintiff and all of them are under disability, but not to suits by a number of plaintiffs only some of whom are under disability (see *Seshan* v. *Rajagopala*[1], *Vigneswara* v. *Bapayya*[2], and *Ahinsabibi* v. *Abdul Kader Sahib*[3].) Suits of the latter class are dealt with by S. 8 which lays down in what cases of joint claimants and creditors the running of time shall be suspended as provided for by S. 7 and when there shall be no such suspension. Article 44 applies to suits by several plaintiffs, but is confined to cases of minority and where the object of the suit is to set aside sales by a guardian. Section 8 therefore covers all the cases to which Article 44 would apply when the plaintiffs could be said to be joint creditors or joint claimants.

Then, as I have shewn, Article 44 really enacts that in the suits to which it applies the running of time would be suspended

1. (1889) I.L.R. 13 M. 236. 2. (1892) I.L.R. 16 M. 436.
3. (1900) I.L.R. 25 M. 26.

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during minority, and the first part of S. 8 lays down that the running of time shall not be suspended in certain cases. If the present is one of those cases, the fact that Article 44 applies to it would not, having regard to its scope, exclude it from the operation of S. 8.

This brings me to the next branch of the argument in support of the appeal. This point is covered by authority. I am not prepared to hold a different view. It is laid down in *Vigneswara* v. *Bapayya*[1], in *Ahinsabibi* v. *Abdul Kader Sahib*[2] and in *Singa Prasad Singh* v. *Kwahish Ali*[3] that the co-parceners of a Hindu family seeking to recover the family property from an alienee are joint claimants withing the meaning of S. 8 and it certainly can make no difference in the application of S. 8 whether the alienation was made by a guardian as here or by the manager. The two plaintiffs are brothers, and it is found that the elder of the two, on attainment of majority, would presumably be the manager. He became therefore competent more than three years before the institution of the suit to give a valid charge within the meaning of S. 28 as laid down in the cases just referred to. The suit has, therefore, been rightly held to be time-barred. The appeal is dismissed with costs.

My learned brother holds a different view.

Sundara Aiyar J.:—This Letters Patent appeal is against the decision of *Krishnasawmy Aiyar* J. in a second appeal which that learned judge dismissed under order XLI, Rule 11. The original suit was instituted by two brothers who are members of an undivided Hindu family to recover certain properties which were alienated by their mother and natural guardian in favor of the defendants by several sale deeds in the year 1895. The plaintiffs impeached the sale as not justified by any necessity and therefore not binding on them. Both the District Munsif, and the Subordinate Judge on appeal, dismissed the suit on the ground that it was barred by limitation. At the time of the presentation of the plaint the plaintiff was 23 years old and the 2nd plaintiff 20 years, so that the suit was instituted more than 3 years after the attainment of age by the 1st plaintiff but less than 3 years after the 2nd plaintiff became a major. The lower

1. (1892) I.L.R. 16 M. 436. 2. (1900) I.L.R. 25 M. 26.
3. (1882) I.L.R. 4 A. 512.

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courts proceeded on the view that S. 8 of the Limitation Act XV of 1877, which was in force at the time, was applicable to the case, and that the plaintiffs were joint claimants, one of whom, the 1st plaintiff, was competent to give a discharge for the claim when he became major without the concurrence of the other claimant. Before *Krishnasawmi Aiyar* J. it seems to have been admitted that according to Act XV of 1877 the suit would be barred. On appeal it was stated that this admission on a point of law was wrongly made and it was contended that the suit was really not barred by limitation with respect to either of the plaintiffs; and that even if the 1st plaintiff should be held to have been barred, the 2nd plaintiff was entitled to a decree for possession of the whole property and not merely a half share thereof. As the alienations were made in 1895, more than 12 years had expired since then before the suit was instituted.

It is therefore unnecessary to consider whether Article 44 of Schedule II to the Limitation Act would be applicable to a suit by a Hindu for the recovery of immoveable property alienated by his guardian during his minority—a point, the decision of which is, in my opinion, attended with considerable difficulty on account of the conflicting decisions bearing on it. There can, however, be no doubt that the plaintiffs are entitled to rely on Article 44 when 12 years have elapsed from the date of the alienations. The question, therefore, is whether, on a correct construction of the Article, the suit is barred either wholly or partially, and whether S. 8 of the Act is applicable to cases governed by Article 44 The lower courts have, as already stated, assumed that S. 8 would be applicable to the case.

Mr. Vardachariar's argument at the hearing of the appeal was that that section has no application to a case governed by Article 44 In this contention I think he is right. The article in question fixes a certain date at the time from which the period of limitation begins to run. In a suit " by a ward who has attained majority to set aside a sale by his guardian" that date is " when the ward attains majority." In my opinion each ward has 3 years from the time when he attains majority to set aside a sale by his guardian. The right of guardianship with respect to each minor is distinct from, though similar to, the right with respect to the other. The guardian has distinct rights and liabilities as guardian of each of the minors. His right of guardianship cannot be said to be joint with regard to the two plaintiffs. In

making the alienations in question the guardian must be taken to have exercised the power of alienation over the rights of the 1st plaintiff and of the 2nd plaintiff separately, though a single deed of transfer was employed for the alienation of the rights of both plaintiffs. The juristic act was different with regard to each of the plaintiffs though the guardian did not sell the undivided share of each of the plaintiffs separately, but sold their joint shares by a single instrument. It must be remembered that the right to recover the property flows from the right to set aside the alienation and the nature of the rights of the plaintiffs must be determined, therefore, with reference to the character of the act of alienation. Each of the plaintiffs, therefore, has a distinct cause of action.

Is S. 8 of the Act applicable to such a case? I am of opinion that it is not. I think that S. 8, which deals with suits by joint claimants, must be held inapplicable to the case for the simple reason that the claim cannot be regarded as joint for the reasons just mentioned. The alienation of the right of each being juristically a different act, the claim to set it aside must also be regarded as distinct in law, notwithstanding that the two plaintiffs are members of a joint Hindu family. It is desirable to refer to the language of both Sections 7 and 8 of Act XV of 1877. Section 7 is in these terms (I quote only the portion necessary for the case):—

"Where a person entitled to institute a suit or make an application is at the time from which the period of limitation is to be reckoned a minor or insane or an idiot, he may institute the suit or make the application within the same period after the disability has ceased as would otherwise have been allowed from the period prescribed therefor in the third column of the First Schedule."

S. 8 enacts as follows:—

"Where one of several joint creditors or claimants is under any such disability and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others."

It is clear to my mind that the expression in S. 7 "the same period after the disability has ceased as would otherwise have been allowed from the time prescribed in the third column of the First Schedule" clearly shews that the section contemplates only cases where, but for the disability which is made the ground of protection to the person suffering therefrom, time would run

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against the litigant before the cessation of the disability, and that the section would be inapplicable where, apart from the disability, time would not run against the plaintiff under the third column of the schedule before the disability ceases. The fact that the time fixed as the starting point in Article 44 is, in reality, the same as the time of the cessation of the disability is, in my opinion, immaterial in deciding whether S. 7 would apply, inasmuch as, to make the section applicable, it is necessary that time should run from a previous date under the schedule but for the protection afforded by the section on the ground of disability. It is not open to me, I think, to overcome this argument by regarding Article 44 as a mere illustration to S. 7 or as a surplusage. Proceeding to S. 8, I am unable to avoid the conclusion that it is applicable only to the same class of cases as S. 7, that is, to cases where, it being provided by the third column of the schedule that time should run from a certain date, the starting point is postponed by reason of a disability. Stress was laid by Mr. Varadachari on the word 'such' in the clause " where one of several joint creditors or claimants is under such disability." But it seems to me that the word merely designates the disabities referred to in S. 8, *viz.*, minority, insanity or idiocy, and that the use of that word would, by itself, be insufficient to show that the section is applicable only to cases where a period otherwise fixed in the schedule is postponed by reason of a disability. But there are, I think, other words in the section which support his argument. It says " when a discharge can be given without the concurrence of such person time will run against them all, but where no such dischage can be given time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." Take the expression in the latter clause " until one of them becomes capable of giving such discharge." Does this not indicate that it applies to a case where time would otherwise be running previously on account of the starting point fixed in the third column of the schedule? The same is the import, in my opinion, of the expression "when a discharge can be given without the concurrence of such person." It assumes that time would be running with reference to the starting point fixed in the schedule, but for disability, against the person not capable of giving a discharge. Both clauses assume that time would be

running with reference to the starting point in the schedule against some persons not capable of giving a discharge either when time so begins to run or at a later time. Both Sections 7 and 8 are, I venture to think, inapplicable except where the starting point fixed by the schedule is postponed by reason of disability. But as the legislature, whatever the reason might be, has fixed for the present suit, as the starting point of limitation, the time when minority ceases, it is impossible to regard it as a case where the starting point fixed by the schedule is postponed by S. 7 or as one in which a person under disability is incapable of giving discharge himself, when limitation would be running against him with respect to the starting point in the schedule and could be sought to be bound by the discharge given by another person capable of giving it on his behalf also.

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For this reason also I am of opinion that S. 8 is inapplicable to the case, apart from the fact that as already pointed out, the cause of action of each of the plaintiffs is distinct in the case.

On the view taken by me I must hold that the right of action of the 1st plaintiff was barred at the date of suit and that the 2nd plaintiff's right of action was not barred.

What, then, as to the relief to which the 2nd plaintiff is entitled? It was contended on his behalf that though the 1st plaintiff's right of action might be barred, the defendants would not acquire the ownership in his share of the family property, as an undivided member of a Hindu family cannot be said to own, till partition, any distinct share in the property of the joint family, and that the 2nd plaintiff is therefore entitled to recover the property, and the decision in *Ramanna* v. *Venkata* [1] is relied on as supporting the argument. I am of opinion that this contention is not entitled to prevail. When the 1st plaintiff's right to sue became barred, his right and ownership, whatever they were, became extinguished according to S. 28 of the Limitation Act. The nature of the rights of undivided members of a Hindu family has recently received much elucidation in the decisions of this court. It is now settled for this Presidency that an alienee for consideration from a Hindu co-parcener obtains title to the alienor's share in the property transferred as it stood on the date of alienation. See *Aiyyagiri Venkatramayya* v. *Aiyyagiri Ramayya* [2] and

1. (1883) I.L.R. 11 M. 246. 2. (1901) I.L.R. 25 M. 690.

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the observations of *Bhashyam Iyengar* J. therein; *Ramachandra Pillai* v. *Kalimuthu Chetti* [1]. It is there conclusively shewn that the proposition that a co-parcener has no right to any definite share of the property is only true in the sense that his share is liable to fluctuations of increase and decrease as between him and his co-parceners and also in the sense that until partition he cannot, claim as between himself and his co-parcerners, exclusive title to any particular item of the family estate or any definite share of the income of the estate. It is also demonstrated that the decisions of the Judicial Committee of the Privy Council made it impossible to hold any other view than that an alienee's position is quite different from what that of the alienor would be in the absence of a transfer by him. The sale by the guardian of the 1st plaintiff's right must be taken, therefore, to have conveyed his half share to the alienees. I also abstain from discussing the question further on principle, as I regard the proposition as established beyond dispute so far as this court is concerned. Therefore when the 1st plaintiff's right to sue the alienees became barred his right to one half of the properties became extinguished and was transferred to the alienees.

Ramanna v. *Venkata*[2] has really no application to the case. There a Hindu father made a gift of some family property and his son sued subsequently to recover it. A previous suit by the father to set aside the sale and get back the property had failed. *Collins* C. J. and *Muthusawmi Aiyar* J held that the son was entitled to recover the whole. The sale not being for considera-tion the father's share did not vest in the alienee but the whole property continued to vest in the joint family notwithstanding the gift. The family was undivided at the time of the suit. The son was therefore held entitled to recover the whole property as part of the family estate. In *Gopalsawmi* v. *Periasawmy Thevar*[3] the eldest only of the three sons instituted a suit to recover certain property belonging to the family, claiming it as his own. Subsequently his co-parceners, in order to prevent the dismissal of the suit, purported to renounce their shares in the property. The plaintiff's exclusive right was negatived at the trial. The plaintiff, in the course of the suit, asked to be allowed to amend

1. (1911) 21 M.L.J. 246. 2. (1888) I.L.R. 11 M. 246.
3. (1895) 6 M.L.J. p. 27.

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his plaint so as to enable him to recover his share of the property, but his request was refused. It was held that the co-parceners' petitions were ineffectual and that the plaintiff's application for amendment was rightly refused. *Sheppard* J. made an observati n which is pertinent to this case. He said " the question here is, whether the Judge was wrong in not allowing the plaintiff so to amend as to make him to recover his share of the property." He could not recover more, for any right which his brother ever had was extinguished by limitation in March 1891, and even if it subsisted such right has not been validly transferred to the plaintiff." He then went on to observe that " when one of the joint creditors has omitted to join the others at the outset and the latter have been joined only after the expiration of the period allowed by the law as to limitation, it has been held that the suit must be dismissed altogether and not that the original plaintiff should be allowed to recover his share of the money due— *Kalidas Kaval Das* v. *Nathu Bhagvan*[1] and *Imuldin* v. *Liladhar*[2]. It seems to me that the same principle must be applied in the present case and that as when the plaintiff's application was made it was too late for his brothers to assert the right by suit the judge was right in refusing the amendment applied for." *Best* J. was of opinion that the cases referred by *Sheppard* J. were actions on contracts and were not applicable to a suit for property against trespassers. He was of opinion that the amendment asked for should have been allowed. I agree respectfully with the proposition that the shares of those who did not sue in time would be extinguished when the period of limitation expired. In *Manzur Ali* v. *Mahmud Un-nissa*,[3] *Stanley* and *Banerji* JJ. held that when some of several co-obligees of a money bond were barred by limitation from recovering their shares, their rights would become extinguished by limitation and the remaining co-obligee who was a minor was saved from limitation by minority to his share of the money. The principle that should govern the case is that where the remedy alone is barred and the right of the co-sharer who is barred is not extinguished, his undivided coparceners would be entitled to recover the whole. See *Govindaram* v. *Tatia*[4]; *Ananta Krishna Dass Bakshi* v. *Ananda Krishna Bhose*[5].

1. (1883) I.L.R. 7 B. 217.
2. (1882) I.L.R. 4 A. 524.
3. (1902) I.L.R. 25 A. 155.
4. (1895) I L.R. 20 B. 383.
5. (1886) I.L.R. 14 C. 50.

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As I am of opinion that the 1st plaintiff's right was extinguished when he attained the age of 21, I must hold that the 2nd plaintiff is entitled to recover only a half share of the properties alienated.

I would reverse the decree of both the lower courts and the judgment of *Krishnasawmi Aiyar* J. in so far as the 2nd plaintiff is concerned and remand the suit to the first court for the disposal of his claim on the merits. I would also direct that in the circumstances of the case each party should bear his own costs throughout up to date.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

Manjappa Chettiar	..	Appellant*
v.		(*Defendant*)
Ganapathi Gounden	..	Respondent
		(*Plaintiff*).

Manjappa Chettiar v. Ganapathi Gounden.

C. P. C., S. 95—Scope of—No bar to regular suit—Tort—Wrongful attachment—Essentials for relief—"Malice" and "Want of reasonable and probable cause"—"Malice"—"Special damage"—Meaning of—Damages, measure of —Cr. P. C., S. 250.

S. 95, C. P. C., is no bar to a regular suit for damages for wrongful attachment before judgment. It creates a special jurisdiction in the court trying a suit to award compensation as incidental relief and gives an alternative remedy in cases of wrongful attachment and in no way interferes with the principles regulating suits for damages for abuse of courts process. The section allows a limited remedy without proof of malice, which it is open to a party to avail himself of if he chooses.

Remedy provided by S. 95, C. P. C., compared with the analogous remedy provided by S. 250, Cr. P. C.

In a suit for damages for wrongful attachment, the ordinary rule followed in cases of damages for malicious prosecution, that the defendant would not be responsible unless he had acted with malice as well as want of reasonable and probable cause, applies.

If the object of the defendant in obtaining attachment before judgment be merely to put pressure upon the plaintiff to pay his dues promptly and not to prevent any apprehended alienation by him, then the plaintiff is guilty of malice.

If the object be the levying of black mail, the coercion of the accused in respect of some unconnected matter, the obtaining of compensation or restitution from the accused—that would amount to malice. Recklessness regarding the truth or otherwise of the allegations would also amount to malice.

* S. A. No. 272 of 1910. 28th September 1911.

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* The meaning of the phrase "special damage" dwelt upon.

The attachment of a respectable man's property before judgment on the ground that he is attempting to alienate his properties with a view to defeat his judgment-creditor must in India damage his reputation and credit; and it is immaterial that it is not proved that he was not affected in some specific manner.

The defendant's means is no test of the measure of damages awardable to plaintiff.

Second appeal from the decree of the Temporary Subordinate Judge's Court of Coimbatore in A. S. No. 117 of 1908 presented against the decree of the Court of the District Munsif of Tiruppur in O. S. No. 37 of 1908.

The facts appear in the judgment.

A. Krishnasamy Aiyar for appellant:—Malice is necessary to sustain an action for malicious attachment—*Goutière* v. *Rohesh*[1]; *Kishori Mohun Roy* v. *Harsukh Das*[2]; *Ray Chunder Roy* v. *Sundari Debi*[3]. On the finding of the Sub-Judge, defendant had no evil motive but was actuated only by the desire to get his money.

T. K. Govinda Aiyar for respondent:— The law applicable to India is contained in S. 95, C.P. C. English law is not applicable to the case. The finding of the Sub-Judge is tantamount to a finding of malice. To procure that which a man is legally entitled to by wrongful means is unlawful, and a desire to procure that end is indirect motive which amounts to malice.

A. Krishnasami Aiyar cited *Surajmal* v. *Maneck Chand*[4].

The Court delivered the following

JUDGMENT:—The suit in this case was for damages sustained by the plaintiff by reason of the defendant causing his properties to be attached before judgment in a suit instituted by the defendant against the plaintiff (O. S. No. 6 of 1906 in the District Court of Coimbatore). The defendant along with his plaint (O. S. 6 of 1906) put in an application for attachment of all the properties of the plaintiff. The suit was for a sum of Rs. 6,000 on a pro-note executed by the plaintiff in favour of defendant's brother. The properties attached were, according to the District Munsif's finding in this case, worth at least Rs. 60,000, and on the defendant's own admission their value was

1. (1876) 2 N.-W. P. 353.
2. (1889) I. L. R. 17 C. 437 (P. C.)
3. (1872) I. L. R. 4 C. 583.
4. (1904) 6 Bom. L. R. 704.

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not less than Rs. 30,000. The defendant stated in support of his application for attachment that the plaintiff had alienated some of his properties and was about to alienate his other properties in order to defeat the execution of any decree the defendant might obtain against him.

He obtained an *interim* order of attachment, but it was set aside on the plaintiff's application, the court holding that there was no ground for the application for attachment. The defendant in his written statement alleged "that the plaintiff had plenty of debts and warrants against him, and getting afraid at the action of the plaintiff, who without paying the defendant's debt, mortgaged properties for Rs. 15,000 to his elder brother and executed some other documents in favour of others, the defendant issued a notice for the discharge of his debt ; but it has not been discharged." He then proceeded to state that his debt was not discharged by the plaintiff for two months after he obtained the decree. All the defendant's allegations about the plaintiff's indebtedness and alienations have been found to be untrue except that the plaintiff had executed a mortgage for Rs. 15,000 in favour of his brother. The District Munsif found that the defendant had absolutely no grounds to believe that the plaintiff intended to defeat him or any other creditor. He also found that the defendant had no reasonable grounds for believing his allegations. He then observes that "unless the defendant had some object (which from his conduct appears to have been sinister and indirect) in view, he could not have applied for attachment of all the plaintiff's properties worth about Rs. 75,000 at least for his debt of Rs. 5,000 and odd." He also says that the defendant had no information, before putting in his application for attachment, of any intention on the plaintiff's part to make alienations or of his being indebted to any one except his brother. He found also that the plaintiff must have been put to great mental suffering and apparently credited the plaintiff's statement that he suffered in reputation. He allowed Rs. 500 as damages. On appeal the Subordinate Judge concurred in the Munsif's finding that there was no reasonable and probable cause for the defendant's application, though the language used by him is not quite happy. With regard to the defendant's motive again, his finding is not as precise as might be desired.

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He refers to the defendant's allegations in his written statement already referred to, and then states:—"From these pleadings it appears to me that the object of the present defendant in applying for an attachment before judgment in O.S. No. 6 of 1906 was simply to have his money paid without delay and without enabling the plaintiff to take the objections he took in the previous suit, and thus to delay payment." The objection in the previous suit spoken by the Subordinate Judge was that the defendant's brother, to whom the pro-note sued on had been executed, assigned it to the defendant deliberately with a view to deprive the plaintiff of the opportunity of pleading a set off of certain debts which the defendant's brother owed to him. The Subordinate Judge then says:—"Plaintiff does not say in his evidence, and has adduced no other proof, of enmity between him and the defendant or of any evil motive of the defendant." The finding, therefore, must be taken to amount to this: that the defendant wished to use the process of attachment before judgment to obtain prompt payment of his debt and not with the view of preventing the plaintiff from alienating his properties so as to defeat any decree, but at the same time not on account of any enmity.

With regard to the question whether the plaintiff sustained any damage the Subordinate Judge merely observes:—"For the injury sustained by the plaintiff by reason of all his properties being attached improperly he is no doubt entitled to damages." He reduces the amount of damages to Rs. 250 in consideration of the defendant not being a wealthy man. The defendant has appealed to this court against this judgment, and the plaintiff has preferred a memorandum of objections to the reduction of the amount awarded as damagee

The first argument in the second appeal is that in a suit for damages the plaintiff is bound to prove both that the defendant had no reasonable and probable cause for applying for attachment and also malice in fact. For the respondent it is contended that the law in India is different in this respect from the English Law as Section 95 of the C.P.C., 1908 (Section 491 of the Old Code) provides that the court trying the suit may award compensation against the plaintiff where it finds that attachment before judgment was applied on *insufficient* grounds. Neither absence of

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reasonable and probable cause nor malice is required under this section. The question for decision is whether the rule laid down in that section is applicable to a case where the defendant who complains of improper attachm nt before judgment files a distinct and regular suit for compensation. This question, so far as we are aware, has never been expressly decided by this court. We have come to the conclusion that the appellant's argument is well founded. The section, in our opinion, creates a special jurisdiction in the court trying a suit to award compensation as incidental relief and limits the amount it may award to Rs. 1,000. It gives, in our opinion, an alternative remedy in cases of wrongful attachment, and provides that, in case a party complaining resorts to it, he shall not afterwards resort to a fresh suit, by enacting that an order determining any such application shall bar any suit "for compensation in respect of suit, arrest, attachment or injuncfoon." There is no reason for holding that the section in any way interferes with the principles regulating suits for damages, for the abuse of the process of courts. The general rule governing such cases in England has always been that actual malice must be proved. The section allows a limited remedy without proof of malice, which it is open to a party to avail himself of if he chooses. It must be noted that the Code makes provision only for some kinds of abuse of the process of courts and does not deal with all kinds of abuse. Section 95 of the Civil Procedure Code is analogous to S. 250 of the Criminal Procedure Code, which allows a criminal court to award compensation not exceeding Rs. 50 to a complainant when it is satisfied that the accusation against him is frivolous or vexatious. The section does not alter the law regulating regular suits for damages for false prosecution where the plaintiff would be bound to prove absence of reasonable and probable cause and malice, while under the section, it is enough for the criminal court to find that the complaint was frivolous or vexatious. That section, unlike S. 95 of the C. P. C., does not bar a suit for false prosecution, but merely provides that the amount awarded as compensation under it shall be taken into account in decreeing compensation in a subsequent civil suit. The Allahabad High Court in *Goutiere* v. *Robert and others*[1] held that the correspond-

1. (1870) 2 N. W. P. 353.

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ing provision in the C. P. C. of 1859 did not alter the law applicable to suits for damages for arrest or attachment. The Calcutta High Court was apparently of the same opinion in *Ray Chandar Roy* v. *Sundari Debi*[1], though the case was one for improper attachment after decree. There is also a *dictum* of the Judicial Committee of the Privy Council in *Kissory Mohun Roy* v. *Hursook Dass*[2]. The case was one in which a third party sought to recover damages for wrongful attachment of his property as the property of the defendant in the suit. It was contended that it was necessary to prove malice and absence of reasonable and probable cause in making the attachment. Their Lordships say :—"That is the rule which obtains between the parties to a suit where the defendant suffers loss through its institution and dependence." The same view was taken by the Bombay High Court in *Suraj Mal* v. *Manek Chand*[3]. The absence of reasonable and probable cause was taken to be necessary in *Thakdi Hajji* v. *Budruddin Saib*[4], but no reference was made to malice. We must hold that there is no reason for departing, when a suit is filed for damages, from the well established rule that when the plaintiff's grievance arises directly from the order of a judicial tribunal, though it is moved thereto by a private party, the defendant would not be responsible in damages unless he has acted with malice as well as without reasonable and probable cause. Has the Subordinate Judge, then, found in this case that the defendant acted with malice? On the one hand he says in effect that he was not satisfied that there was previous emmity between the plaintiff and the defendant, or that the latter was influnced by any evil motive arising from such enmity, to apply for attachment. But on the other hand he has not only found that there was no reasonable cause for the application but also says that the defendant's object was not to prevent an alienation of the defendant's property so as to defeat the execution of his decree but to have his money paid without delay—a motive which unfortunately often induces suitors in this country to apply for attachment before judgment. It need hardly be said that a plaintiff acts improperly in making use, for putting undue pressure on his debtor, of a process intended to prevent fraudulent conduct on the debtor's part. We are

1. (1878) I. L. R. 4 C. 583.
2. (1889) I. L. R. 17 C. 436 (P. C.)
3. (1904) 6 Bom. L. R. 704.
4. (1906) I. L. R. 29 M. 208

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of opinion that such conduct amounts to malice in the sense in which that expression is understood with reference to suits of this kind. Malice has been explained to mean any improper or indirect motive, *i. e.*, some motive other than the one which should properly actuate the party. No hatred or enmity is required. See *Hicks* v. *Faulkner* [1] and also *Quartz Hill Gold Mining Company* v. *Eyre*[2]. He also believes that there is no ground for an attachment before judgment on account of any intended fraud on the part of the appellant's debtor but that the former appellant must be actuated by some other motive than a desire to further the ends of justice. In *Brown* v. *Hawkes*[3], *Cave* J., speaking of suits for malicious prosecution explained malice as "some other motive than a desire to bring to justice a person whom he honestly believes to be guilty." If the object be the levying of blackmail, the coercion of the accused in respect of some unconnected matter, the obtaining of compensation or restitution from the accused—that would amount to malice as pointed out in the same case. The object of the defendant in this case must clearly be held to be malicious in the light of the explanation above given. Recklessness regarding the truth or otherwise of the allegations would also amount to malice. The defendant must certainly be taken to have outstripped his due limits when he took upon himself to state that the plaintiff was about to alienate his properties with a view to defeat his own debt.

The next contention on behalf of the appellant is that, as the plaintiff sustained no actual pecuniary loss he is not entitled to recover any damages, as in all suits of this kind special damage must be alleged and proved in order to entitle the plaintiff to recover. It is no doubt often stated that special damage is one of the essentials necessary to maintain such an action. But as pointed out by *Bowen* L. J. in *Ratcliffe* v. *Evans* [4] the expression 'special damage' is apt to mislead and care is required to find out in what particular sense it is used in each context. That very learned Judge points out that the expression has at least three different meanings. In the first place, it means actual damage arising out of the special circum

1. (1878) 8 Q.B.D. at 175.
2. (1883) 11 Q.B.D. 674 at 687.
3. (1891) 2 Q.B.D. 718.
4. (1892) 2 Q.B.D. 524.

stances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and other infringement of an absolute right, *i. e.*, the particular damage which results from the particular circumstances of the case. In the second place, where no actual and positive right has been disturbed and where it is the damage done that is the wrong, the expression denotes the actual and temporal loss which has in fact occurred and is also called particular damage. In the third place, in actions brought for a public nuisance, such as the obstruction of a river or a highway, the expression means that actual and particular loss which the plaintiff must allege and prove he has sustained beyond what is sustained by the general public if his action is to be supported, such particular loss being the cause of action. Dealing with the case before him, which related to a statement maliciously published by the defendant about the business of the plaintiff, the learned Judge observes that the allegation of special damage necessary to support the action would vary according to the circumstances of the case. While damage is the gist of such an action, it is not always necessary, he observes, to prove the actual loss specially and with certainty, and "cases may occur where a general loss of custom is the natural and direct result of the slander and where it is not possible to specify particular instances of the loss." In all actions accordingly on the case, where the damage actually done is the gist of the action, the character of the acts themselves which produced the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done might be stated and proved. In *Quartz Hill Gold Mining Company* v. *Eyre*[1], where the action was for malice only, without reasonable and probable cause—presenting a petition under the Companies Act to wind up a trading company—it was held by the Court of Appeal to be unnecessary to prove actual pecuniary loss to the company. *Brett*, M. R., said that all that was necessary was that the plaintiff company must have sustained some damage "such as the law takes notice and credit of." By the very presentation of the petition the reputation of the Company were sure to be affected.

1. (1883) 11 Q.B.D. 674 at p. 687.

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Bowen, L. J., observing that "a trader's credit is as valuable as his property." When a blow is struck at the credit of a person it would be a pity if the law did not place in the hands of the injured and aggrieved person a means of righting himself and recouping himself as far as can be for the mischief done to him. This principle was adopted by the Madras High Court in *Kumarasami Pillay* v. *Udayar Nadan* [1] in an action for malicious prosecution. See also *Wyatt* v. *Palmer* [2] where the Court of Appeal doubted whether after the decision in *Quartz Hill Gold Mining Company* v. *Eyre*[3] an allegation of special damage could be considered necessary in an action for damages for getting the plaintiff adjudicated a bankrupt. In HALSBURY'S *Laws of England*, Vol. X, the law is thus stated where actual damage is necessary to sustain an action:—"In these cases the character of the acts themselves which produced the damage, and the circumstances in which these acts are done, regulate the degree of certainty and particularity with which the damage done ought to be stated and proved." See S. 639, p. 347. In CLERK AND LINDSELL on *Torts*, IV Edition, 659, the learned authors observe that an action for the abuse of an ordinary civil process differs from an action for malicious prosecution in that the gist of it seems to be 'special damage.' It is not clear whether they mean that pecuniary damage or specific damage to reputation should be proved. If they do, we are, with all respect, not prepared to agree with them; and the learned authors cite no English cases in support of such a position. We cannot doubt that the attachment of a respectable man's property before judgment on the ground that he is attempting to alienate his properties with a view to defeat his judgment-creditors must in this country damage his reputation and credit. It is immaterial that it is not proved that they were affected in some specific manner; and we are prepared to follow the learned Judges who decided *Kumarasawmy Pillai* v. *Udayar Nadan*[1] in applying the rule in *Quartz Hill Gold Mining Company* v. *Eyre* [3] to such a suit. We hold, therefore, that the plaintiff is entitled to a decree for damages in this suit. The Subordinate Judge, in assessing the amount, reduced the sum awarded by the District Munsif on the ground that the defendant was not a man of large means and that the costs payable to the plaintiff would amount to Rs. 260. He was not right in taking the former of these circumstances

1. (1908) I.L.R. 32 M. 170.
2. (1899) 2 Q.B.D. 106.
3. (1883) 11 Q.B.D. 674 at p. 687.

into consideration. The District Munsif observes that the defendant did not object to the amount of compensation claimed by the plaintiff in his plaint, namely Rs. 2,000, nor do we find any objection taken to the amount decreed by the Munsif in the grounds of appeal in the lower appellate court. In all the circumstances of the case we think that the Subordinate Judge was wrong in making a reduction in the sum awarded by the Munsif. We shall therefore modify the decree of the Subordinate Judge by awarding to the plaintiff the sum of Rs. 500 allowed by the District Munsif. The second appeal is dismissed with costs and the memorandum of objections is allowed with costs. Manjappa Chettiar *v.* Ganapathi Gounden.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Phillips.

The Agent & Manager, S. I. Ry. Co. .. Petitioner*
(*Defendant*)

v.

Vengu Pattar, Managing Partner in the Firm of P. K. Vengu Iyer, & others .. Respondents
(*Plaintiffs*).

Provincial Small Cause Courts Act, S. 25—Revision—Technical objection and delay in filing petition. The Agent & Manager S. I. Ry. Co. *v.* Vengu Pattar.

Where a Railway Company (petitioner) relies upon a mere technicality *e. g.*, that the notice of suit was not on the Agent but only on the Traffic Manager, in order to defeat a just claim and where the petitioner has only come into court long after the period of 3 months, the court will not interfere in revision.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court of Palghat in S. C. S. 546 of 1909.

Suit to recover the value of goods sent by the plaintiff through the defendant Railway Company which were lost in transit. The lower court held that the plaintiff's case was proved, that he was entitled to a decree, and that the fact that the plaintiff gave notice of his claim to the Traffic Manager of the Company and not to the Agent was immaterial as the Agent had generally given the Traffic Manager power to settle claims up to Rs. 500 and as the Traffic Manager actually began to settle the case with the plaintiff though unsuccessfully. Defendant preferred this Revision Petition.

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* C. R. P. 236 of 1910. 31st August 1911.

The Agent & Manager S. I. Ry. Co. *v.* Vengu Pattar.

T. Rangachariar for defendant (petitioner).

C. V. Anantakrishna Aiyar for respondent.

T. Rangachariar :—Sections 77 and 140 of the Railway Act of 1890 prescribe that notice of claims on account of loss of goods should be made to the Agent of the Railway Company. A notice to the Traffic Manager, as here, is insufficient—*Nadirchand Shaha* v. *Wood* [1]. The fact that the Agent authorised the Traffic Manager to settle claims below Rs 500 is irrelevant. The above case shows that S. 140 *imperatively* requires service on the Agent and that the word '*may*' in that section means '*must*'. *G. I. P. Ry. Co.* v. *Dewase*[2] shows that even if the notice is addressed to the Agent it must be served on him exactly in the way indicated in S. 140. See *G. I. P. Ry. Co.* v. *Chandrabai*[3]. Even *Periannan Chetty* v. *S. I. Ry Co.*[4] holds that service on Agent is necessary. There is no suggestion that the Agent became aware of the claim within two months.

C. V. Anantakrishna Aiyar :—The objection of the other side is technical. The revision petition was filed on the 12th day after deducting the time taken for copies. Again in revision petitions the High Court need not pay any attention to technical pleas—*Woods* v. *Maher Ali Behari*[5]. The Agent has delegated his powers to the Traffic Manager. In none of the cases quoted was there any such authorization. If there is delegation, then notice to the delegate is sufficient—*Woods* v. *Maher Ali Behari*[5]. The decision in *Periannan Chelty* v. *S. I. R. Co.* [6] shews it is sufficient if the notice comes to the knowledge of the Agent. See also C. R. P. 614 of 1910 which is exactly like *Woods* v. *Maher Ali Behari*[5].

T. Rangachariar in reply :—My ground is not technical. It is a condition precedent which has not been complied with. The power to delegate is limited by S. 145 of the Railway Act, and this is not one of the powers that can be delegated.

The Court delivered the following

JUDGMENT :—The Subordinate Judge's decree is objected to on the ground that the notice contemplated by Sections 77 and 140 of the Railways Act was not duly given by the plaintiff. No doubt there are several rulings that the notice must be on the Agent of the Railway (*Nadirchand Shaha* v. *Wood* [1], *G. I. P. Railway Co.* v. *Dewasi*[2] *G. I. P. Railway Co.* v. *Chandrabai*[3]) but in *Periannan Chetty* v. *S. I. Ry. Co.*[4] the

1. (1907) I.L.R. 35 C. 194. 2. (1907) I.L.R. 31 B. 534.
3. (1906) I.L.R. 28 A. 552. 4. (1898) I.L.R. 22 M. 137.
5. (1908) 13 C.W.N. 24.

opinion of the learned judges was that it was sufficient to show that the Agent actually did get notice, whether in the manner prescribed in S. 140 or otherwise, and in *Woods* v. *Maher Ali Behari* [1] the learned Judges held that a notice to the Traffic Manager when he was empowered by the Agent to dispose of the claim and action by him was sufficient notice. In this case also the Traffic Manager had authority from the Agent to dispose of the plaintiff's claim and he would enquire into the plaintiff's claim. If the ruling in *Woods* v. *Maher Ali Behari* [1] is accepted the Sub-Judge's order is correct. Without, however, coming to a decision on the correctness of that ruling I think that in this case where a Railway Company relies upon a mere technicality to defeat a just claim by a member of the public and where it has only come into court long after the period usually allowed in practice for the admission of revision petitions, I should not be justified in interfering in revision. The petition is dismissed with costs.

The Agent & Manager, S. I. Ry. Co. *v.* Vengu Pattar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

Lakshmi .. Appellant* (*Defendant*)

v.

Mani Devi others .. .. Respondents (*Plaintiffs*).

Lakshmi *v.* Mani Devi.

C. P. C., S. 47—Appeal—Order declaring decree executable—Preliminary and final orders—Appeal from preliminary order—Remand order, appeal when lies—Decree—Construstion.

The determination of any question within S. 47 is a decree and the decision of the question whether a decree is executable or not is certainly a decree. An order that execution should issue and that a commissioner should be appointed for partition is a decree and is appealable. [*Venkatagiri Aiyar* v. *Sadagopachariar*[2], *Narayana Pattar* v. *Gopalakrishna Pattar*[3], *Ram Rupal* v. *Rup Kuari*[4] and *Bhup Indar Bahadur Singh* v. *Bajai Bahadur*[5] referred to.]

When the law gives a person two remedies he is entitled to avail himself of either of them unless they are inconsistent. [*Mussamatt Golab Koer*

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*C. M. A. 113 of 1910. 20th September 1911.

1. (1908) 13 C.W.N. 24.
2. (1903) 14 M.L.J. 550
3. (1904) I.L.R. 28 M. 355.
4. (1883) I.L.R. 6 A. 269 (P.C.)
5. (1900) I.L.R. 23 A. 152. (P.C.)

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v. *Badshah Bahadur*[1] referred to.] Where two orders are passed in execution, the second after and in consequence of the first, and the statute gives a right of appeal against both, an appeal is competent against the first order alone even though the second order has been passed before the filing of the appeal itself; and if the first order is reversed in consequence, the second order will *ipso facto* cease to have effect.

An appeal against a remand order will lie even after the decision of the lower court in consequence of the remand. [*Mackenzie* v. *Narasinga Sahai*[2], *Madhusudan* v. *Kaminikanta Sen*[3] and *Kurigal Mal* v. *Bishambar Das*[4] dissented from. *Uman Kunwari* v. *Jarbandhan*[5] approved. *Subba Sastri* v. *Ramachandra Sastri*[6] and *Mullikarjuna* v. *Pathaneni*[7] followed].

Held that a consent decree which did not direct possession of any lands to be given to plaintiffs but merely declared the right of defendant to remain in possession of some of the plaint lands could not be construed as a decree directing delivery of possession of the remaining lands to plaintiff.

Appeal from the order of the District Court of South Canara in E. P. 54 of 1909.

K. Narayana Rao, for the respondent, took the preliminary objection that the appeal cannot be heard as no appeal has been filed against the final order. He cited *Madhusudan* v. *Kaminikanta Sen*[3]; *Mackenzie* v. *Narsingh Sahai*[2]. He also submitted that an order simply declaring that the decree is capable of execution cannot be regarded as an order within S. 244, r. 2, Civil Procedure Code.

K. P. Lakshmana Rao, for appellant, relied upon *Uman Kunwari* v. *Jarbandhan*[5] where, he said, good reasons are given why the Calcutta view ought not to be adopted. Section 105, Civil Procedure Code of 1908, precludes a party from taking objection to the preliminary decree when the appeal is filed against the final decree. If the view adopted in Calcutta is right, the party would be wholly without remedy. Again, granted the order on the construction is right, the appellant has no objection to offer to the final decree. On the construction, he submitted that the decree was only a declaratory decree and incapable of execution.

The Court delivered the following

JUDGMENT :—This is an appeal against the order of the District Judge of South Canara in an application for execution of

1. (1909) 13 C.W.N. 1197.
2. (1909) I.L.R. 36 C. 762.
3. (1905) I.L.R. 32 C. 1023.
4. (1910) I.L.R. 32 A. 225.
5. (1908) I. L. R. 30 A. 479.
6. (1894) I.L.R. 18 M. 421.
7. (1896) I.L.R. 19 M. 479.

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the decree in O. S. 43 of 1906. The decree was the result of a compromise between the parties. The material portion of it was in these terms: "The court doth order and decree that plaintiffs do pay the assessment on the entire property as per plaint *karar* dated 16-11-05; that 1st defendant shall enjoy land yielding 126 muras of rice, and house, out of the land referred to in the karar; that 1st defendant shall not alienate the said land of 126 muras of rice; that if alienated, the alienation shall be null and void; that after the death of the 1st defendant the said land and house shall be enjoyed by the 2nd defendant paying thereon 63 muras of rice to plaintiff annually by the end of June of each year through this court, etc., etc." In 1909 the plaintiff applied for execution and asked for the order " directing that from out of the lands mentioned in the decree, land yielding 126 muras of rice, which is already in the possession of the 1st defendant and which is to be retained with her as per compromise decree, be caused to be separated towards the said 1st defendant and that the remaining properties be given in possession to the plaintiff by a commission." The 1st defendant objected on the ground that the decree was declaratory in its terms and that therefore no execution could issue. The District Judge held that "the decree can be executed by setting aside lands that yield 126 muras of rice income" and directed that this should be done, and ordered the appointment of a commissioner to prepare lists of the lands. The 1st defendant has presented the appeal to this court on the ground that the Judge was wrong in construing the decree as one that was not purely declaratory.

On the merits there can be no doubt that the order of the Judge cannot be upheld. The decree did not direct possession of any lands to be given to the plaintiffs but merely declared the right of the 1st defendant to remain in possession of land yielding 126 muras of rice of which she already had possession. It does not even declare the plaintiff's title to any lands but merely decrees that the plaintiffs do pay the assessment on the entire property of the family. We are unable to see how on the terms of the decree an order directing that the plaintiffs be put in possession of all the lands except that yielding 126 muras of rice, could be justified.

Mr. Narayana Rao, the learned vakil for the respondent, has, however, raised a preliminary objection which we are bound to

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deal with. The objection is that before the appeal was presented on the 18th July 1910 the Judge has passed another order on 18th March 1910 directing delivery to the plaintiffs in accordance with his former order after hearing the objections to the lists prepared by the commissioner; that the defendant did not appeal against the final order of the 18th March which has in consequence become final; and that he was not entitled, after the passing of the second or final order, to appeal against the first order of the 29th January.

To this objection Mr. Narayana Row, in the course of his argument, added another—that no appeal could be preferred at all against the order of the 29th January as it really did not decide any question of right between the parties.

We may dispose of the second objection in a few words. According to S. 2 of the Civil Procedure Code "the determination of any question within S. 47" is a decree. The question whether a decree is executable or not is certainly one that comes within this definition. No doubt the determination of a mere issue by the execution court made prior to the passing of the final order would not be regarded as an adjudication between the parties against which an appeal would lie. See *Venkatagiri Aiyar* v. *Sadagopachariar*[1]. But in this case the Judge did not merely record a finding on an issue. He held that execution should issue in favour of the plaintiff and ordered the appointment of a commissioner as required by the decree. In *Narayana Pattar* v. *Gopalakrishna Pattar*[2] the learned *Chief Justice* and *Subrahmanya Aiyar* J. held that when the executing court finally decided, the decree-holder was entitled to institute an appeal against such an order. The learned Judges there point out the distinction between that case and one where the court merely records a finding on an issue, as in *Venkatagiri Aiyar* v. *Sadagopachariar*[1]. It has also been decided that where the executing court decides that the plaintiff is entitled to mesne profits an appeal will lie against that order though the amount of the profits may not have been ascertained by it. See *Ramkripal* v. *Rup Kuari*[3]; *Bhup Indar Bahadur Singh* v. *Bajai Bahadur Bahadur*[4].

1. (1903) 14 M. L. J. 359.
2. (1904) I.L.R. 28 M. 355.
3. (1883) I.L.R. 6 A. 269 (P. C.)
4. (1900) I.L.R. 23 A. 152 (P.C.)

Our judgment is also in accordance with *Deokhi Nanda Singh* v. *Bansi Singh*[1], which lays down the test for deciding whether an appeal would lie against any particular order in execution or not. We overrule this contention. Lakshmi v. Mani Devi.

The first contention is certainly better supported by authority, but we are of opinion that it is not entitled to prevail. The defendant being entitled to appeal against the order of the 29th January we are unable to hold that he was not entitled to do so within the period allowed to him by law. The second order merely carried out the first order in this case; it did not in any way supersede that order as indeed it could not do. We cannot see how that order could affect the defendant's right of appeal. He might have had no objection to it provided the first order was right.

This indeed is the position taken up by the appellant before us. To use the language of the decision of the Full Bench of this court in another case: "Where a right and jurisdiction are conferred expressly by statute they cannot be taken away or cut down except by express words or necessary implication." It is argued that the later order, not having been appealed against, would remain in force even if we reverse the earlier one, and that therefore it is not open to us to take the futile step of setting aside the first order. We cannot agree that the reversal of the earlier order will leave the later one intact. The second order depends for its validity upon the first one allowing execution in favour of the plaintiffs, and with the quashing of the first the second must cease to have any force. The appellant has not been able to draw our attention to any decision of this court in support of his position. But he relies on the decision of the Calcutta High Court in *Mackenzie* v. *Narasinga Sahai*[2] and upon *Madhusudan* v. *Kaminikanta Sen*[3] which was followed in that case. It is perhaps desirable to examine briefly the decisions of the Calcutta High Court bearing on this question. *Madhusudan* v. *Kaminikanta Sen*[3] was a case of an appeal against an order of remand. It was presented after the Munsif had passed his final judgment subsequent to the remand. *Maclean* C.J. and *Mitra* J. held that the appeal was incompetent. The reason given is that S. 588 of the old C.P.C., provides for appeals against various

1. (1910) 14 C.L.J. 35. 2. (1909) I.L.R. 36 C. 762.
3. (1905) I.L.R. 32 C. 1023.

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interlocutory orders, several of which do not affect the decision of a suit on the merits, though some do; that a party failing to appeal against any of the orders could object to it on an appeal against the final decree and that therefore if he desires to avail himself of the privilege conferred by S. 588 in relation to an order of remand, he ought to do so before the final disposal of the suit. With all respect for the learned Judges we must say the argument does not commend itself to us. When the law gives a person two remedies he is entitled to avail himself of either of them, unless they are inconsistent. See *Mussammat Gulab Koer* v. *Badshah Bahadur*[1]. The learned Judges distinguished an earlier case, *Jalinga Valley Tea Co.* v. *Chesa Tea Co.*,[2] on the ground that the appeal there had been presented before the final judgment was passed.

But the ratio of that decision is equally applicable, whether the appeal against the remand is presented before or after the second judgment in the case. *Field* J. observes: "The Code does not say that there shall be an appeal only if the case has not been finally determined in the court of first instance before that appeal is preferred or comes on for hearing. We cannot, therefore, import into the Code a provision which does not there exist. The Munsif's jurisdiction to hear the case upon remand depended upon the remand order. If the remand order was badly worded the decree and indeed all the proceedings taken under that remand order are null and void." In *Mackenzie* v. *Narasinga Sahai*[3] there was a preliminary decree in a suit for partition and a subsequent final decree. The appeal was against the former only, and was presented after the final decree had been passed. The learned Judges who decided the case—*Mookerjee* and *Carnduff* JJ.—followed *Madhusudan* v. *Kaminikanta Sen*[4]. They say that the final decree would still stand even if the preliminary decree were reversed. No reason is given for this proposition. The learned Judges differ from the judgment of the Allahabad High Court in *Uman Kunwari* v. *Jarbandhan*[5] and point out that the view taken in that case, that an appeal might be preferred against an order of remand even after the court of

1. (1909) 13 C.W.N. 1197.
2. (1885) I.L.R. 12 C. 45.
3. (1909) I.L.R. 36 C. 762.
4. (1905) I.L.R. 32 C. 1023.
5. (1908) I.L.R. 30 A. 479.

first instance had passed its final judgment after remand, was based on the opinion of the Allahabad High Court that the party aggrieved by an order of remand could not object to it on an appeal presented against the final decree; and that the Calcutta High Court had adopted a contrary view on the point. Now, the Legislature has laid down in the present Code of Civil Procedure, S. 105 (2), that an order of remand cannot be impeached except by an appeal against that order. It is similarly provided in S. 97 that "where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree." The result of the opinion of the Calcutta High Court in the case cited by the appellant would be that, if a party, without any fault of his own, is unable to appeal against a preliminary decree or an order of remand before the final decree on remand is passed, he would lose all opportunity of objecting to that order or decree, and be deprived of the right of appeal expressly conferred on him by the Legislature. The incorrectness of the position would be manifest from another inconvenience, which may be pointed out here. Suppose a District Court passed an order of remand and before it is appealed against the Munsif's Court passes a decision on the merits in pursuance of the remand order. Suppose the Munsif's decision on the merits is unimpeachable. If the defendant's appeal could be only against the final judgment, he would be bound to appeal to the District Court though necessarily he would not be entitled in that appeal to attack that court's order of remand. And yet, according to the view of the Calcutta High Court, he would be bound to get the order of the Munsif confirmed in order to get a right of appealing to the High Court against the order of remand. *Mookerjee* J. has attempted in a later case to support *Mackenzie* v. *Narasinga Sahai*[1] on another ground. In *Baikunthanath Dey* v. *Nawab Salimulla Bahadur*[2] the learned Judge says: "When an order of remand is passed its validity may be challenged directly and immediately by an appeal under S. 588, Cl. 28, or indirectly under S. 591, when an appeal is preferred against the final decree in the suit. The party affected by the

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1. (1909) I.L.R. 36 C. 762.
2. (1908) 12 C.W.N. 590.

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order of remand must make his election. He may, if he chooses to prefer an appeal against the order of remand, obtain a stay of proceedings during the pendency of the appeal. He may, on the other hand, carry out the order of remand, and take the chance of a successful termination of the suit in his favour; and in the event of defeat, prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand." But surely a party appealing against an order of remand is not entitled, as of right, to a stay of proceedings in the court of first instance. Nor does it lie in the power of a defendant objecting to a remand to decide whether he should appear at the further proceedings before the court of first instance or not. He is bound to do so at the risk of those proceedings being completed in his absence, in case of default. This theory of alternative reliefs is pointed out by Mr. Justice *Mookerjee* himself to be wrong in *Mussammat Gulab Koer* v. *Badshah Bahadur*[1] where the learned Judge observes that a litigant is entitled to take advantage of each and every one of the remedies open to him except when they are inconsistent with each other. The Allahabad High Court in *Kurigal Mal* v. *Bishambar Das*[2] followed *Mackenzie* v. *Narasinga Sahai*[3]; distinguishing its own earlier case *Uman Kunwari* v. *Jarbandhan*[4] (which had been dissented from in *Mackenzie* v. *Narasinga Sahai*[3]) on the ground that "a right of appeal from an order of remand was expressly given by S. 588 of the old code," and the court proceeded upon the ground that "such right of appeal could not be taken away in the absence of some direct provision to the contrary." We may point out that a right of appeal against a preliminary decree or against an order in execution is also expressly granted by the statute. The learned Judges of the Allahabad High Court go on to observe: "Moreover, in considering what the effect of the reversal of an order of remand under S. 562 aforesaid would be, this court was careful to point out that anything done in pursuance of such an an order would become *ipso facto* of no effect on the reversal of the said order

1. (1909) 13 C.W.N. 1197.
2. (1910) I.L.R. 32 A. 225.
3. (1909) I.L.R. 36 C. 762.
4. (1908) I.L.R. 30 A. 479.

because the court concerned would have no jurisdiction to pass any further order in the case (except by way of review) unless empowered to do so by the order under S. 562 itself. No such consideration arises in the case now before us as it is clear that the learned Munsif after passing his preliminary decree had jurisdiction and indeed was bound to proceed in due course to pass a final decree in the case. It seems to us that a serious anomaly would be created by the modification of the preliminary decree of June 25th, 1908, while the final decree of June 30th, 1908, remained in force and had not been appealed against." The whole argument, it will be noted, is based on the assumption that the final decree which is the result of the proceedings dependent for their validity on the preliminary decree would survive the reversal of the earlier decree. This assumption, we have already pointed out, is unsupportable. *Kurigal Mal* v. *Bishambar Das* [1] has been reaffirmed by the Allahabad High Court in *Narain Das* v. *Balgobind*[2]. The Madras High Court has held that an order of remand is appealable even after the passing of the final decree subsequent to the remand. See *Subba Sastri* v. *Balachandra Sastri*[3] and *Mulikarjuna* v. *Pathaneni*[4].

For the reasons above mentioned we overrule the first preliminary objection also.

In the result, the order of the lower court must be reversed, and the application for execution dismissed with costs both here and in the lower court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

The Public Prosecutor .. Appellant*

v.

Chirreddi Munayya .. Accused.

Murder and robbery—Evidence, presumptive—Recent and unexplained possession of stolen property.

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* Cr. A. No. 365 of 1911. 31st October 1911.

1. (1910) I.L.R. 32 A. 225.
2. (1911) 8 A.L.J. 604.
3. (1894) I.L.R. 18 M. 421.
4. (1896) I.L.R. 19 M. 479.

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In cases in which murder and robbery have been shown to form parts of one transaction, recent and unexplained possession of stolen property, while it would be presumptive evidence on the charge of robbery, would similarly be evidence against the robber on the charge of murder.

Appeal under S. 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Sessions Case No. 3 of 1911 by the Sessions Judge of Cuddapah.

P. R. Grant for the appellant.

K. Venkatalingam for the accused.

The Court delivered the following

JUDGMENT:—This is an appeal by Government against the acquittal of one C. Munayya on a charge of having murdered one Seshamma on the 24th September 1910. The Sessions Judge accepts the prosecution evidence as true, but thinks that it is not in law sufficient to establish the guilt of the accused. In this we are of opinion that he is in error.

The material facts proved may be stated as follows:—

Seshamma was a widow, living with her brother. He was absent from home on the 24th September last. She was last last seen alive in her house about 1 o'clock on that afternoon. About 3 o'clock the same afternoon the accused and another man were seen by two witnesses to enter the house, and to leave it again some time later. Some time before 6 o'clock the same afternoon one Baligadu went to the house and found her lying dead in the room, her head and face beaten in evidently with a mallet which lay blood-stained by her. He at once gave the alarm, and the two witnesses who had seen the acccused and another enter the house mentioned the fact publicly. Next day her brother, Seshayya, returned on being informed of the murder and made a complaint to the Police in which he mentions the accused and the other as the murderers, and gives a long list of jewels which she used to wear, and which had been removed from the corpse. Search was made for the accused by the Village Magistrate and Police but he was not to be found in his house or in the village. He was eventually, on the 5th October, arrested at night in a tope in another village. On the next day he made a statement and took the Police, the Village Magistrate and several others to a place

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about half a mile from the village and dug up a pot which contained a number of jewels, which agree with the jewels stated in Seshayya's complaint to have been taken from Seshamma when she was murdered. The Chemical Examiner has certified that a number of the jewels so given up by the accused bore on them traces of mammalian blood.

The accused in the Sessions Court denied his guilt but gave no explanation as to how he came by the jewels. From these facts we think it is reasonable and legitimate to infer that the accused was the murderer of Seshamma and took the jewels from her.

In the case of *Queen-Empress* v. *Sami* [1] it was stated that "in cases in which murder and robbery have been shewn to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property, while it would be presumptive evidence against a prisoner on the charge of robbery, would similarly be evidence against him on the charge of murder" and this principle has been accepted and acted on in several other later cases by this court.

There is no circumstance in the present case to suggest that the accused was only a receiver of the property, while the fact that he was seen to go into the house of the woman shortly before the time when she was murdered is almost conclusive evidence that he was the murderer and thus obtained the jewels which he afterwards gave up to the Police.

We find the accused, C. Munayya, guilty of murder under S. 302, I. P. C., but looking to the fact that he was at first acquitted we resolve to impose the lesser alternative sentence allowed by law. We direct that he be transported for life. Under S. 397, Criminal Procedure Code, we direct that the sentence of transportation take effect immediately.

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1. (1890) I.L.R. 13 M. 426 at 432.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Jamna Doss .. .. Appellant* (*Respondent-Agent & witness for Plff.*)

v.

A. M. Sabapathy Chetti .. .. Respondent (*Petitioner-2nd Deft.*).

Jamna Doss *v.* Sabapathy Chetti.

Cr.P.C., S. 195, Cls. 6, 7 (c)—Jurisdiction of appellate bench of High Court to hear appeal from sanction order of Presidency Small Cause Court—High Court—Original and appellate side, of—Original and appellate jurisdiction—Meaning of.

Both the original and the appellate sides of the High Court constitute but one court though the jurisdictions are different.

An appellate bench of the High Court is competent to dispose of an appeal from an order of sanction granted by the Presidency Small Cause Court. [*Sew Bollock Singh* v. *Ramdin Bania*[1]] referred to.

Appellate and original jurisdictions defined.

The effect of Cl. 7 (*c*) of S. 195, Cr. P. C., is merely to designate the court to which an appeal lies under that clause and not to describe the nature of the jurisdiction which it exercises. Its effect is to make the High Court the appellate tribunal in dealing with sanction orders under S. 195, Cr. P. C., of the Presidency Small Cause Court: and the High Court exercises its appellate jurisdiction in an appeal under S. 195 from an order of sanction by the Presidency Small Cause Court.

Appeal from the order of the Chief Judge of the Court of Small Causes, Madras, according sanction for the proseeution of the appellant Jamna Doss, the agent and witness for the plaintiff in Suit No. 10,215 ot 1910 on the file of the Court of Small Causes, Madras, for offences under Sections 193 and 194 of the Indian Penal Code.

K. Ramanatha Shenoi, for respondent, took the preliminary objection that the appeal did not lie to the appellate side of the High Court but only to the original side. [*Sundara Aiyar* J.—Your objection is rather that this Bench cannot hear the appeal ?] It comes to the same thing, but that is not all. In the original side, the application ought to have been by Judge's summons. [*Sundara Aiyar* J.—Do the rules make provision for the case ?] Not, except in a general way. The jurisdiction exercised is original, not appellate. The petition is by way of appeal and not an appeal. He cited *Muthuswami Mudali* v. *Veni Chetty.*[2]

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* A. A. O. No. 184 of 1910. 6th September 1911.

1. (1911) 14 C.W.N. 806. 2. (1907) I.L.R. 30 M. 382.

Jamna Doss v. Sabapathy Chetti.

L. A. Govindaraghava Aiyar, for appellant, submitted that the criterion for finding out the appellate court is its being the principal civil court of original jurisdiction ; but such court is not exercising original powers but only appellate. Revisional power is appellate power. He cited *Chappan* v. *Moidin Kutti* [1].

The Court delivered the following

JUDGMENT :—[After dealing with the case on the merits and revoking the sanction on the ground that the petitioner had not made any contradictory statements, their Lordships proceeded as follows:—ED.]

A preliminary objection was raised by Mr. K. Ramanatha Shenoi that this Bench, sitting on the appellate side of the court, has no power to hear this appeal. The appeal is preferred under S. 195 of the Criminal Procedure Code. Clause 7 (*c*) of that section provides " where no appeal lies, such court (*i. e.*, the court granting the sanction) shall be deemed to be subordinate to the principal court of original jurisdiction within the local limits of whose jurisdiction such first mentioned court is situate." According to this clause, an appeal against an order of the Small Cause Court granting sanction would lie to the High Court because the High Court is the principal civil court of original jurisdiction within whose jurisdiction the Presidency Court of Small Causes is situate. Mr. Ramanatha Shenoi contends that the court to which the appeal lies is the original side of the High Court. This argument is based on the assumption that the original side of the High Court is a different court from the appellate side. This, in our opinion, is quite fallacious. The court is one, but it exercises both original and appellate jurisdictions. In interpreting S. 591 of the repealed Code of Civil Procedure (Act XIV of 1882) which lays down that no appeals shall lie from appellate orders passed under S. 588, it has been pointed out by this court that the section would not apply to orders passed under S. 588 by a judge of this court, because S. 591 deals with appeals from one court to another, while the High Court is one court by whomsoever the jurisdiction of the court may be exercised, whether by a single judge or by a Bench of more than one judge. [See 9 M. 447, 20 M. 152 and 20 M. 407—ED.]

1. (1898) I.L.R. 22 M. 62.

Jamna Doss v. Sabapathi Chetti.

We, therefore, are of opinion that there is no foundation for the argument that the appeal lies to one particular branch of this court.

It is next contended that as the appeal lies to the High Court as the principal civil court of original jurisdiction we as a Bench constituted to exercise appellate jurisdiction have no power to hear the case. In our opinion the effect of clause 7 (*c*), S. 195, Criminal Procedure Code, is merely to designate the court to which an appeal lies under that clause and not to describe the nature of the jurisdiction which it exercises in dealing with the orders of the Small Cause Court. Its effect is only to make the High Court the appellate tribunal. When the High Court deals with a sanction granted by the Small Cause Court, does it exercise original or appellate jurisdiction? As we understand the matter, when one court deals with a judgment of another court having power to confirm or to set it aside, the jurisdiction it exercises is appellate jurisdiction. Original jurisdiction is the jurisdiction in original proceedings, *i. e.*, proceedings instituted in the court, whether suits, petitions or any other proceedings. We cannot agree that, in deciding whether we should revoke the order of the Presidency Small Cause Court granting sanction against the appellant or refuse to do so, we are exercising any original jurisdiction though we are acting as the High Court which under clause 7 (*c*) of the section is invested with the power of dealing with cases of sanction granted or refused by the Presidency Small Cause Court. Being of opinion that the power of this court to deal with a sanction granted by another court comes within the purview of its appellate and not original jurisdiction, we hold that we have the power to hear and dispose of the appeal and disallow the preliminary objection. The view we have taken is in accordance with the judgment of *Pugh* J. of the Calcutta High Court in *Sew Bollock Singh* v. *Ramdin Bania*[1] where the learned Judges point out that the High Court acts in the exercise of revisional jurisdiction in dealing with cases under S. 195, Criminal Procedure Code.

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1. (1911) 14 C.W.N. 806.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Spencer.

A. R. Krishnan Chetty (died) & others .. Appellants
v. (*Plff.* & *his legal reptives.*)
Vellaichami Thevan (died) & others .. Respondents
(*Defendants*).

Krishnan Chetty *v.* Vellaichami Thevan.

Guardians and Wards Act, S. 7 (2)—Guardian, appointment, effect of, on mother's powers — Estoppel—Essentials—Ratification—Essentials—Minor—Necessaries—Proof, quantum—Admisions in suit, effect of.

When a guardian is appointed by court under the Guardians and Wards Act for a minor's property, persons other than such guardians cannot legally bind the minor's estate.

The want of authority of a *de facto* guardian is a good defence to a suit brought by a mortgagee to enforce his mortgage against a minor, though in a suit by the minor to set aside the mortgage, a court might equitably decline to grant relief until the plaintiff compensates the mortgagee to the extent of the benefit derived by him.

There can be no estoppel when truth was known to the person pleading it : nor can it be invoked to defeat a plain provision of law.

There can be no ratification of a transaction void owing to the promisor possessing no contractual capacity.

A cause of action cannot be founded on an estoppel, nor does an estoppel arise from a representation of a mere intention—*e.g.*, an intention to pay promptly.

Where a deed is executed by a minor and his mother without the latter describing herself as guardian it would be a violent presumption to treat the mother as acting for the minor.

Where a creditor of a minor's estate seeks relief on the basis of his having lent for necessaries, it rests upon him to have taken care that the bond is so drawn up as to render the minor's estate in law liable for the debt.

Admissions may no doubt be made by parties at any time, but where the maker of the admission contradicts and retracts it on the ground of inducement, etc., it cannot be treated as conclusive so as to justify a court in passing a decree on the basis of those admissions.

Appeal from the decree of the Subordinate Court of Madura East, in O. S. No. 41 of 1904.

Suit for money due on two mortgage deeds, one executed by the defendant and his mother, and the other by the defendant alone. Various pleas were raised, *e.g.*, minority at the time of execution, the void character of the mortgages as there was a certificated guardian for the defendant then, and their prejudicial

* A. No. 227 of 1905. 21st September 1911.

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character, the mortgages being unnecessary. The suit was dismissed Hence the appeal.

S. Srinivasa Aiyangar for appellants.

T. Rangachariar, T. Rangaramanujachariar, S. Sundararaja Aiyangar, C. S. Govindaraja Mudaliar, C. S. Venkatachariar and *M. Narayanasawmi Aiyar* for respondents.

S. Srinivasa Aiyangar.—It is true a guardian for minor's property in a joint Hindu family cannot be appointed—*Gharibulla* v. *Khalak Singh*[1]. But this case shows that if a person who is really a minor executes a document and there is nothing to show that he is a minor, the burden is on him to show that he was a minor then or that, if a guardian had been appointed for him, that he was not then 21 years of age.

A minor's contract cannot be ratified; but if *A* executes a document as guardian of *B* while *B* is really a major, then *B* may ratify it. [*Chief Justice.*—The capacity in which *A* executes is not one of agent so that it could be ratified. If the other acts as his agent he is estopped from disputing the same as he assents to the act done by another for him. It does not matter in what capacity it is done provided he is a major then.] Minority is a privilege; the onus is on the person who pleads minority—*Gharibulla* v. *Khalak Singh*[1]. The defendant does not describe himself as a minor in the deed. Nor is there any proof of my knowledge of his minority. If a person does not describe himself as a minor he is estopped from saying that he was then a minor. Supposing minority, the fact that the mother does not describe herself as guardian is immaterial if she acts really as guardian —*Makundi* v. *Sarabsukh*[2]; *Jogobundhoo Doss* v. *Hari Rawoot*[3]; *Murari* v. *Zayana*[4]. The facts that there is a court guardian, and the natural guardian does not obtain the sanction of the court for the mortgage, are immaterial if there was necessity for the transaction — *Arunachalla Reddi* v. *Chidambara Reddi*[5]. The case of *Ananthaya Kamtti* v. *Lakshmi Narayanappayya*[6] shows that even a care-taker can validly charge the minor's property if the act is a necessary one in the interests of the minor. Necessity and

1. (1903) I.L.R. 25 A. 407, 416 (P.C.)
2. (1884) I.L.R. 6 A. 417.
3. (1888) I.L.R. 15 C. 16 (P.C.)
4. (1895) I.L.R. 20 B. 286.
5. (1905) 13 M.L.J. 223.
6. (1904) 15 M.L.J. 233.

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propriety are the tests—*Hanuman Pershad's Case*[1]; *Honappa* v. *Mahalpai*[2]. Sections 29 and 30 of the Guardians and Wards Act prohibit only court guardians—*Manishankar Pranjivan* v. *Bai Muli*[3]. The case of *Nathu* v. *Balwant Rao*[4] is not against me, for the reasons there given do not apply to this case. It is a question of fact whether the *de facto* guardian acted as guardian while there was a court guardian—*Madan* v. *Ranji Lal*[5]. The items for which the money was lent were necessaries. Expenditure for necessaries supplied to a minor is recoverable. The word 'necessaries' has an extended meaning in law. Even costs supplied to conduct a suit are necessaries—*Succaram Mobarji* v. *Kalidas Kalianji*[6]; *Murari* v. *Zayana*[7]. The necessaries were supplied by others and I afterwards paid for them. I am entitled to subrogation. 'Necessaries' vary according to conditions of life—*Bawal Sahu* v. *Baynath Persad*[8].

T. Rangachariar:—In 1897 a guardian was appointed for the defendant; that shows that he was a minor then. It is on this account that the plaintiff took up on himself the burden of proving majority. He failed in this; no question of estoppel therefore arises, *vide* issues. Plaintiff admits that the executant was a minor and that a guardian for his property was appointed. There is no evidence that the mother was in *de facto* management of the estate. The court guardian was the lawful guardian of the estate and he was in possession of the estate. Under S. 7, Cl. (2), of the Guardians and Wards Act, an appointment implies the removal of any natural or *de facto* guardian. Moreover, if a natural guardian is appointed guardian of the person, all her previous rights as natural guardian cease, and we have to look to her rights only under the provisions of the Act—*Ram Chandar* v. *Chanda Lal*[9]. When there is a lawful guardian, the natural guardian would only be trespassing if she deals with the estate, even if the dealings be for any necessary purpose. It is the act of a stranger as in *Ayivantha Chetty* v. *Aramanathachi*[10] even though the executant executes as guardian if in fact she was not the lawful guardian and even though there

1. (1856) 6 M.I.A. 393 (P.C.)
2. (1890) I.L.R. 15 B. 259.
3. (1888) I.L.R. 12 B. 686.
4. (1903) I.L.R. 27 B. 390.
5. (1901) I.L.R. 23 A. 288, 289.
6. (1894) I.L.R. 18 B. 631.
7. (1895) I.L.R. 20 B. 286,
8. (1907) I.L.R. 35 C. 320.
9. (1905) 2 A.L.J. 460.
10. (1910) 21 M.L.J. 73

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was no court guardian. See also *Nizam-ud-din Shah* v. *Ananda Prasad* [1]; *Abdul Khadir* v. *Chidambaram Chettiar*[2]. The case of *Arunachella Reddi* v. *Chidambaram Reddi*[3] is a case in which the powers of a natural guardian would continue as there was no court guardian in that case. There the lawful guardian, *i.e.*, the testamentary guardian, consented to and ratified the alienation of the natural guardian who was in possession. The other cases quoted by the other side are not at all analogous to the present case. *Gharibullah* v. *Khalak Singh*[4] has been misunderstood by the other side. Moreover, there was no necessity for entering into these transactions. There was no real contract made in respect of these transactions, and if there was one this suit is not on that contract. There is no estoppel on the facts of this case, for the plaintiff knew everything as to age, etc. Vol. 13, Laws of England, para 553, states what representations would constitute an estoppel. Statements as to future are only expressions of intention which can be changed. If a man says " it is possible I will get money and I will pay,' that is not an estoppel as to the liability to pay. There must be a pre-existing cause of action; estoppel itself does not give rise to a cause of action—see CASPERSZ on *Estoppel*, p. 204, on the necessity of what is relied on as an estoppel being clear. Estoppel can only arise from a clear definite statement. An estoppel cannot be pleaded to defeat a provision of law, *e. g.*, that a mortgage can be executed only in a certain way. If there is no valid mortgage already, estoppel cannot create one—*Barrow's Case* [5]; *Kuni Veera Reddi* v. *Kuni Bapi Reddi* [6]; *Madras Hindu Mutual Permanent Benefit Fund* v. *Raghava Chetty*[7]. If there was an intention that certain persons by name should execute a deed, then the absence of some cannot be justified by saying that their manager signed—*Sivasami Chetti* v. *Sevagan Chetty*[8]. Here if it was intended that the minor also should execute the deed then it would not do to say that the guardian executed. There cannot be any ratification of a minor's contract after his attaining majority. A void contract cannot be ratified. The case *Ramasawmi Pandia Thalvar* v. *Authiappa Chettiar*[9] is followed

1. (1896) I.L.R. 18 A. 373.
2. (1908) I.L.R. 32 M. 276.
3. (1902) 13 M.L.J. 223.
4. (1903) I.L.R. 25 A. 407.
5. (1880) 14 Ch. D. 432, 441.
6. (1904) I.L.R. 29 M. 336.
7. (1895) I.L.R. 19 M. 200, 201.
8. (1901) I.L.R. 25 M. 389.
9. (1904) 16 M.L.J. 422.

in *Anglo-Indian Trading Co.* v. *Brierly*[1]. The decision to the contrary in *Mussamat Kundan Bibi* v. *Sree Narayan*[2] is criticised as wrong by POLLOCK & MULLA in their *Contract Act*, p. 56.

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S. Srinivasa Aiyangar replied.

The Court delivered the following

JUDGMENT:—The plaintiff in the lower court, a money-lender by profession, based his claim upon two hypothecation bonds, Exhibit *L*, for Rs. 1,000 executed on July 27th, 1898, and Ex. *A* for Rs. 3,000 executed on June 28th, 1899, and as his suit was dismissed he now appeals. On account of the first defendant's minority, a guardian named Krishnasawmy Iyer was appointed on January 18th, 1897, under the order of the District Court of Madura, marked Ex. *CC*. On November 20th, 1899, by force of orders marked Ex. *EE* and *FF*, the first defendant's mother who had by Ex. *CC* been made guardian of the persons of the first defendant and his minor sister jointly with the guardian of their property was appointed guardian of their property also and Krishnasawmi Iyer was discharged from his office. On October 31st, 1900, the first defendant was declared by the court to have attained majority and the guardian's powers ceased.

Exhibit *L* was executed by the first defendant's mother Rukku Nachiar alone, purporting to act as guardian of the first defendant and his sister. Exhibit *A* was executed both by the first defendant and his mother, but she does not describe herself therein as his guardian. A comparison of dates easily shows that both documents were executed during the continuance of the guardianship of the guardian of the property appointed by court. The Subordinate Judge has found that the first defendant was below eighteen years when the guardian was appointed. Mr. Srinivasa Aiyangar has asked us to come to a different conclusion on the evidence, but on this point we may briefly remark that no evidence, sufficient to rebut the legal presumption that the first defendant was a minor when guardians of his person and property were appointed by the court having jurisdiction under Act VIII of 1890, has been laid before us.

As regards Exhibit *L*, it has been contended that it is valid on the ground that it was executed by the first defendant's

1. (1910) 9 M.L.T. 17. 2. (1906) 11 C.W.N. 135.

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mother who was guardian of his person and *de facto* guardian of his property, if the debt was incurred for necessary purposes. But in the first place there is no proof that she was *de facto* guardian beyond the vague statement of the plaintiff's 8th and 9th witnesses that her men managed the first defendant's villages and there was no suggestion of the kind in Exhibit *DD* when a motion was made to the court to remove Krishnasawmi Iyer and appoint Rukku Nachiar. In the second place the authorities cited on the appellant's behalf fall far short of establishing the proposition that, when a guardian of a minor's property is appointed under the Guardians and Wards Act, persons other than such guardians can legally bind the minor's estate. It would be exceedingly inconvenient for the minor's interests if there was such conflict of authority between guardians. The legislature has in fact provided for such an eventuality so far as guardians appointed by court are concerned. Section 7 (2) of the Guardians and Wards Act takes away the power of any guardian not so appointed, by declaring that the court's order appointing a guardian under the Act will have the effect of removing any other guardian. Sections 29 and 30 provide against the lawfully appointed guardian encumbrancing or alienating portions of the minor's estate without the court's permission. In *Nathu* v. *Balwant Row* [1] it was held that an adverse act of a mother, while acting *de facto* guardian of her son, in disposing of the minor's property as if it was her own and purporting to pay her own debts, although the purchase money was in fact applied in payment of debts for which the minor was liable, would not bind the minor for whom a guardian had been appointed by court. The effect of appointments under the Act of extinguishing the powers of a natural guardian is discussed in *Ramchander* v. *Chanda Lal* [2]. No doubt these cases are not on all fours with the present, but they show how other courts have treated the powers of certificated guardians as exclusive, and the language of the Act is clear enough. In *Abdul Khader* v. *Chidambaram Chettiar*,[3] where the parties were Mahomedans, this court held that persons purporting to act as *de facto* guardians and to incur debts in good faith for the benefit of a minor, could not bind the minor's property by their

1. (1903) I.L.R. 27 Bom. 390. 2. (1904) I.L.R. 2 A.L.J. 460.
3. (1908) I.L.R. 31 M. 276.

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acts, if in fact they had no legal status as guardians. The position of a mother after the appointment of a guardian by court appears to be no better, even though she may be guardian of the minor's person as in this case. The want of authority of a *de facto* guardian is a good defence to a suit brought by a mortgagee to enforce his mortgage against a minor, though if the positions were reversed and the minor was suing to set aside the mortgage, as was held in *Nizam-ud-din Shah* v. *Ananda Prasad,* [1] a court might equitably decline to grant relief until the plaintiff compensated the mortgagee to the extent to which he had benefited by the money advanced on the mortgage.

Turning to the decisions cited on the other side, they do not help us much. *Honappa* v. *Mahalpai*[2] and *Manishankar Pranjivan* v. *Bai Muli*[3] deal with the powers of natural guardians when no certificated guardian has been appointed. So also the case of *Arunachella Reddi* v. *Chidambara Reddi*[4]. There was a testamentary guardian in that case and he acquiesced in the alienation made by the natural guardian for necessity. In *Ananthayya Kamtti* v. *Lakshmi Narayanappayya*[5] there was a caretaker in possession of a minor's estate as a guardian but no conflict of authority arose between guardians, certificated or natural. In *Madan Mohan* v. *Ranji Lal*[6] the certificated guardian joined with the minor in executing the mortgage in dispute but failed to obtain the court's permission, and the court treated the transaction as voidable and good if not followed by notice of an intention to avoid it, whereas in *Mohori Bibi* v. *Dharmodas Ghose*[7] the Privy Council has treated mortgages entered into by minors as void for want of contractual capacity. In *Gharibullah* v. *Khalak Singh* [8] certain mortgages were contracted by the manager of an undivided Hindu family, and the mother who obtained a certificate of guardianship did not get the court's sanction under S. 29. It is thus not a case in point.

Next it is contended that apart from Rukku Nachiar's act being valid, the first defendant and those who claim under him are precluded from disputing the validity of Exhibit *L*, because

1. (1896) I.L.R. 18 A. 373.
2. (1890) I.L.R. 15 Bom. 259.
3. (1888) I.L.R. 12 Bom. 686.
4. (1902) 13 M. L. J. 223.
5. (1904) 15 M. L. J. 233.
6. (1901) I.L.R. 23 A. 288.
7. (1903) I.L.R. 30 C. 539.
8. (1903) I.L.R. 25 A. 407.

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in 1903 after attaining majority, the first defendant undertook in a letter filed as Exhibit *L* (1) to see that this debt and that secured by Exhibit *A* were paid at an early date if the plaintiff arranged to take an assignment of Exhibit *L* from the original mortgagee Mahomed Ibrahim. It is sought to make Exhibit *L* (1) do duty as an estoppel, as a ratification of the suit bonds Exhibits *A* and *L*, or as a foundation for a new contract between the first defendant and the plaintiff after the attainment of majority. The plaintiff's position is said to have been made worse by his acting on the first defendant's offer to pay promptly on condition of his taking the assignment (Exhibit *M*) but the plaintiff's statements at page 167 of the printed documents that the first defendant's mother represented her son to be 17 or 18 in 1896 or 1897 (the year when a guardian was appointed), that he got no record to show his age, and that he was aware of the guardianship petition being presented, show that he was not wilfully kept in ignorance of the first defendant's minority, and there can be no estoppel if the person concerned knows the truth about the facts asserted. Moreover, estoppel cannot be invoked to defeat a plain provision of law (vide *Madras Hindu Mutual Permanent Benefit Fund* v. *Raghava Chetty*[1]). A mortgage can only be effected by a registered document, and there is no registered document validly executed by the first defendant in existence. There is only an alienation made by his mother without authority. The case of *Sarat Chander Dey* v. *Gopal Chander Saha*[2] can be distinguished by the circumstance that the District Judge found that Ahmed, whose acquiescence in his mother's conduct was held to amount to estoppel, had reached majority at the date of the mortgage. The case of *Parameshwar Ojaha* v. *Mussamat Goollee*[3], relied on by Mr. Srinivasa Aiyangar, was another case of a major permitting his mother to represent him as a minor, and to mortgage ancestral property. If in that case he had been in fact a minor, his permission would have gone for nothing. Then too, there can be no ratification of a void transaction, void owing to the promisor possessing no contractual capacity at the time, vide *Ramasawmi Pandia Thalavar* v.

1. (1895) I.L.R. 19 M. 200. 2. (1892) I.L.R. 20 C. 296 (P.C.)
3. (1869) 11 W. R. 446.

Auithiappa Chettiar[1] and POLLOCK & MULLA'S *Contract Act*, p. 56.

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Nor can a void deed form a good consideration for a fresh contract, made on attaining majority. In this case we are told that the first defendant was benefitted by not being put into court at once and by a change of creditors and the promisee was benefitted by the promise of the 1st defendant to pay the debt of Rs. 3,000. These advantages may serve as consideration for the assignment, but this suit was brought on the mortgages, the cause of action is described in the plaint as starting from them, and no case of a new contract appears to have been put forward till now. Even in the prayer for additional issues, at page 185 of the printed documents, this case is not clearly set out. A cause of action cannot be founded on an estoppel, nor does an estoppel arise from a representation of a mere intention such as the first defendant's intention to pay promptly—*vide* HALSBURY'S *Laws of England*, Vol, XIII, p. 377, S. 534.

As regards Ex. *A*, it was executed both by the first defendant and his mother. Decisions have been cited to show that it is not necessary for a guardian to describe himself as a guardian if he actually is one, but when a minor purports to act and execute for himself, as in this case, it would be a violent presumption to treat his mother as acting for him.

Assuming, however, that her act was the act of a guardian, it is bad for the same reason as her execution of Exhibit *L*, viz. because there was a guardian appointed by the court at the time. The first defendant's execution of Ex. *A* was bad as being the act of a minor.

Again it is argued that the plaintiff is entitled to be reimbursed for necessaries supplied to the minor and to get a charge on his estate independently of the suit bonds. Section 68 of the Indian Contract Act and the decision in *Bhaval Saha* v. *Baijnath Pertab Narain Singh*[2] are quoted in support of this position and some of the items and oral evidence have been referred to in order to show what the cost of the minor's maintenance was and how the money borrowed from the plaintiff was expended. On this point it will be sufficient to note that the Subordinate Judge, in paragraph 19 of his judgment, found no evidence that the

1. (1904) 16 M.L.J. 422.
2. (1907) I.L.R. 35 C. 320.

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debts which Exhibit *A* discharged and those which the account Exhibit *K* evidence, were all borrowed for the real necessity of the first defendant or Rukku Nachiar. In our opinion also, the plaintiff failed to establish satisfactorily that the debts were incurred for the first defendant's benefit, several of the debts mentioned in Exhibit *A* being incurred by his mother. The plaintiff evidently knew that he was dealing with a limited owner as he states (at page 170 of the printed documents) in his evidence that he knew, when Exhibit *B* was taken, that Krishnasawmi was appointed guardian and that the first defendant and his mother told him that he, the guardian appointed by the court, was giving Rs. 20 for their maintenance every month. Exhibit *B* in date is after Exhibit *L* and before Exhibit *A*. From Exhibit *DD* it appears that Rukku Nachiar was given monthly Rs. 30 and 4½ kalams of paddy, and although the cash payments were delayed for a time, there is no such allegation as to the grain. Thus the first defendant and his mother were not without necessaries for their support, and we are not satisfied that they could not have lived within their income if they had tried. Even if some of the articles purchased with the money advanced by the money-lender were necessaries, the responsibility would rest on him when a bond is taken for the debt to take care that the bond is so drawn up as to render the estate of the minor in law liable for the debt. This was the opinion of the learned judges who decided the case in *Bhaval Saha* v. *Baijnath Pertab Narain Singh*[1], and we agree with them. If the present suit had been based on accounts and the plaint framed for the recovery of necessaries supplied to a minor, questions of limitation would have arisen.

Lastly, a question has been raised whether the lower court should have given the plaintiff a decree on the admission of liability under both Exhibits *A* and *L* contained in the first defendant's statement presented on February 27th, 1905, and printed at pages 8 and 9 of the printed pleadings. The plaint contains a prayer for a personal decree against the first defendant. The first defendant is now dead and the 12th respondent is his legal representative. In the first defendant's first written statement dated September 6th, 1904, upon which issues were framed on

1. (1907) I. L. R. 35 C. 320.

November 30th, 1904, he completely denied his liability. In his deposition on July 18th, 1905, he stated that his first written statement was put in at the instance of the fifth defendant and his second written statement at the instance of the plaintiff. He added that the facts mentioned in the written statement put in through Mr. Naganathier (*i.e.*, the first) were true. Exhibit *IV* is a notice given by the first defendant to plaintiff in August 1904, in which he alleged that the plaintiff had held out false hopes to him before suit and had practised fraud in respect of the documents for 1,000 and 3,000, by which Ex. *L* and *A* are evidently intended, and that they were unsupported by consideration and invalid. S. 152 of the Code of Civil Procedure, in force when the suit was tried, declares that if at the first hearing of a suit it appears that the parties are not at issue on any question of law or fact, the court may at once pronounce judgment. S. 158 contains a similar provision for suits in which there are, as here, several defendants. No doubt admissions may be made by parties at any time, but seeing that the court of first instance did not treat the first defendant's second statement as a confession of judgment and pass a decree against him on the strength of it, we are of opinion that it can only be treated as a piece of evidence, and that not conclusive, looking to the circumstances under which it was made. These are that its maker contradicted it before and retracted it afterwards alleging that he had been induced to make it, that it was put into court on a day when there was no hearing of the suit and after the framing of issues, and that at the time it was made the first defendant appears to have parted with most, if not all, of his rights over his property.

We think that the appellant is not entitled to any relief in this suit and we would dismiss his appeal with costs of 5th and 6th (one set) and 4th and 12th respondents (one separate set).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

Duraisawmi Sastrial .. Appellant* (*Resp.-Deft.*)

v.

Venkatarama Iyer & another .. Respondents (*Petrs.-Plffs.*).

Duraisawmi Sastrial *v.* Venkatarama Iyer.

Limitation Act IX of 1908, *S.* 7—"*Discharge can be given*"—*Decree in favor of members of Hindu joint family—Competency of managing member to give discharge.*

The managing member of a Hindu joint family is competent to give a valid discharge of a decre-debt due to the family within the meaning of S. 7 of the Limitation Act IX of 1908. [Observations of *Bhashyam Aiyangar* J. in *Periasawmi* v. *Krishnayyan* [1] declared to be no longer law.]

Appeal under S. 15 of the Letters Patent from the judgment and order of Mr. Justice *Abdur Rahim* in C. R. P. No. 581 of 1910 presented against the order of the Court of the Subordinate Judge of Kumbakonam in interlocutory application No. 475 of 1910 in S. C. S. No. 39 of 1899.

The following was the judgment of *Abdur Rahim* J. from which this appeal was preferred "I think the order of the Subordinate Judge must be set aside. One of two joint decree-holders cannot give a discharge without the concurrence of the other (*Periasami* v. *Krishnayyan*[1]) and therefore, under S. 7 of the new Limitation Act, the petitioners are entitled to apply for execution of the decree. The order is set aside and the lower court will dispose of the petition for execution according to law.

The respondent will pay the costs of this petition."

C. V. Ananthakrishna Aiyar and *P. Gangadhara Aiyar* for appellant.

K. Balamukunda Aiyar for respondents.

C. V. Ananthakrishna Aiyar:—Payment to the managing member is a discharge of the decree. Section 231, Civil Procedure Code (Order XXI, r. 15) cannot be taken to cut down his rights in this respect. It has been held that the managing member can compromise without leave of court—*Ganesha Rao* v.

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* L. P. A. No. 52 of 1911. 15th September 1911.

1. (1902) I. L. R. 25 M. 431 at 439.

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Tooljaram Rao[1], affirmed in O. S. A. 47 of 1908. It has also been held that the manager of a Hindu family need not furnish security before drawing out money from court—C. M. A. 80 of 1910 and C. M. A. 155 of 1906. The same has been held in respect of the *karnavan* of a Malabar family—Ref. Case 3 of 1911. In *Harihar Pershad Singh* v. *Mathura Lal* [2] the Calcutta High Court has held that security need not be taken from the managing member of a Hindu family under S. 462, C. P. C. He referred to *Periasawmi* v. *Krishna Aiyar* [3] but submitted that S. 7 of the Limitation Act of 1908 has made the decision inapplicable.

K. Balamukunda Aiyar submitted that the decision in *Periasawmi* v, *Krishna Aiyar*[3] had not become any the less applicable so far as one branch of it goes, *viz.*, that S. 231 (Order XXI, r. 15) is applicable to all cases of joint decree-holders, and so long as no exception is made thereto, the managing member cannot claim exemption from its restrictions. He relied upon *Surja Kumar Dutt* [4]; *Govindram* v. *Tatra* [5]; *Manchand Panachand v. Kesari* [6].

The Court delivered the following

JUDGMENT:—In this case a decree was passed in favour of two persons, members of a joint Hindu family, by the Subordinate Judge's Court of Kumbakonam in a small cause suit. The first plaintiff in the suit was the managing member. Both the plaintiffs were minors at the time when the decree was passed. The present application for execution was put in by both of them. The first plaintiff had attained majority more than three years before the date when the application was put in. But the second plaintiff is alleged to have attained majority less than three years before that date. The judgment-debtor contended that the execution of the decree was barred by limitation and the Subordinate Judge upheld his contention. A petition to revise the Subordinate Judge's order was filed in this court and *Abdur Rahim* J. holding that the application was not barred by limitation reversed the order of the lower court. This appeal is against the order of the learned Judge. The question has to be

1. (1908) 19 M.L.J. 4.
2. (1908) I.L.R. 35 C. 561.
3. (1902) I.L.R. 25 M. 431 at 435, 440, 442.
4. (1901) I.L.R. 28 C. 465.
5. (1895) I.L.R. 20 B. 283.
6. (1910) I.L.R. 34 B. 672.

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decided under the provisions of S. 7 of the present Limitation Act (IX of 1908). The corresponding section in the repealed Act (XV of 1877) viz., S. 8, did not apply to applications for execution of decrees. That section has been altered in the present statute so as to make it applicable to such applications. Section 7 of the new Act provides:—"Where one of several persons jointly entitled to make an application for the execution of a decree, is under any such disability, (*i.e.*, minority, etc.) and a discharge can be given without the concurrence of such person, time will run against them all, but where no discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased." The section, it cannot be denied, contemplates the existence of cases where one of several decree-holders can give a discharge without the concurrence of the others. It is contended on behalf of the judgment-debtor that it is only where a joint judgment-creditor has expressly authorised another as his agent to give a discharge that the other could give a discharge within the meaning of the section. The section itself does not lay down in what cases one decree-holder could give a discharge so as to bind other decree-holders. That must be decided by the substantive law governing the parties. According to Hindu Law there can be no doubt that the managing member of a Hindu family can receive monies on behalf of the family from debtors and give a discharge so as to bind the whole family. There is, in our opinion, no section in the Civil Procedure Code restricting the manager's power to receive monies on behalf of the family when a decree has been passed. It is admitted that monies realised in execution of decrees could be dealt with by the managing member after realisation in the same manner as he is entitled to deal with other monies. We can see no reason for holding that his powers with respect to the realisation of monies for which decrees have been passed should be more restricted than his powers with respect to collection of other monies. Order XXI, Rule 1, of the Code of Civil Procedure (1908) corresponding to S. 257 of the old Code provides, no doubt, that all monies payable under a decree may be paid *inter alia* to the decree-holder out of court and the expression "decree-holder" would, no doubt, mean decree-holders where there are more persons than

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one, in favour of whom a decree has been passed. But the question is:—"Is not payment to a decree-holder who is the managing member of a family and jointly entitled along with its junior members to the benefit of the decree, a payment to all the decree-holders, if the substantive law of the parties entitles him to receive monies on behalf of the family?" There is no reason for holding that it is not. The position of a managing member is similar, for the purposes of the present question, to that of an agent. We mean that he has got at least all the powers of an agent for receiving monies due to the family, and this being so, there is no reason for holding that within the meaning of Order XXI, Rule 1, of the Code of Civil Procedure, 1908, monies due under a decree to a number of decree-holders constituting a Hindu family may not be paid to one amongst them who is the managing member. The managing member may sue singly in his capacity as manager and receive money due to the family. There is no reason why, simply because he has associated the junior members along with himself in instituting the suit, his power to release the money due to the family should be less than if he sues alone. The language of S. 257 of the old Code, is only permissive and does not expressly prohibit payment to an agent or to one having the powers of an agent, under the law of the parties. The respondent's vakil has referred to observations of Sir *V. Bashyam Iyengar* J. in the case *Periasawmi* v. *Krishna Ayyar* [1] which are also referred to in the judgment of *Abdur Rahim* J. If the learned Judge really meant to lay down that the provisions of S. 257 should be construed without reference to the substantive law of the parties in deciding whether one of them is entitled to receive monies for which a decree is passed in favour of a joint Hindu family, then, with all deference, we are unable to concur with him. Some decisions have been referred to which were passed while the repealed Limitation Act was in force. As pointed out already, S. 8 of that Act did not apply to applications for execution and the courts were therefore bound to hold that in such applications the rule now laid down in S. 7, of the new Act could not be applied and the result was that if one alone of several decree-holders was a minor the benefit of S. 7 of the new Act could not be claimed by either of the decree-holders or by the judgment-debtor while at the same

1. (1902) I.L.R. 25 M. 431.

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time the decree-holders were held by this court not to be entitled to the protection afforded by S. 6 of the new Act to persons suffering from disability—see *Seshan* v. *Rajagopala*[1]; *Venkayya* v. *Lakshmayya*[2]. This unfortunate result has now been obviated by the amendment. We may observe that the judgment of Sir *V. Bashyam Iyengar* J. is expressly based on the fact that S. 8 of the old Limitation Act was not applicable to applications for execution. The legislature having subsequently amended it apparently with reference to the observations of the learned Judge, we think there ought to be no difficulty now in applying the rules of Hindu Law in deciding the question whether the managing member can give a discharge so as to bind others or not. Having regard to the change in the language of the section of the Act, we consider it unnecessary to refer to some other cases that have been relied on for the respondents. We may observe that this court has held more than once that money due to the members of a Hindu family under a decree may be directed to be paid to the managing member without taking any security notwithstanding the provisions of S. 231 of the old Civil Procedure Code; see A. A. O. No. 80 of 1910, Referred Case 3 of 1911, A. A. O. No. 155 of 1906 on the file of the High Court, and also *Harihar Pershad Singh* v. *Mathura Lal*[3]. It is no doubt open to the court, where the manager is obliged to seek its help for realising a decree by process of execution, to direct security to be given for protecting the interests of other members when it sees reasons for doing so, but this cannot deprive him of the right to receive the money himself if he can do so without the assistance of the court. This court has also held that the rights of a managing member under the substantive law would be recognised in matters relating to procedure, such as the right to compromise a suit without the consent of the court where minor members of the family are also parties to the litigation—see *Ganesha Rao* v. *Tuljaram Rao*[4] confirmed in O. S. A. No. 47 of 1908. For these reasons we are of opinion that the judgment of the learned Judge must be reversed and that of the Subordinate Judge restored. The respondent will pay the appellant the costs of this court both in this appeal and before *Abdur Rahim* J.

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1. (1889) I.L.R. 13 M. 236.
2. (1892) I.L.R. 16 M. 98.
3. (1908) I.L.R. 35 C. 561.
4. (1908) 19 M.L.J. 4.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph Benson, Offg. Chief Justice, and Mr. Justice Sankaran Nair.

T. R. Ganesha Row .. .. .. Appellant*

v.

T. V. Tulja Ram Row and others .. Respondents.

Ganesha Row *v.* Tulja Ram Row.

C. P. C., S. 462, "On behalf of a minor"—Hindu Law—Decree directing payment of money to father alone—Father foregoing benefit by compromise in appeal—No necessity for sanction.

The appointment of a Hindu father as guardian *ad litem* will not deprive him of his capacity to act on his own behalf; and a compromise *bona fide* entered into by him of a disputed claim foregoing money payable only *to him*, though as representative of the family of which he is the head, will be binding on the minor members of his family who are parties to the litigation, and S. 462 C. P. (1882) is not applicable to such a case.

Appeal from the judgment of Mr. Justice *Wallis* in the exercise of the ordinary original civil jurisdiction of the High Court in O. S. No. 194 of 1906.†

For facts see 19 M.L.J. 4 where the Judgment of Wallis J. is reported.

The Advocate General (P. S. Sivaswami Aiyar) and *T. R. Venkatrama Sastri* for appellant.

C. P. Ramaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The facts are fully set out by the learned Judge and we think it unnecessary to recapitulate them. It is sufficient to say that the decree in the original suit (C.S. No. 266 of 1886) made Tulja Ram Rao, the 18th defendant, accountable to the family, consisting of three branches besides that of Tulja Ram for a sum of Rs. 3,26,000 and odd. On appeal (Original Side Appeal No. 33 of 1892) he was held to be accountable for an additional sum of Rs. 1,40,000 and the half share in the Scottish Press purchased by him was declared to be family property, and it was also held that he must further account for a sum of Rs. 1,03,000 for his drawings from the press. The share of the plaintiff's branch in the total sum for which Tulja Ram was held accountable was about Rs. 86,000. While Tulja Ram's appeal against that decree was pending, a compromise was entered into between the parties by which the plaintiff's father (the 2nd defendant) renounced his share of the amount decreed; the plaintiff in that suit gave up about Rs. 10,000 out of the amount decreed to him, and a widow who represented a third

* O.S.A. No. 47 of 1908. 28th September 1909.

† See 19 M.L.J. p. 4.

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branch gave up more than Rs. 60,000. Tulja Ram withdrew his appeal and the plaintiff's father entered up satisfaction of the decree.

It is contended before us that as the plaintiff was a minor defendant in that suit, any compromise entered into by the second defendant, his father, who was her guardian *ad litem*, is not binding on him as the sanction of the court was not sought for and obtained. It is argued that though a *bona fide* compromise, by a father or a managing member of a family, of a disputed claim may, in certain circumstances, be binding on the minor members of the family, yet when the minor is a party to the suit he will not be bound by a compromise entered into by his father, appointed by the court guardian *ad litem* without the sanction of the court nor will he be bound by any such compromise even when a person other than the father or the guardian under Hindu Law is the guardian *ad litem*, because it is urged, when a guardian is appointed by a court, the minor becomes a ward of court and any power which his father or any other person may have to bind his interest in any property in a pending suit is put an end to. We feel that there is a great force in this contention, and if it were necessary to decide the question we should hesitate to hold that a minor would be bound by any compromise with reference to such property without the sanction of the court.

In this case, however, a decree had been passed determining the rights of the parties, and the decree made the money (Rs. 86,000) payable to the plaintiff's father, the third defendant in that suit. No sum was payable to the plaintiff, who was the 6th defendant, in that suit. It is, no doubt, true that the money was, by virtue of the Hindu Law, payable to the plaintiff's father as the representative of the branch of the family consisting of himself and his descendants, whether or not they were parties to the suit, and he was entitled to receive it only as ancestral property, not as separate property. But so far as the question before us is concerned he was the sole decree-holder entitled to enter up satisfaction. Section 462, Civil Procedure Code, only precludes "the next friend or guardian for the suit" from entering into any agreement "on behalf of a minor" without the leave of the court. If, therefore, some other person had been the minor's next friend or guardian

Ganesha Row v. Tulja Ram Row.

for the suit, then the plaintiffs' father could have entered into the agreement now in question with Tulja Ram, the judgment-debtor, on his own behalf without any reference to S. 462, C.P.C. His appointment as guardian *ad litem* would not deprive him of his capacity to act on his own behalf. But as the money was made payable to him only as the representative of the family of which he is the head, the compromise he entered into will be binding on the other members, including the plaintiff, only if it is a *bona fide* compromise of a disputed claim.

The learned Judge has held that this agreement (Ex. *AA*) was part of a family settlement which put an end to disputes between all members of the family and enabled the heads of the three branches of the family which thenceforth became divided from one another—the fourth being represented by a widow—to carry on in partnership the valuable business of the Scottish Press which could have been jeopardized by further quarrels. The plaintiff has not given any oral evidence. The documentary evidence has been read to us. It certainly shows that Tulja Ram believed that he had no grounds for appealing against the decree in the suit. He had competent counsel to advise him. The correspondence also shows that the matters in dispute were discussed fully between the parties and their advisers. The main questions raised in appeal as to the ownership of the half share of the Scottish Press which was purchased in Tulja Ram's name and his liability for failure to collect over a lakh of rupees due to the family were undoubtedly substantial questions. The withdrawal of his appeal was therefore, in our opinion, good consideration to justify the plaintiff's father in entering into the compromise. The terms of the compromise differed as between the parties because circumstances were different. We are, therefore, unable to treat the release (Ex. *AA*) as a gift by the plaintiff's father to his brother Tulja Ram. Being of opinion, therefore, that the agreement is binding on the plaintiff, we dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Abdur Rahim.

Ranchode Dass Govardhan Dass.. .. Appellant*

v.

Krishna Dass .. .. .. Respondent.

On appeal from the judgment and decree of Mr. Justice *Wallis* made in the ordinary original civil jurisdiction of the High Court in Suit No. 90 of 1903

Govardhan Dass *v.* Krishna Dass.

Execution—Decree against assets of deceased—Representative's plea of assets—Onus.

Once it is admitted or proved that the man sought to be made liable under a decree obtained against a deceased person had come into possession of assets belonging to the estate of the deceased judgment-debtor, it is for him to satisfy the court as to the extent of the assets received by him and to account for them. [*Magalomi Gerudiah* v. *Narayana Rungiah*[1] referred to.]

T. Ethiraja Mudaliar, T. V. Seshagiri Aiyar and *C. V. Anantakrishna Aiyar* for appellant.

The Advocate General (P. S. Sivaswami Aiyar) C. P. Ramaswami Aiyar and *A. Nanabhoy Devay* for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal from the judgment of *Wallis* J. declaring that the appellant has sufficient assets of his deceased father in his hands to meet the plaintiff-respondent's claim and directing the appellant to pay to the respondent the amount of the appellate decree dated the 5th April 1906, *viz.*, Rs. 9,308-5-2 plus interest on the principal sum of Rs. 7,358-12-0 from 22nd March 1905.

The appellant's father died in February 1903, leaving the appellant his only son, and the respondent obtained the above-mentioned decree against the appellant payable out of the assets in the latter's hands of his deceased father. In execution of the decree certain properties in the defendant's possession were attached and he alleged in those proceedings that he had no assets of his father. An enquiry was then held and the learned Judge found against him.

* O. S. A. No. 3 of 1909. 1st September 1911.

1. (1881) I.L.R. 3 M. 359, 365.

Govardhana Dass v. Krishna Doss.

It appears to have been admitted by the appellant in an affidavit filed by him in certain proceedings that assets of his father to the extent of Rs. 4,000 came to his hands, and it was in fact never disputed that some assets of his father did come into the defendant's possession. His contention seems to have been that, taking into account the amounts for which his father was liable to account as an executor of the will of his grand-uncle Girdhara Dass, dated 9th February 1885, under which the defendant was, in the circumstances which happened, the sole residuary devisee, and what the defendant has paid to other creditors of his father, there are no assets in his hands now available.

Now, once it is admitted or proved that the man sought to be made liable under a decree obtained against a deceased person had come into possession of assets belonging to the estate of the deceased judgment-debtor, it is for him to satisfy the court as to the extent of the assets received by him and to account for them. This onus is based on the well-recognised rule of evidence that a fact which is peculiarly within the knowledge of a certain party must be proved by him—see *Magalomi Gerudiah* v. *Narayana Rungiah*[1]— and in this case it is amply proved that the appellant, who is the sole heir of his father, was in possession of all books of account, documents and papers relating to the estate. But he contends that his father chose to mix up the trust fund with his own funds and therefore it is incumbent on his father's creditors to make out that any portion of the assets in the appellant's possession belonged to his father and not to the trust estate. Under these circumstances a commissioner was appointed by the learned Judge to enquire into and report as to what assets of the appellant's father Govardhana Dass came into the appellant's possession.

[Their Lordships next proceeded to deal with the case on the merits and finally dismissed the appeal.—Ed.]

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1. (1881) I. L. R. 3 M. 359 at 365 *et seq.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Varadaraja Appa Rao Bahadur Zamindar Garu .. .. .. Appellant* (*Plaintiff*)

v.

Gudavalli Brahmayya .. .. .. Respondent (*Defendant*).

Appa Rao *v.* Brahmayya.

Landlord and tenant—Rent—Payment of lower rate by defendant's vendors by reason of usage—Pleadings—Purchaser's liability to pay usual rate.

Where a zamindar claims a certain rate of rent from his tenants, but the tenants plead a lower rate which was paid by their vendors (Velamas) and the landlord sets up a certain usage by which lower rates were charged from Velama tenants, and the usage was found by the Court:—*Held* that the tenants were bound to pay the rate claimed, there being no question of plaintiff's seeking to enforce payment of rent *by reason* of usage *from* defendants; and consequently no question arise as to the defendants' knowledge of the usage before their purchase. [*Manavikrama Raja* v. *Rama Pattar*[1] distinguished.]

Second appeal from the decree of the District Court of Kistna in A. S. No. 315 of 1907, presented against the decision of the Court of the Head Assistant Collector of Bezwada in S. S. No. 1 of 1907.

The Advocate General (*P. S. Sivaswami Aiyar*) for appellant.

T. Prakasam for respondent.

The second appeal coming on for hearing on December 1910, the Court (*Krishnaswami Aiyar* and *Ayling* JJ.) delivered the following

JUDGMENT:—This is a suit to enforce acceptance of pattah. The plaintiff has charged rates higher than the rates charged for the fields in question in previous years. The defendant bought the holding about 9 years ago. The previous holders of the lands were Velamas, and the plaintiff's case is that a favourable rate was charged upon Velamas, and for the same lands, if they passed into the hands of non-Velamas, the ordinary rate is higher, and the defendant is bound to pay, being a non-Velama, the higher rate. The issue raised is with reference to the custom so pleaded by the plaintiff. The District Judge has given no finding on the question of custom. On the other hand he says: "Whatever be the practice of the village, it is not shown that the defendant is bound to pay at the higher rate." It is true that the District Judge refers to the payment for 6 years by

* S. A No. 650 of 1909. 5th September, 1911.

1. (1897) I. L. R. 20 M. 275.

the defendant of the lower rate after his purchase. The plaintiff explains away the receipt of the lower rent for 2 years by saying that no transfer in the registry had been made. The Judge does not proceeed to find an implied contract to pay at the lower rate with the defendant by reason of the payment for 4 years at this rate; nor has it been set up by the defendant. We must ask the District Judge to return a finding on the question whether the custom pleaded of lower rates for Velama holders is esablished by the evidence on record, and, if so, whether the defendant is bound to pay the higher rate. Eight weeks will be allowed for the return of findings and 7 days for the filing of ojections.

In compliance with the adove judgment the District Judge of Kistna submitted the following

FINDINGS :—This appeal has been remanded by their Lordships of the High Court to give a finding

"Whether the custom pleaded of lower rates for Velama holders is established by the evidence on record, and, if so, whether the defendant is bound to pay the higher rate."

* * * *

My finding on the 1st point is that the custom pleaded of lower rates being charged for Velamas is established by the evidence.

* * * *

I, however, do not consider I should be justified in differing from 20 Madras 275 and therefore I must hold that defendant was not bound to pay the higher rate.

This second appeal coming on for final hearing after return of the above findings, the Court delivered the following

JUDGMENT :—The finding of the lower appellate court is that the proper rent for the defendant's land according to the rates prevailing in the village is what is claimed by the plaintiff in his plaint. It has also found that it was on account of a usage entitling Velama holders to pay a lower rate of rent that the rent levied from the defendant's vendor was lower than the normal rate. Having given these findings, the lower appellate court considered itself bound by the decision in *Manavikrama v. Rama Pattar*[1] to hold that the plaintiff was not entitled

1. (1897) I. L. R. 20 M. 275.

Appa Rao v. Brahmayya.

to recover rent at the rate claimed. The learned Judge himself distinguishes the facts of that case from those in the present case, but still he has felt himself bound to follow that case. In our opinion, that decision has no application at all to this case. There, the Zamorin sought to recover from the defendant in the suit certain fees on the ground of usage; he contended that the usage set up governed the incidents of all contracts between him and the holders of perpetual leases under him. It was held that in order that such an incident of the contract might bind a purchaser for valuable consideration from one of the Zamorin's tenants, the latter was bound to show that the purchaser was aware that such an incident was appended to all contracts of perpetual tenancy between him and his tenants. The plaintiff here is not seeking to enforce the payment of rent on the ground of any usage; on the other hand, he claims what he contends is the normal rent for the defendant's land according to the rates in the village. And, the usage is alleged only as an explanation for the payment of a lower rate by the defendant's vendor. No question therefore arises of the defendant being aware of any usage sought to be enforced against him. The defendant took the land subject to the payment of rent properly due for lands in the village. He did not set up any express or implied contract to prove any different rate of rent payable by him. Assuming he was under the impression that the rate of rent paid by his vendor could be taken advantage of by himself, that can be no reason for refusing to the plaintiff the proper rate of rent. We reverse the decree of the lower appellate court and restore that of the court of first instance with costs both here and in the lower appellate court.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Present :—Lord Macnaghten, Lord Atkinson, Lord Robson and Mr. Ameer Ali.

Kaikhusru Aderji Ghaswala & others .. Appellants*

v.

The Secretary of State for India in Council .. Respondents.

Cantonment land—House from before the time of the formation of cantonment—Presumption—Licensee.

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* May 18, 19 & 23 and June 27, 1911.

Mere possession or occupation of a bungalow on cantonment site affords no presumption whatever that the owner or occupier or his predecessors in title were owners in fee. Ghaswala v. The Secretary of State for India in Council.

Where at the time the cantonment was formed, compensation was given to all owners of sites for surrender of their occupancy rights, the presumption would be, even assuming that the suit house was there from before the time of the formation of the cantonment, that the owner of the suit site was similarly compensated.

Held :—That the owners of the suit house were mere licensees, that the lands in question had been lawfully resumed, and that the owners need not be paid compensation on the basis of private ownership.

Appeal from an order of the High Court of Judicature at Bombay directing the re-hearing of an appeal from a judgment and decree of the District Judge of Poona, but in reality, by virtue of an order of His late Majesty in Council dated the 4th July 1908, an appeal on the merits of the suit from a judgment of the said High Court dated the 29th July 1907.

The judgment of their Lordships was delivered by

Lord Robson :—In form this is an appeal from an interlocutory order of the High Court of Bombay, dated the 12th February 1908, which directed the re-hearing of an appeal from a judgment and decree of the District Judge of Poona, dated the 22nd October 1904, in favour of the appellants, but by an Order of His late Majesty in Council it is in effect an appeal on the merits of the suit from a Judgment of the High Court dated the 29th July 1907.

The action was brought by the respondent to eject the appellants from premises known as No. 9, Arsenal Road (formerly known as 23, Staff Lines) within the limits of the Poona Cantonment.

It was claimed on behalf of the Government of Bombay that the land belonged to them and was only held by the appellants on military or cantonment tenure, which entitled the Government to resume it at their pleasure, subject to compensation for buildings which the tenants might have erected thereon. The appellants, on the other hand, claimed the land as their private property, and while admitting that they were subject to military jurisdiction in the shape of properly authorised cantonment regulations, and to the Government right of appropriation, contended that they were entitled to compensation on a basis of private ownership, and not as mere licensees.

Ghaswala v. The Secretary of State for India in Council.

The title of the appellants began with a document dated the 27th August 1864 whereby one I. C. V. Beyts, a Purser in the Indian Navy, certified that for the consideration therein mentioned he "handed over to Dorabjee Pestonjee, Esq., all claim " he had to the house, outhouses, and premises generally, marked " 23, Staff Lines, Poona, Cantonment." This document is endorsed as " sanctioned" by the Brigadier-General Commanding. Its wording appears on the whole to be more consistent with the contention of the Government that the interest of the tenant was that of a licensee of the land with a right to the buildings than with the private ownership in fee alleged by the appellants. The appellants, however, assert that the predecessors in title of Beyts were in fact owners of the land at the time the cantonment was established, and that nothing had since happened to vest the title in the Government. In support of this they produce a map of the cantonment dated the 8th February 1828, though possibly made in 1826, in which they show a house standing on the premises they identify with No. 9, Arsenal Road. They can say nothing as to the tenure on which that land was then held nor by whom it had been granted, and can only ask the court to infer that the plot was one of the private properties which they say existed there before the cantonment was formed. But if that inference be not sustainable, then they contend that they are in actual possession of the land, that the onus is on the respondent of rebutting the presumption of ownership in fee attaching to the possession of land whether in a cantonment or elsewhere.

The Poona Cantonment dates from the year 1817, and was formed after the defeat of the Peishwa at the Battle of Kirkee. In exercise of the right of conquest the military authorities at that time marked off a considerable area of land, about 5 square miles (which was cultivated or capable of cultivation only to a very slight extent) for the occupation and convenience of the troops. They soon set about to frame regulations for the appropriation and control of this area. Up to 1834 the Presidency of Bombay was governed by regulations made by the Governor in Council and the first regulations affecting this cantonment appear to be those issued in 1819. By Bombay Regulation I of 1819, S. 4, it is provided that the limits of the cantonments

at which any corps or considerable detachment may be quartered shall be fixed by the Commanding Officer in concert with the Zillah Magistrate or Criminal Judge and directing those authorities to report thereon to the Governor in Council. On the 14th September 1820 the Governor in Council directs the Commander-in-Chief to issue instructions carrying into immediate effect the provisions of Regulation I of 1819.

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The precise delimitation of the Poona Cantonment was accordingly then commenced and the correspondence during the years immediately ensuing (particularly a letter dated the 24th September 1822 from the Collector to the Commissioner) shows that the military authorities were making arrangements and agreements with the owners of the lands belonging to Poona such as would indemnify them for the loss they sustained by being deprived of their rights of occupancy. On the 4th May 1823 the Commissioner, Mr. Chaplin, writes to the Collector to inform him that the whole of the land which had been sketched out as necessary for the cantonment by the military authorities must be given up, and asking for a report on any arrangements that might in consequence be requisite for indemnifying the present holders of the land. It seems reasonably clear therefore that from the first the military authorities were conscious, as they would scarcely help being, of the inconvenience and risk of having absolute owners of land within the cantonment, and of the necessity for propitiating them by proper settlements and compensation. Even if the appellant established that his house was built at or before the time the cantonment was formed, there is still, under the circumstances of the case, a strong probability that he was duly compensated along with other proprietors for the change in his position as owner to that of licensee. This probability is rendered stronger as the history of the Cantonment proceeds.

Bombay Regulation 3 of 1826, S, 21, provides that the limits of cantonments shall be subject to the approval therein mentioned and adds "in which limits private property is not to be included." Bombay Regulation 22 of 1827, S. 20, is to the same effect.

On the 20th September 1827 a Government proclamation was issued for the information of the Poona district notifying that the

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cantonment boundaries were fixed, prohibiting cultivation within that area, and warning all persons that the produce of such cultivation would be subject to appropriation without compensation.

It is unnecessary to go in detail through the numerous succeeding regulations which show how strictly the military authorities asserted their proprietary rights. They are summarised in Aitchison's Cantonment Code of 1836, and in Jameson's Cantonment Code of 1850, and they make it clear that, though permission to occupy ground was frequently given, especially for the building of officers' houses or bungalows, such permission carried with it no sort of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities. The permission of the Commanding Officer was necessary even for the sale or letting of this house thus built.

In this state of things it is impossible to say that mere possession or occupation of the bungalow on this site affords any presumption whatever that the appellants or their predecessors in title were owners in fee. The presumption is all the other way, and that adverse presumption is strengthened when the history of the site comes to be examined. It has been traced to the year 1843, when it was occupied by an army surgeon. It afterwards came into the hands of a contractor, Nundram Sudarji, and in 1860 he is found petitioning the Commander-in-Chief against a proposal by the military authorities to remove his bungalow along with others for various reasons, which illustrated the limited and precarious character of his tenure. Again, in 1882, Adarji Dorabji applied for permission to build a fowl shed on the site, and duly obtained the sanction of the Commander-in-Chief. These circumstances tend to show that the appellant's predecessors in title did not regard the property as differing in its tenure and terms from other property in the cantonment.

Their Lordships are of opinion that the appellants are mere licensees, and that the land in question has been lawfully resumed by the Government, and they will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant.—*Messrs. T. L. Wilson & Co.*

Solicitors for respondent.—*The Solicitors to the India Office.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Present:—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Maung Kyin and another .. Appellant*

v.

Ma Shwe & others .. Respondents.

Evidence Act, S. 92—Scope of—Proof of fraud not excluded.

S. 92 does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. It certainly does not preclude evidence of a change of name on the part of a party in relation to matters antecedent to the deed.

Maung Kyin *v.* Ma Shwe.

Appeal from a decree of the Chief Court of Lower Burma in its civil appellate jurisdiction, dated the 21st December 1908, affirming the decree of the said Chief Court (original civil jurisdiction) dated the 21st May 1907.

The judgment of their Lordships was delivered by

Lord Robson.—The appellants are defendants in this action which was brought by the respondents in the Chief Court of Lower Burma on its original civil side. Judgment was there given in favour of the respondents and was affirmed on appeal to the court on its appellate side.

The action was brought to recover possession of certain parcels of land which may be conveniently referred to as the first, second, third, and fourth hereditaments. The respondents claimed under certain deeds which purported to be absolute conveyances, but which the appellants contended were meant to be, and had always in fact been, treated by all the parties concerned as mortgages only, and they tendered evidence of the acts and conduct of the parties to that effect. This evidence was excluded by the courts below under S. 92 of the Indian Evidence Act, 1872, and the principal question arising on this appeal is whether or not that evidence was properly rejected.

The respondents also claimed that the appellants were bound under the covenants for title contained in the conveyance

* February 17, 22 and 24 and July 11, 1911.

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they had executed in favour of the respondents, to discharge a mortgage existing on the premises at the time of the conveyance.

On the 21st May 1895 Ko Shwe Myaing owned all the properties in question and he mortgaged the first hereditament (with certain other properties not in dispute) to one Morison for 12,000 rupees. On the 30th November 1901 he executed, what purported to be, an absolute conveyance of the first and second hereditaments to the appellants for the sum of Rs. 8,500, saying nothing in the conveyance about the mortgage to Morison. The appellants allege that this document, though in form a conveyance, was in truth a mortgage, and that possession of the property was retained by Ko Shwe Myaing who paid various sums by way of interest on the alleged purchase money, and in part repayment of the principal sum showing, as they contend, that it was merely a loan.

Early in 1902 the third and fourth hereditaments were sold under an order of the court in an action by one Miller against Ko Shwe Myaing. They were purchased by the appellants for Rs. 11,565, and a certificate of the sale was accordingly given by court to the appellants. With regard to this transaction the appellants contend that it also was in substance a mortgage and Ko Shwe Myaing remained in possession until the 20th November 1905 when he executed a deed purporting to transfer the equity of redemption in all the said properties to the appellants absolutely.

On the 4th March 1903, by two instruments of conveyance of that date, the appellants purported to convey the before-mentioned four sets of hereditaments to U Shwe Pe and his wife Ma Shwe La. The consideration money for the first and second hereditaments was stated as being 5,000 rupees, and for the third and fourth hereditaments as 11,000 rupees. The appellants allege that U Shwe Pand Ma Shwe La knew that they, the appellants, were mortgagees merely, and that the supposed purchase monies for the properties were simply the amounts of the mortgage debts outstanding, they having been to some extent reduced by repayments of principal, so that the deeds in question were in truth mere transfers of mortgages, and not absolue conveyances. The deeds of the 4th March 1903 were not followed by possession on the part of the respondents, except as to the

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fourth hereditament, possession of which was, according to the appellants, taken by the respondents on the terms that they, the respondents, should account for the rents and profits against interest at a reduced rate in respect of the mortgage debts.

In the month of December 1903 the said U Shwe Pe, as the holder of a decree against Ko Shwe Myaing took proceedings to attach the first hereditament and in order to preserve them from execution, the appellant Maung Kyin at the request of Ko Shwe Myaing paid U Shwe Pe the amount of his execution debt. Of course a transaction of this kind, if proved, was clearly inconsistent with respondents' contention that U Showe Pe had become the owner of these premises by the deed of the 4th March 1903, and would go to establish the contention of the appellants that that deed was only a transfer of a mortgage.

On the 29th May 1905 Morison's mortgage was transferred to trustees on behalf of the appellants, and was expressly kept alive by the terms of the said indenture of the 20th November 1905, under which Ko Shwe Myaing purported to convey the equity of redemption to the appellants absolutely. The appellants entered into possession of the first, second, and third hereditaments under the conveyance of 1905, and the respondents brought this action against them on the 20th December 1905 to have it declared that they, the respondents, were absolute owners of the hereditaments in question. U Shwe Pe had, in the meantime, died, and the action was maintained by his widow and legal representatives.

The appellants at the trial sought to prove—(1) that the value of the hereditaments far exceeded the amount of the sums specified as the consideration moneys in the conveyances; (2) that interest was paid on those moneys and they were in part repaid, thus showing that they were loans only; (3) that U Shwe Pe and Ma Shwe La were well aware of this, and knew (as shown by negotiations between themselves and Ko Shwe Myaing as well as the appellants) that the documents of the 30th November 1901 and 13th February 1902, under which the appellants claimed and the benefit of which they transferred to U Shewe Pe and Ma Shwe La, were mortgages only; (4) that possession of the hereditaments remained with the alleged vendors; and (5) that after the alleged sale to U Shwe Pe and Ma Shwe La,

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of the 4th March 1903, U Shwe Pe himself treated the property as belonging to the alleged mortgagor, Ko Shwe Myaing, and attached a portion of it in execution of a decree against him or his wife.

The evidence which the appellants thus proposed to tender was described in general terms and their Lordships have not the advantage of dealing with it in the form of questions specifically put and argued. So far, however, as it is still pressed, it, no doubt, consisted only of evidence relating to the acts and conduct of the parties as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them. Its object was to show that, whatever the terms of the documents may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions, they had always treated the business between them as one of loan secured by mortgage.

This may give rise to important and difficult questions under S. 92 of the Indian Evidence Act, which provides that when the terms of any contract required by law to be reduced to the form of a document (and sales or mortgages of land are, by Ss. 54 and 58 of the Transfer of Property Act, 1882, included among such contracts), "no evidence of any oral agreement or statement shall " be admitted as between the parties to any such instrument or " their representatives in interest, for the purpose of contradicting " varying, adding to, or subtracting from, its terms."

The case has been argued before their Lordships as though the questions in dispute turned entirely on the construction of this section as applied to the deeds of the 4th March 1903 under which the respondents claim. Their Lordships, however, are of opinion that the case for the appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it is said that the respondents, or the persons under whom they claim, took absolute conveyances of property from the appellants with notice that they in fact belonged to a third person, namely, the alleged mortgagor, Ko Shwe Myaing. If this be so, S. 92 of the Indian Evidence Act, even if construed according to the respondents' contention, will

not avail them. It is applicable to an instrument "as between the parties to any such instrument or their representatives in interest," but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. The evidence of Ko Shwe Maung is of course material and necessary on this point, and their Lordships, after giving to this case very careful consideration, and without at present expressing any opinion on the construction or application of S. 92 of the Evidence Act in relation to the deeds of the 4th March 1903, think that the rejected evidence should be heard, subject to any objections the respondents may be advised to take. The court will then be in a position to deal hereafter (if it should become necessary) with the admissibility of the evidence in relation not only to the deeds of the 4th March 1903, but also in relation to the questions that may arise in connection with the alleged knowledge or conduct of the parties antecedent to the execution of those deeds and upon which their validity may possibly depend.

The claim of the respondents to have the mortgage existing on the premises at the time of the conveyance, discharged by the appellants will be dealt with, if necessary, after the case has been re-heard.

Their Lordships will therefore humbly advise His Majesty that this action be referred to the Chief Court of Lower Burma for a new trial. The respondents must pay the costs of this appeal. The other costs will abide the result of the new trial and will be dealt with by the Chief Court.

A. H. Arnold and Son—Solicitors for appellants.

Bramall and White—Solicitors for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Present :—Lord Macnaghten, Lord Atkinson, Lord Robson and Mr. Ameer Ali.

Bombay Burmah Trading Corporation, Ld. .. Appellants*

v.

Aga Mahomed Khaleel Shirazee .. Respondent.

Bombay Burmah Trading Corporation, Ld. *v.* Aga Mahomed.

Contract—Construction—Goods, supply of—"Passing of goods"—Warranty of quality implied from knowledge of purpose—" Passing of goods " by employee of seller—Essentials of passing of.

Where the persons who enter into a contract for supply of goods to be used for a particular purpose (*e.g.*, sleepers for Railways) are informed of the purpose for which the goods are wanted, they must be taken to have impliedly warranted that the goods supplied were reasonably fit for that purpose.

The appellant entered into a contract with the respondent's assignor for the supply of sleepers for the Railway and the contract contained the following clause. "The passing of our (the suppliers') Moulmein and Rangoon friends, the Bombay, Burmah Trading Corporation, Limited, is as usual final as regards both measurement and quality."

Held that it did not mean that the contractors can supply anything they chose but that the supply should be according to the standard set up expressly or impliedly under the contract or at the least the requirement that the sleepers were reasonably fit as sleepers of dimensions described for use by the Railway Company : that the right conferred by the clause on the suppliers amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment whether, the goods supplied were in conformity with the requirements of the contract under which they were so supplied. The point is not whether the men employed " to pass " acted honestly according to the best of their skill and judgment, but whether they ever approached the question they had to determine, namely, the conformity of the goods supplied with the contract under which they were supplied ; and if they never applied their minds to that but merely determined that the sleepers were fit to be sent on as the manufactures of their employers, there cannot be any " passing" of the sleepers within the meaning of the Contract Act.

Appeal from a judgment and decree of the High Court of Judicature at Madras, in its appellate jurisdiction dated the 21st December, 1908, whereby the judgment and decree of the

* 11 July, 1911.

Bombay Burmah Trading Corporation, Ld. *v.* Aga Mahomed.

Sir Charles Arnold White, Chief Justice, in the ordinary civil jurisdiction of the said court was reversed, and judgment given in favour of the respondent for Rs. 11,913-4-6 damages and costs.

Martelli, K. C., and *D. C. Leck* for appellants.

De Gruyther, K. C., and *K. Brown* for respondent.

Their Lordships' judgment was delivered by

Lord Atkinson :—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated the 21st December 1908, made in the exercise of its appellate jurisdiction, whereby the judgment and decree of the Chief Justice of the same court made in the exercise of its ordinary, jurisdiction were reversed, and judgment entered for the respondent, the plaintiff, in the suit, for the sum of Rs. 11,913-4-6 damages for the breach of contract for the sale and deliveryto the plaintiff of 1,500 teakwood railway sleepers.

The facts of the case are not complicated, and as far as it is necessary to set them out are as follows :—

A person named M. Chinnappa Iyer, of 209, Thambu Chetty Street, Madras. in the month of May 1905, entered into a contract with the Madras Railway Company for the sale to them of 1,500 teakwood sleepers of the dimensions 12′ by 12″ by 7″, deliverable in two instalments of 750 each.

The Company had advertised for tenders for 3,000 teak sleepers on a specification which set forth that the sleepers should be of the dimensions above mentioned, and should be of the following description :—

" Each teak sleeper to be delivered at the Terminal "Buildings Yard at Rayapuram, must be straight, sound, and "well seasoned, sawn uniformly square and to correct dimensions "throughout its length, and be free from holes, shakes, cracks, sap, "and other imperfections. The sleepers so delivered at Rayapuram "will be inspected by an engineer deputed by the Chief Engi-'neer, whose decision as to those to be accepted or rejected "will be final. The sleepers which may be condemned as not complying with this specification will not be paid for, and they

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"must be removed from our yard at your own cost within seven "days of your receiving notice to do so."

The price to be paid was apparently Rs. 210 per ton.

The appellants are large timber merchants, part of whose business it is to manufacture and supply teak sleepers. Their duly accredited agents at Madras are Messrs. Arbuthnot & Co., one of the members of which firm is Mr. F. S. Arbuthnot. Iyer, before tendering to the Railway Company for this contract, entered into negotiations with F. S. Arbuthnot in reference to the terms upon which they would supply him with sleepers to enable him to carry out any contract which he might make with the Railway Company for the supply of any portion of the sleepers required. This cannot be disputed. It is practically admitted; and, from the following letter, signed by F. S. Arbuthnot and addressed to the appellants' Manager at Rangoon, coupled with the evidence which he gave at the trial hereafter referred to, it would rather look, as if he regarded the appellants as the real contractors and Iyer and a firm of King & Co. merely as intermediaries. The letter is Exhibit D, and runs as follows:—

"Madras,

"22nd May 1905.

"Dear Sir,

"*Sleepers*—With reference to your telegram of 20th April "for 3000 sleepers 12 ft. by 12 ins. by 7 ins. at Rs. 170 landed "Madras, we have just heard unofficially that we have secured the "business—1,500 through King and 1,500 through another dealer. "This sale will be advised definitely next week when we receive "written confirmation from the buyers."

Ultimately Iyer entered into a contract with the appellants through Arbuthnot & Co. for the sale to him of 1,500 sleepers 12 by 12 by 7 at the rate of Rs. 170 per ton (Rs 40 per ton less than the price to be paid by the Railway Company) landed at Madras to be shipped from Moulmein or Rangoon at appellants' option. The contract is contained in the letters which passed between the parties. It never was embodied in a formal instrument. Much controversy arose as to whether Iyer, had during his

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negotiations with Arbuthnot & Co., ever given to F. S. Arbuthnot, who appears to have been the member of the firm in charge of this transaction, a copy of the specification of the Company on which he had tendered, thus making it the basis of his contract with them. The Chief Justice, the trial judge, was of opinion that the respondent had failed to establish that Iyer had done this. The court of appeal thought the contrary. A copy of the specification in the form of a letter (marked Exhibit *A*) signed by the Chief Engineer of the Company and addressed to Messrs. Arbuthnot & Co., was, on search, subsequently found amongst the papers of Mr. F. S. Arbuthnot. This gentleman stated on his examination (page 118, Record) that he knew nothing about this letter till after the suit was instituted. He admits it bears his signature, as well as those of Mr. Young and M. Arbuthnot (members of the firm) and also of a Mr. Peebles. All letters, he states, came to him in the ordinary course of business, and this letter after having been initialled was sent down to be placed among the records of the office. He adds— "My firm did not tender. King & Co. did not tender. They "procured the 1,500 through my firm. I knew they (the "sleepers) were required for the Madras Railway. I think it is "probable I was told they were for the purpose of the contract "for 3,000 with the Madras Railway. I expect I added 1,500 and "1,500 together." Lower down on the same page he states that the firm considered they had the control of the Madras Railway contract, that they had power to select the person who was to have the order, that Chinnappa Iyer, unlike King & Co. (who would not take sleepers from Moulmein), had not been doing business with them regularly, and that they had only selected him because they had been asked by one Dubash of the Import Department to give him a chance. Their Lordships think it unnecessary to decide this point as to the alleged delivery of the copy specification to F.S. Arbuthnot by Iyer for these reasons:— First, because they concur in the opinion expressed by the court of appeal at page 156, line 29, of the Record, that "the evidence "shows that Exhibit *A* (the copy specification) merely con-"tains an enumeration of the qualities of a good sleeper usually "insisted on by railway authorities," and secondly because the appellants, having through their agents been fully informed of

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the purpose for which Iyer purchased these sleepers from them, must be taken to have impliedly warranted that they were reasonably fit for that purpose, aad thirdly, because they think that a sleeper whose qualities are inferior to those "of a good sleeper, as usually insisted upon by railway authorities," cannot well be considered to be a sleeper of the dimensions specified reasonably fit for use by the Madras Railway Company. The point therefore becomes, in their Lordships' view, irrelevant. One of the letters forming the written contract with Iyer, namely that dated the 23rd May 1905, written by Arbuthnot and addressed to Iyer contains the following paragraph:—

"The passing of our Moulmein or Rangoon friends, the "Bombay-Burma Trading Corporation, Limited, is as usual final "as regards both measurement and quality, which please take "note."

In their Lordships' view the defence of the appellants to the claim made against them will ultimately be found to rest upon this paragraph, the rights it confers, and the manner in which those rights have been exercised. The first question is as to its true construction. What does it mean ? It cannot mean that the appellants were entitled to deliver under the contract any kind of sleeper they chose. It must have contemplated that there was some standard with which these sleepers should be compared. That standard must at the lowest have been the standard set up, expressly or impliedly, by the contract between the parties ; that was the specification, or at the least the requirement that the sleepers were reasonably fit, as sleepers of the dimensions described, for use by the Madras Railway Company. So that the right conferred upon the appellants amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment, whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied.

So much as to the contract entered into between the appellants and Chinnappa Iyer. Some short time after that event, and before any sleepers had been delivered, Iyer, finding himself

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unable to pay the deposit stipulated for in his contract, with the consent of the appellants, and of the Railway Company, transfered to the respondent the benefit of his contracts with both companies and procured the latter to be accepted in both in his stead.

A formal agreement was drawn up between the respondent and the Railway Company, and was duly executed by both. It is dated the 19th of June 1905, and the description of the sleepers to be supplied contained in it differs from that contained in Exhibit *A* in this, that the words "from teakwood" are inserted in the agreement after the word "sawn." In other respects the descriptions were identical.

There was much controversy on the point as to whether, whatever the precise contract between the appellant and Iyer may have been, new terms were not, on the occasion of this transfer, added to it, and the stipulation made then, if not before, that the sleepers supplied should conform to the specification of the Railway Company.

The question turns upon the two letters following dated respectively the 16th and 21st June 1905, and three paragraphs from a letter of Arbuthnot & Co. dated 23rd of the same month, coupled with the evidence of F. S. Arbuthnot on the point at page 191, line 12, of the Record. The letters are as follows :—

"Madras, 16th June 1905.

"Mr. Aga Mahomed Khaleel Shirazi,

"36-37, Ungappa Naick Street,

"Madras.

"Dear Sir,

"We are in receipt of your letter of to-day's date enclosing "original letter from M. Chinnappa Iyer from which we note "that he has transferred to you his contract with the Madras "Railway for 1,500 sleepers 12' × 12" × 7", for which he has con- "tracted with us at Rs. 170 per ton, landed Madras. To this "we agree, on condition that you send us by return your cheque "for the deposit due, Rs. 8,925, all other terms and conditions "as mentioned in our various letters to M. Chinnappa Iyer.

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" You ask us to allow interest on the deposit, but this is only " granted to our two very large contractors, and on account of " the troubles which M. Chinnappa Iyer has given us over this " contract we are not disposed to make an exception in his " favour. As, however, the contract is now transferred to you, " as a special case we agree to allow you interest on the deposit " at the rate of 5 % per annum, *but on the condition only* that each " shipment of sleepers arriving for you is paid for in full im- " mediately on arrival.

" Yours faithfully,

" *Per pro.* Arbuthnot & Co.

" (Signed) F. S. Arbuthnot,

" Agents, B. B. T. C. (Ltd.)

" 36-37, Ungappa Naick Street,

" Madras, 21st June 1905.

" To.

" Messrs. Arbuthnot & Co.,

" Agents, B. B. T. C., Limited,

" Madras.

" Dear Sirs,

" In your letter of the 16th instant you said that the terms " and conditions are as mentioned in your letters with Mr. M. " Chinnappa Iyer. On my enquiry he said that the conditions " are this, *i.e.*, the teak sleepers of 750, 12′ × 12″ × 7″ should be " delivered in the month of October, and the remainder of 750 " in March next. The same should be taken delivery within a " month, if it exceeds a month, an interest of 9 % should be charg- " ed. The teak sleepers must be delivered as per Railway " specification which was sent to you by Mr. M. Chinnappa " Iyer, an interest of 5 % must be allowed on deposit money. On " these conditions I herein enclose you a cheque on Chartered " Bank of India, Australia, and China for Rs. 8,925 (eight

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"thousand nine hundred and twenty-five). An early reply with " the receipt is solicited.

" I am, Dear Sirs,

" Yours faithfully,

(Signed)—Mahomed Khaleel Shirazi.

" Madras, 23rd June 1905.

" Mr. Aga Mahomed Khaleel Shirazi,

" 36–37, Ungappa Naick Street.

" Madras.

" Dear Sir,

" We are in receipt of your letter d/ 21st instant enclosing a " cheque on the Chartered Bank of India, Australia, and China for " Rs. 8,925, which has been placed to the credit of your account " as a deposit against the order of M. Chinnappa Iyer (now " transferred to you) for 1,500 sleepers 12′×12″×7″ at Rs. 170 " per ton landed Madras.

" As regards the terms of delivery M. Chinnappa Iyer is " under a misapprehension. We have never undertaken to " deliver 750 sleepers in September and 750 in March next, nor " could we under any circumstance bind ourselves to deliver the " sleepers precisely in the months specified by you. We have, " however, informed our friends of the delivery which would " suit you best.

" As regards other terms, the passing of our friends the " Bombay-Burmah Trading Corporation, Limited, either at " Rangoon or Moulmein (whichever port shipment may be " made from) is as usual final as regards both measurement and " quality. No exception is ever made to this rule."

Mr. Arbuthnot's evidence is in substance to the effect that he considered the third paragraph of this letter of the 23rd of June a contradiction of the statement contained in the letter to which it was a reply as to the obligation to deliver sleepers according to the railway specification, but not as a contradiction of Iyer's allegation that the specification had been sent to him. The evidence of this gentleman on this point cannot be regarded as satisfactory; but having regard to the view which their Lordships have

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taken as to the true nature of the implied warranty to be imported into the written contract, the point so much discussed is, they think, as alreay stated, irrelevant. There is not and cannot be any pretence for the suggestion that the sleepers supplied were in fact either in conformity with the specification, or were reasonably fit to be used as sleepers of the dimensions specified by the Madras Railway Company.

Of the 748 sleepers delivered by the appellant on the 8th of September no less than 593 were rejected by that Company, and of the 600 delivered on the 9th of December 1905 no less than 513 were rejected, and as to the balance of the 1,500 the contract was rescinded by mutual consent.

The real defence, therefore, of the appellants is rested upon the alleged fact that the sleepers delivered were passed by the two expert persons they employed for the purpose in the impartial and honest exercise of their judgment.

On examining the evidence of these witnesses, James McGeorge and William Pyne, however, it clearly appears that they did not correctly appreciate the position in which they had been placed, or the true nature of the task they were appointed to perform. They were in truth constituted judges or arbitrators to decide upon a matter in which the interests of the two contracting parties were in conflict. They were the employees of one of these parties. That would render their task all the more delicate and difficult, and would make it all the more incumbent upon them to take care to avoid even the appearance of injustice to the respondent. Well, in the first place Mr. McGeorge had scarcely had skill and experience sufficient for the work he was put to do. And in addition neither he nor his colleague was ever supplied with the materials necessary to enable him to do it. He never saw the Specification "A." He said he did not think he ever saw a "Railway Contract for Sleepers." Pyne, the other witness, who was both skilled and experienced, was left in the same state of ignorance as to the contract. He never saw the specification, nor does he appear to have ever been informed what were the terms of the respondent's contract with the appellants. At the bottom of page 130 he says, "Masters informed me as to "dimensions and time for delivery. We had logs in stock. I had

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"simply to go round and make suitable logs." At foot of page 131 he is reported as having said: "I applied the same process of "examining them as I did to them in ordinary course of business." And in reply to questions put to him by the Chief Justice he further deposed: "When I approached inspection I did so from "the point of view of passing goods in the ordinary routine of "business as fit to be sent out." The Chief Justice finds that these men acted honestly according to the best of their skill and judgment. That may be so, but that is not the point. The point is that they never approached the question they had to determine, namely, the conformity of the goods supplied with the contract under which they were supplied. They never applied their minds to this. They merely determined that the sleepers were fit to be sent out as the manufacture of their employers. There was not, therefore, any "passing" of the sleepers within the meaning of the contract, and the contention of the appellants on this appeal that there was such a "passing," in their Lordships' view, entirely fails.

They accordingly think that the decision appealed from was right and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of the appeal.

Budd, Johnson and Jecks—Solicitors for appellants.

Douglas Grant—Attorney for respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE, BENGAL.]

Present :—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Purna Sashi Bhattacharji and others .. Appellants*

v.

Kalihan ai Chowdhuri and others .. Respondents.

Hindu Law—Succession—Deed altering mode of succession—Test.

Two brothers, Hindus, subject to the Dayabhagha law, executed a document by which they purported to provide for the permanent devolution

* 4th May 1911.

Purna Sashi Bhattacharji *v.* Kalihan Rai Chowddhuri.

of their respective properties in the direct male line including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule; and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs or their descendants. *Held*, on a construction of the document, that it could not be construed to be a gift to the son of the executant defeasible in the event of his death without male issue; that the sole intention of the executants was to alter the rule of succession in their family which they had power to do and that the instrument was consequently void.] *Tagore* v. *Tagore* [1] followed.]

The question in all these cases is not whether the gift over was given in the event which happened afterwards but whether it was good in its creation.

Appeal from a decree of the High Court at Calcutta, dated the 14th of March 1906, which reversed a decree of the Subordinate Judge of Tipperah, in Bengal, dated the 16th April 1903.

DeGruyther K.C. and *Ross* for appellants.

Burkmaster K.C. and *Parikh* for respondent.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali.—This is an appeal from a judgment of the High Court of Bengal, dated the 14th of March 1906, reversing a decision of the Subordinate Judge of Tipperah; and the only point for determination turns upon the construction of a document executed in 1868 by two brothers, Krishna Kishore Chowdhuri and Naba Kishore Chowdhuri, subject to the Dayabhaga School of the Hindu Law, by which they purported to provide for the permanent devolution of their respective properties in the direct male line, including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule; and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs or their descendants.

Krishna Kishore died in June 1868, leaving him surviving, besides a son named Ananda Kishore and a daughter Durga Sundari, his brother Naba Kishore and their mother Kalitara. Ananda died in 1872 without any issue and Kalitara in March 1901.

The plaintiffs, who are the sons of Durga Sundari, instituted this suit on the 29th of July 1901 against Naba Kishore, claiming

1. L. R. I. A. Sup; Vol. 47.

as next reversioners to Ananda, their maternal uncle, the properties which originally belonged to Krishna Kishore and after him to Ananda, and which had since come into the possession of the defendant (Naba Kishore.)

Naba died shortly after the institution of the suit, and his sons, the present respondents, were then brought on the record in his place as his legal heirs and representatives.

The plaintiff's case is that, notwithstanding the rules laid down by the two brothers in the instrument of 1866, which they contend to be invalid under the Hindu Law, on the death of Ananda Kishore, the properties descended to his grandmother Kalitara, who held them as a life tenant until her death, and that on her decease Ananda Kishore's estate devolved on them as his next reversioners,

The defendants' contention is that under the instrument of 1866, on the death of Ananda Kishore, the properties forming the subject-matter of the present litigation passed to Naba, and on his death to the respondents in this appeal.

It appears that in 1862 one Tripura Sundari, the widow of Ishwar Chandra, paternal uncle of Krishna and Naba, conveyed to them jointly her interest in the properties belonging to her deceased husband ; the plaintiffs claim to recover in this suit the share of Krishna in these properties also. Tripura, who was joined as defendant to the action, died after the trial in the first court.

With regard to the main issue in the case, *viz.*, the construction of the instrument of 1866, the Subordinate Judge held in substance that the provisions therein contained, regulating the perpetual descent of the properties of the two brothers in the lineal male line were in contravention of the rules of Hindu Law and were consequently invalid ; and that the plaintiffs were entitled to recover the properties in suit, save certain items regarding which there is no question in this appeal. He accordingly made a decree in favour of the plaintiffs, but disallowed their claim for account against the respondents.

The High Court on appeal, came to a different conclusion. It considered that, under the circumstances that had actually happened, Ananda Kishore had obtained under the instrument in

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question an absolute estate defeasible in case of death without male issue.

The real gist of the judgment is contained in the following passages :—

" Turning then to the questions what might be the exact estate which Ananda Kishore obtained upon the death of Krishna Kishore and to whom the estate devolving upon him would go upon his death without any male issue, it seems to us that if we could confine our attention simply to paragraphs (1) and (3) of the Will we should have to hold that Ananda Kishore obtained an absolute estate of inheritance, and that even if he died without male issue, as he did in this case, his legal heirs, whether male or female. would succeed. But reading those paragarphs with paragraphs (2), (4) and (8) as they must be so read in order to ascertain what the true intention of the testators was, we think that though he obtained an absolute estate, yet such estate was defeasible in case of his death without male issue, with a provision in that event for his widow and daughter.

And again :—

" It may no doubt be said that there was no gift in this case by Krishna Kishore and Naba Kishore in favour of any of their descendants, and that the document merely declares their rights in future and that such rights must therefore be regulated by the ordinary Hindu Law. But it will be observed that so far as Krishna Kishore was concerned, his son Ananda Kishore was then born and it may be taken that he had before his mind that individual at least; and hence the bequest should be taken to be in favour of Ananda Kishore and such other sons as might be born to him thereafter and their male descendants. We are concerned in this case with Ananda Kishore alone and the estate left by him ; and so far as he was concerned, as alreedy indicated, it may be taken that there was a valid gift in his favour subject to the limitation prescribed."

Their Lordships regret they cannot concur in the view expressed by the learned Judges of the High Court as to the meaning and intent of the parties executing the instrument. It is called a Will, but the preamble states the object for which it is executed.

" Whereas," it says, " body is mortal, it is impossible to say what may befall at what time, and as ruin may ensue from disputes relating to the shares arising in future amongst son, daughter, daughter's son, and childless widow, unless some rules are regularly framed, and it has accordingly become necessary to prescribe a set of rules in that behalf, and hence the rules mentioned below are laid down ; these shall become operative and come into force on our death."

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This preamble may rightly be regarded as the key to the policy of the document, and so far as it goes there does not appear to be any intention on the part of the executants to make any gift. The whole purpose in view was to keep the property in the lineal male line, and with that object rules were framed to prevent its devolution to female heirs and male heirs connected through them.

The first paragraph declares that the executants, their sons, grandsons, and "other heirs" shall take the properties "in the manner stated below," that is, subject to the restrictions imposed in the document "in equal shares," and that none will have the power of making the shares unequal.

Paragraph 2 is in these terms :—

"If one of us two, or his son be living and the other or his son be not living, then the said surviving person or his son shall get all the moveable and immoveable properties left by the deceased, with rights of ownership. A sonless widow or daughter or daughter's son shall have no sort of right or title to and any concern whatever with that property, but shall only get during their life-time, food and clothing, &c., as is provided in the 5th paragraph."

Paragraph 3 declares that the sons and grandsons of the executants shall have full power to deal with the properties "left by them in any way they wish in their rights as full owners."

Paragraph 4 provides that only on failure of male progeny in the direct male line of either of the executants, widows, or daughters, or daughters' sons are to get shares "according to the *Shastras*."

Paragraphs 5 and 7 make provisions for the maintenance of widows and daughters.

Paragraph 6, which relates to the guardianship of any minor son left by either of the executants, is immaterial.

Paragraph 8 defines the word *putra*, used in the document, that—

"It shall mean son, son's son, son's son's son, and adopted son and his son, &c., being male issues, and the words written in this Will are to be taken in their plain sense, and not in any distorted far-fetched sense."

And they declare finally that—

"The rules that we two uterine brothers prescribe by this Will as between ourselves shall continue to prevail, and be operative down to our sons, grandsons, &c., successively."

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Throughout the instrument there is no indication of an intention to make a gift to any person; whilst paragraph 4 clearly shows that the "sons and grandsons" who took the properties left by the executants acquired them as "full owners." There was no restriction on their powers to deal with such properties in "any way they wished." But, although they acquired the estate as absolute owners, it was not to descend in the legal channel according to the prescriptions of the Hindu Law, but in accordance with the rules framed by the executants with the avowed object stated in the preamble. It was only on the indefinite failure of male issue in both branches that the female heirs or their descendants were to receive the shares prescribed for them in the *Shastras*.

This is the general policy of the instrument. It was clearly intended to vary the rule of Hindu law, and to control the devolution of the properties until the indefinite failure at some remote period of the male line of both brothers. That such an attempt to alter the mode of succession prescribed by law is illegal is enunciated in the clearest terms in the judgment of this Board in the *Tagore Case*[1]. As their Lordships there observe:—

"Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom, recognised) by the State not merely for the benefit of individuals, but for reasons of public policy.

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable "otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance takes place as the law directs. This was well expressed by Lord Justice Turner in *Soorjeemony Dossee* v. *Denobundoo Mullick* [2]: "A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy.' "

The learned Judges of the High Court had present in their minds the difficulty of reconciling the acquisition by each individual male descendant of full rights of ownership in the property that descended to him with the restraint imposed on its devolution. And, therefore, to give effect so far as possible to the intention of the executants they considered that the absolute estate Ananda acquired "was defeasible in the event of his death without male issue." If the attempt to interfere with the course

1. (1872) L.R. I. A., Sup. Vol. 47.
2. (1857) 6 M. I. A. 555.

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of descent according to law is to be regarded as a condition of defeasance, it was applicable not merely to the case of Ananda, but to the case of every male descendant who happened to leave no male issue; and its application might have been postponed for an indefinite period. Their Lordships are not aware of any authority to warrant such a provision. Nor is there any need for the contention that under the instrument in question there was a devise in favour of Ananda, with a gift over to Naba Kishore, the uncle. As the Subordinate Judge very properly observes in his judgment "the question is not whether the gift over was good in the event which happened afterwards but whether it was good in its creation."

It is clear from the document that if there was any idea at all in the mind of Krishna Kishore of a gift over in favour of Naba or his male descendants, it was dependent on the contingency of the indefinite failure of male issue in his own line. At the time the document was executed there is no reason to suppose that he contemplated that his son would die without issue, or that Naba would survive him. And therefore if it were assumed that a gift over was intended, it would be wholly invalid in view of the clear rule of law laid down in the *Tagore Case*, [1].

Their Lordships, however, have no doubt that the sole intention of the executants in this document, as they expressly avowed in the preamble, was to alter the rule of succession in their family which they had no power to do.

In their Lordships' judgment the plaintiffs are entitled to a decree for properties in respect of which their claim was allowed by the first court. The High Court disagreed with the Subordinate Judge on the question of the liability of the respondents to render accounts. It held that, if the plaintiffs were entitled to a decree in the action, they would also be entitled to an account from the defendants as legal representatives of Naba Kishore, their father, for the rents and issues of Ananda Kishore's estate whilst in his hands. There can be no question that this is the right view.

Their Lordships are of opinion that the judgment and decree of the High Court should be set aside, and that of the first

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court restored, with a modification declaring the liability of the respondents as legal representative of their father, Naba Kishore, to account for the period the estate left by Ananda Kishore was in Naba Kishore's hands. There should also be a declaration that the rights of the parties which have come into existence since Tripura Sundari's death, in respect of the properties conveyed by her to Krishna Kishore and Naba Kishore in 1862, shall not be affected by the result of this case.

The respondents wil pay the costs of this appeal and of the proceedings in the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors : *T. L. Wilson & Co.* for appellants.

Solicitor : *W. W. Box* for the respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

Present:—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Hanif-un-nisa and another .. Appellants*
vs. (*Defendants*)
Faiz-un-nisa and another .. Respondents
(*Plaintiffs*).

Hanif-un-nisa v. Faiz-un-nisa.

Evidence Act, S. 92 (6)—Sale deed—Evidence that no consideration was intended to pass.

Evidence is admissible to show that consideration for a deed of sale was not intended to pass.

Appeal from a judgment and decree of the High Court of Judicature for the North-Western Provinces at Allahabad dated 17th April 1905, which reversed a judgment and decree of the Additional Subordinate Judge of Aligarh dated the 5th November 1902.

W. A. Raikes for the appellants.

L. De Gruyther K. C. (*B. Dube* with him) for respondents.

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* 14th February, 1911.

The judgment of their Lordships was delivered by

Lord Macnaghten:—Their Lordships think the decree appealed from cannot be sustained. They are of opinion that the proper course will be to remit the case to the High Court to be dealt with on the evidence, and they will humbly advise His Majesty accordingly. The costs of the further hearing will be costs in the cause. As the appellants have been successful upon the point of law, they will have their costs of the appeal incurred in England.

Hanif-un-nisa *v.* Faiz-un-nisa.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Present :—Lord Atkinson, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

G. W. Davis	..	Appellant * (*Defendant*)
v.		
Maung Shwe Go	..	Respndent (*Plaintiff*).

Contract Act, S. 16 A—Undue influence—Onerous transaction—Evidence—Appreciation—Conflicting story as to a vital issue of fact.

Davis *v.* Maung Shwe Go.

Even though the bargain was onerous their Lordships did not refuse specific performance, there being nothing to show that it was unconscionable.

In dealing with a case where parties are at issue on a vital question of fact—*e. g.*, as to the terms of an agreement—the safe principle is to consider which story fits in with the admitted circumstances.

Appeal from the appellate decree of the Chief Court of Lower Burma, dated 11th May 1909, reversing that made by its original side dated 18th February, 1908.

L. DeGruyther, K. C., and *Eddis* for appellant.

Bailhache, K. C., and *Jolly* for respondent.

The judgment of their Lordships was delivered by

Mr. Ameer Ali:—This appeal arises out of an action brought by the plaintiff-respondent in the Chief Court of Lower Burma in the exercise of its Original Civil Jurisdiction to enforce the specific performance of an agreement alleged to have been executed by the defendant-appellant on the 4th of April 1906, and in the alternative for damages.

* 14th June 1911.

Davis v. Maung Shwe Go.

The first court dismissed the suit "being unable to hold that the agreement set up had been proved." The Chief Court on appeal has arrived at a totally different conclusion; it has found that the document was signed by the defendant, and it has accordingly reversed the decision of the first court, and decreed the plaintiff's claim. The defendant has appealed to His Majesty in Council and the only question for determination relates to the genuineness of his signature on the agreement in suit.

Although the parties are at issue on this, the vital point in the case, there is otherwise singular unanimity on the general facts. In the conflict of opinion between the Courts in Burma, it seems necessary to their Lordships to examine the admitted facts and circumstances as furnishing the safest guide to correct conclusion.

When the defendant in 1901 acquired the land regarding which he is said to have executed the agreement, he was, on his own admission, in pecuniary difficulties. He had bought the land, which was mostly waste and undeveloped, with money borrowed on its mortgage. In 1905 he was undoubtedly in difficulties; one creditor appears to have taken out execution, the principal mortgagee was pressing for re-payment, and although, according to his statement, even at that time, he had received good offers for the property, they had all fallen through, as each time he had increased his price. It was in these circumstances that he applied to the plaintiff for accommodation. The arrangement entered into, as one of the learned Judges in the Chief Court observes, was onerous even for Burma. The defendant was to obtain Rs. 50,000 from the Bank of Bengal on the credit of the plaintiff; he was to draw, in conjunction with a Burmese broker Ba Pe or Hpay, who appears only to have lent his name for a small consideration, five bills for Rs. 10,000 each, payable at three months after date in favour of the plaintiff, who was to endorse them over to the Bank of Bengal, to enable the defendant to get them discounted by the Bank. For this accommodation he was to pay the plaintiff interest at the rate of 6 per cent. on the amount of the bills.

This arrangement was duly carried into effect on the 30th September 1905; the defendant drew five bills and received from the Bank Rs. 50,000, less its charge for discounting. On the

same date he executed in favour of the plaintiff, as security for the money he had received, a mortgage on the land binding himself to repay the amount in three months. Davis v. Maung Shwe Go.

The bills fell due on the 2nd of January 1906. Admittedly, the defendant was not in a position to meet them nor to pay the interest for which he had made himself liable to the plaintiff. He was still unable or unwilling to sell the land which, so far as can be judged from the record, was his only asset. Under the circumstances, there appears to have been no alternative left for him but to obtain from the plaintiff a renewal of the bills. The plaintiff assenting, the bills were accordingly renewed for another three months on the same terms as before. As the plaintiff had to meet the interest charged by the Bank on the renewed notes, the defendant executed in his favour a promissory-note (Exhibit E) for the interest due to him and the interest which he paid or for which he made himself liable to the Bank of Bengal. These bills were drawn on the 3rd of January and were due on the 6th of April following. It is abundantly clear on the evidence that before the due date arrived, the plaintiff began pressing for settlement. His own evidence is distinct on the point and is substantially corroborated by the defendant's witnesses.

Ma Mi, a Burmese lady, who is stated to be the adopted daughter of the defendant, and her friend Ma E Byu, a female broker, both say in substance that they, on several occasions, went to the plaintiff when he told them the interest on the bills was mounting up and that the defendant should be advised to pay up within the three months or let him "have the land for a lakh."

The letter of the 14th February 1906 (Exhibit F) was a request to the defendant to call at the plaintiff's office "on receipt," as he wished to see him urgently. The plaintiff states, and it is not denied, that it was with regard to payment. (Exhibit G), which bears date the 3rd of March, is a peremptory demand for payment by the 5th of March of the promissory-note (Exhibit E), in default of which legal proceedings were threatened. Although there is no definite statement as to what actually took place between the 3rd and 30th March, there can be little doubt upon the general evidence that during this interval whilst the plaintiff

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was pressing for his money the defendant was equally anxious for time.

The defendant has produced two letters, dated the 31st and 30th March, respectively (Exhibits Nos. 3 and 4). Exhibit No. 4 is addressed by him to the plaintiff and is in these terms:—

"I write to ask you if you are willing to keep the Rs.50,000 on my property the Zainganaing grant for six months longer if I pay you all money due on receipt and the interest on the Rs. 50,000 every three months in advance. Please let me know by letter without delay."

Exhibit No. 3 purports to be a reply to Exhibit No. 4 written by Ba Pe as follows:—

"As you requested I agree to wait for the principal of Rs. 50,000 povided if you will pay up all the due interest, say about three months. Please let me know as soon as possible."

How Exhibit No. 4 came to be produced by the defendant is not clear. The plaintiff does not appear to have been asked about these two letters, but their Lordships have little doubt on the evidence of Ba Pe or Hpey that the defendant did in fact write Exhibit No 4, and received the reply, Exhibit No. 3, written by Ba Pe probably with the knowledge or acquiescence of the plaintiff. Admittedly, however, nothing was done to carry out the arrangement suggested by the defendant in Exhibit No. 4.

The material divergence between the parties begins at this stage. The plaintiff says he was not willing to renew the bills unless the defendant agreed that on failure to meet them a third time the property should be conveyed to him for a lakh of rupees, that he accordingly sent the broker with Exhibit H. for the defendant to sign, that it was brought back to him with the defendant's signature, and that thereupon he renewed the bills taking a promissory-note (Exhibit J), as before, for the interest due to himself and to the Bank. His evidence regarding the instructions to the broker is very clear. He says:—

"Finally, I sent a letter by the broker for signatue by Davis on the terms that I would not renew the hundis unless he signed the letter. This is the letter which I sent, (Exhibit H). I accepted the proposal in that letter."

("I" evidently is a misprint for "he.") Then the plaintiff goes on:—

"I would not have renewed the hundis on any other terms. After Davis had signed I renewed the hundis. These are the fresh hundis then given....The second set were returned to me after I endorsed the third. I had to pay interest on the third lot, and I got from Davis this pro-note for interest (Exhibit J) as he could not pay me in cash. Nya Bwa and his daughter told me he could not pay cash."

In cross-examination he added :—

"I told Nya Bwa that I told him to tell Davis that I would only renew the hundis if the agreement was made for a lakh. I sent the letter, (Exhibit H), with Nya Bwa. I may have sent him to speak about it before that on an earlier day. I think I may. When I sent him to talk about renewal of hundis I sent him with (Exhibit H.) I sent Nya Bwa to tell Davis that I would not renew the hundis unless he did sign. I only sent Nya Bwa once that day, the time I sent him with the letter. He brought back the letter with Mr. Davis' signature as it is now."

With regard to the instructions given to him by the plaintiff the broker, Nya Bwa states as follows :—

"Shwe Go gave me this letter in his office and said : 'If the letter is not signed the hundis will not be signed.' I took this letter and the hundis. I took the letter to Mr. Davis at his house in Sule Pagoda Road. I went with Ko Ba Pe who also signed the hundis. He is a broker. I found Mr. Davis in his house. I went inside and upstairs. His daughter Ma Mi was also present, I showed Mr. Davis the letter (Exhibit H). I told him 'if this is not signed, hundis will not be signed.' We were all sitting round a round table. Mr. Davis then signed the letter in my presence."

He says further that after the defendant signed the document, he put his signature on it as witness. Whether the defendant's signature be genuine or not, the cross-examination of this witness shows clearly that there was considerable discussion and a good deal of going to and fro before the plaintiff renewed the bills. Nya Bwa says :—

"The first time I went and spoke about hundis—about signing hundis. Davis asked me to go to Shwe Go and get him to

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sign them. He refused, and I went back and told Davis. I went back and told Davis, and said, 'You ought to re-pay.' Then I went and called Ba Pe to speak to Shew Go, to sign the hundis. I took Ba Pe to Shwe Go. It was not on this occasion that the letter was written; I and Ba Pe had to go to Davis again. Before we went Ba Pe tried to persuade Shew Go to sign. Shew Go refused. So we, Ba Pe and I, went back to Davis and told him that Shwe Go would not sign. Davis said, 'What is to be done? I have no money.' I went back to Shwe Go and this letter (Exhibit H) was found (*sic*). Shwe Go brought it upstairs ready typed."

Maung Ba Pe or Hpay, who had joined the defendant in drawing the bills, and whose name appears on the renewed bills also states that he had accompanied Nya Bwa when he went to Davis with (Exhibit H) and the "Hundis." The defendant and his adopted daughter, Ma Mi, deny Ba Pe's presence on the occasion bills were brought. Their Lordships think that Ba Pe's statement as to his having gone with Nya Bwa is more likely to be true than the denial of Ma Mi or of the defendant, for it must be observed that although the defendant does say that Ba Pe did not sign the hundis at the same time as he did, and that he believed he signed them afterwards, he does not say, so far as their Lordships can see, that he did so at any other place than his (the defendant's) house.

With reference to the alleged execution of Exhibit H, Ba Pe says as follows:—

"There was first some conversation; it went on some time before he signed. Davis agreed and signed because he thought that during the three months he would be able to raise money on the mortgage. He said so, and I told him that money could be obtained. He did not ask me to borrow money for him, but after that I often met him, and we used to discuss whether he had got the loan or not.

The defendant, on the other hand, stoutly denies the signature on Exhibit H to be his. The defendant's story of the circumstances leading up to the renewal of the bill must be given in his own words. He says:—

"Early in April Nya Bwa came to me and said they wanted the hundis paid up and I said I was short of money. Nya Bwa

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produced this letter (Exhibit No. 1) I can't be certain if it was written there or not. I said 'If you sign this it will be all right.' I first altered 'three' and wrote 'twelve.' Then reading on I came to one lakh and said 'No, I won't sign anything like this. I will write another,' and gave Exhibit No. 1 back to him. It was eventually left in my copy book. Then I wrote out Exhibit No. 2. I made a fair copy of it and gave it to Nya Bwa in a cover to take to Shwe Go."

With regard to Exhibit No. 1, Nya Bwa says it is in his writing; that he wrote it in Davis's house on the 4th April, but he could not tell at what interview it was written. Exhibit No. 1 is in these terms:—

Rangoon, 4th April 1906.

"My dear Ko Nyah Bwa,—If I not succeed within $\frac{\text{twelve}}{\text{three}}$ months I agree to sell my Zainganine land to Shwe Go (for) a lakh of rupees. Try and settle upon Shwe Go as his promise to advance more money if I require.—Yours."

There can be little doubt that Exhibit No. 1 as drafted by Nya Bwa, represented what the plaintiff wanted. The defendant says that it was left behind in his copy-book when the broker took away the fair copy of Exhibit No. 2 to give to the plaintiff.

Exhibit No. 2 is in these terms:—

"Dear Sir,—As I am not prepared to pay you the interest, &c., due, beg that you will wait six months from this date. I will then pay you the interest, and the two small bills I owe you. Should I fail to pay you then the interest I will agree to sell you the land at Pegu for whatever then is offered if you wish to purchase. I am offered now Rs. 2,20,000 and Rs. 2,40,000, but will not sell. My price is Rs. 3,00,000.—G."

The plaintiff swore he never received the letter, the copy of which (Exhibit No. 2) was read to him. Nya Bwa's recollection about this document is hazy, and his statement certainly is not satisfactory. Speaking of Exhibit No. 1 he says:—

"Exhibit No. 1 is not signed. I don't think Davis refused to sign. I think I asked him to sign it. He must have signed this Exhibit No. 1. I had forgotton all about it till I saw it. Davis did not refuse to sign Exhibit No. 1. He may have signed a fair copy. If I see it I can say if a fair copy was

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written. I can say that a fair copy of Exhibit No 1 was made, but I cannot say who wrote it, whether I or Davis or Ba Pe. I can't say what became of the fair copy. It will have been signed; I am not sure. I don't know if this letter, Exhibit No. 2, was written then or not. I cannot say and do not remember, if a fair copy of Exhibit No. 2 was given to me to take away."

The defendant's case is that the bills were renewed on the basis of the arangement proposed by him on the 4th of April by Exhibit No. 2 and that his signature on Exhibit H is a forgery.

In dealing with a case of this kind in which the parties are at issue on a vital question of fact, the safe principle is to consider which story fits in with the admitted circumstances. Now, the defendant and his witnesses state that the next day, or the day after, he sent the fair copy of Exhibit No. 2 to the plaintiff by Nya Bwa, the same Nya Bwa brought to him a document which he was asked to sign. "Its terms," he says, "were something like those in Exhibit H, it was an agreement to sell for a lakh." In cross-examination he adds the document offered to him for signature was not Exhibit H; "that had an eight-anna stamp, but was similar to Exhibit H in terms, and in the form of a letter; I think a little different in the heading; it was, I think, 'from Shwe Go, Dear Sir.'"

And again:—

"I threw the document down in disgust on the table, and went to the back. Then I came back and Nya Bwa read out the document in Burmese. Then he took it away."

Their Lordships will reserve till later their remarks on the statement that the paper shown to him was stamped. But it does seem difficult to conceive why or how a document which was "something like." Exhibit H in its terms, was brought to the defendant for execution by the same broker who had taken away his proposal contained in Exhibit No. 2, and on the basis of which it was understood the further transaction was to take place, or how it came to be presented to him without any introductory remark in the calm manner described by him.

The defendant's story is that on reading that paper so presented to him he became very angry, used strong language, refused to sign it, and went to the back of the house. He was

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called back, and when asked by his witness, the female broker, Ma E Byu, as to the cause of his anger, he made the following statement :—

"You don't know what is written. If I sign that and I die to-night my children would be beggars—would be robbed. Or if Shwe Go dies the same result. If Shwe Go cannot trust me I cannot trust him. I sent him a letter last night asking for six months. If he will not wait go to court and I will get six or twelve months."

Ma E Byu tells the story of what took place on that occasion in a slightly different form, but she introduces into it a statement made by Nya Bwa to the defendant when he refused to sign the paper, which is of importance. She says that when Davis read the paper he became angry, banged about, and spoke about his throat being cut ; he then said "let him (meaning, presumably, the plaintiff) accept what I offered yesterday if he likes ; I am not a child, I won't do like that." "After that" continues the witness " Nya Bwa said, 'it is for three months which is a long time ; you will be able to make other arrangements ; we will see that you are not cheated."

Ma E Byu goes on to say that the defendant, after he was called back, persisted in his refusal to sign the paper, and eventually Nya Bwa took it, folded it up, and put it in his pocket.

The suggestion is that although up to that time the plaintiff had clearly and admittedly not accepted the defendant's "offer" contained in Exhibit No. 2, he quietly and without demur or question consented to the renewal of the bills on the defendant's terms. He had all along been pressing for immediate payment of the monies that had already become due ; he had been trying to get a definite agreement from the defendant that if he did not meet his liabilities at the end of three months the property should be transferred for a lakh. The defendant admits that "a lakh was the plaintiff's limit." Ma Mi, too, says that when she and Shwe Go (the plaintiff) had a talk about the sale of the land, he said "he thought it was worth about a lakh and that he would offer that but no more." The evidence of Ma E Byu is to the same effect. She says Ma Mi, in her presence, told Shwe Go that the defendant had received an offer of a lakh and a half, on which the plaintiff replied;—

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"Who will offer 1½ lakhs or 2 lakhs? He will be 'lucky if he gets a lakh. Tell him to sell it for a lakh.' I said 'don't speak about 1 lakh. He would not sell for 1½ not even for Rs. 2,20,000, he said he would not go below 3 lakh.' Shwe Go said 'if he can get so much he had better sell quick, why wait?' I said 'He did not sell; what I can do?' He said to Ma Mi 'It is a long time and he has not paid interest, what is he doing?' Ma Mi said 'he will pay, he is looking about him.' Shwe Go said 'Very well, the sooner he pays the better as we have to pay interest."

And yet, without any objection or further discussion, the plaintiff, it is suggested, remained content with the proposal in Exhibit No. 2, to wait for six months for his interest, payment of which he had been demanding all the time, with a right of pre-emption at an indefinite price for above his limit. The suggestion seems hardly consistent with the admitted facts.

The statements of the defendant in cross-examination regarding Exhibit No. 2 are by no means satisfactory, and their Lordships are not prepared to say that the Chief Judge's comment is alltogether unwarranted.

The bills were admittedly renewed on the 6th April and were due on the 9th of July following. Before the due date, however, on the 16th of June, the plaintiff wrote to the defendant a letter, (Exhibit K) in these terms:—

"I beg to inform you that since the death of my brother Maung Shew Oh on the 5th instant, the nature of the circumstances regarding our business has changed. So I wish you to bear in mind that you should not fail to fulfil your promise according to your letter dated the 4th April 1906. I expect you will strictly make good the promise on or before the appointed date."

The defendant admits receipt of this letter, but says he took that letter to refer to his letter of the 4th April which he had given to Nya Bwa. The terms of Exhibit K, however, in their Lordships' opinion, are not consistent with those of Exhibit No. 2. Exhibit K contemplates an early fulfilment of an undertaking or promise of an explicit character; whereas under Exhibit No. 2 the defendant was not liable for any payment until 4th

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October. Under Exhibit No. 2 the plaintiff had only an option to purchase the land for whatever was then offered for it, which left it open to discussion and enquiry. There was nothing in it which could be "strictly made good."

Again Exhibit No. 2 contemplated that the relative legal position and rights of the parties should remain unchanged for six months, but admittedly when the hundis fell due on the 9th July the bills were not renewed for another three months; no document was executed for the interest; and nothing was done by the defendant to keep matters in *statu quo*. He admits that "in the ordinary course the plaintiff would have wanted more hundis to do that." The only explanation the defendant has to offer of the unusual course adopted is that he thought the plaintiff had taken up the loan himself.

There was an interview between Shwe Go and the defendant after the bills fell due. Shwe Go says it was on the 11th of July when Davis told him he could not pay and asked him to pay. Whereupon the plaintiff said he had to pay and would pay, but that the defendant would have to abide by the conditions of the letter of the 4th of April to which the latter replied he would. The defendant admits the interview; he says Nya Bwa came to his daughter who spoke to him and he went and saw Shwe Go; that he told him he was short of money and could not pay the interest and asked him to pay it for him, to which the plaintiff agreed; and he adds "that was for a further renewal for three months." As a matter of fact, the bills were not renewed, nor does the defendant appear to have concerned himself any more with his obligation on them. They were paid off by the plaintiff on the 12th July, *viz.*, the day after the interview, with three days' extra interest.

In their Lordships' opinion neither the conduct of the defendant nor the acts of the plaintiff are consistent with the arrangement in Exhibit No. 2; they appear to be in accord with the agreement in Exhibit H which was substantially to the effect that if the defendant failed a third time to meet his liability on the bills for the payment of all interest thereon, the matter was to be treated as concluded, and that the land would be sold to him for the amount stated.

What transpired shortly after is also of importance in the consideration of the case. Four weeks later the defendant wrote to the plaintiff for a loan of Rs, 1,000, which he said he urgently needed for the funeral of his wife. In the latter (Exhibit L) he mentioned that he had sold his Pegu lands for Rs. 3,00,000, and

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that the loan would be repaid on receipt of the earnest-money on the following Friday. There is no reference, however, either to the liability on the bills and the promissory notes which, according to his story, were outstanding, or to the plaintiff's pre-emptional right under Exhibit No. 2.

The plaintiff's reply, through his lawyer, was prompt and significant. The letter (Exhibit M) dated the 11th of August, stated that it was well-known to the defendant that he could not sell the land to others as he had contracted to sell to the plaintiff under whose instructions the writer had commenced drafting a conveyance more than a week before and warned the defendant that, unless he carried out his agreement, he would be sued for specific performance. He also demanded the name of the intending purchaser. To this the defendant replied, through his solicitor, on the 13th of August, denying any such agreement. But the writer adds: "our client did offer to sell, but your client will not agree to pay the price." Their Lordships' attention has not been called to any evidence in support of this statement.

After some further correspondence between the lawyers on the two sides, this suit was launched on the 17th of August.

So far the admitted facts and circumstances point to one conclusion. The facsimiles of two admittedly genuine signatures of the defendant, together with the facsimile of the disputed signature, are on the record, and their Lordship have had an opportunity of examining them. With reference to the latter the signature on Exhibit H), the defendant says as follows:—

"From the signature alone I would not be able to swear whether it was mine or not. The flourish of the 'D,' however, goes further to the left than mine generally do. Exhibit No. I (3) I have flourished a little more than usual."

The Judge in the Court of first instance says that he had examined it carefully and that it revealed no obvious signs of forgery except that there was a mark of double writing or correction in the second of the three initials which occurred below the name. Nor do their Lordships perceive any difference between the admitted signatures and the disputed signature.

The mark of double-writing to which the learned Judge refers might be purely accidental; in their Lordships' judgment much importance cannot be attached to it. But his finding does not show that he had formed, on a comparison of all the admitted signatures of the defendant with the disputed signature, a

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decided opinion that it was a forgery, for, in summing up the case, he expresses himself in these terms.

"It seems, therefore, improbable that Davis would have agreed to sell his land for one lakh simply in order to induce Shwe Go to wait three months for the interest due—a sum of not more than Rs. 5,000. On the other hand, it seems improbable that a man in the position of Shwe Go should commit or abet the commitment of forgery in order to obtain possession of the land mortgaged to him."

He seems to have been a good deal influenced in his view by the improbability of the defendant agreeing to sell the land, for which it was stated large offers had been made, for only a lakh and a temporary accommodation for a comparatively small sum. The learned Judge appears to have overlooked that the whole question of the renewal of the bills was involved in whatever arrangement was arrived at on the 4th of April. The defendant had either to take them up or get them renewed. Had no arrangement been come to, an action on the bills would have jeopardised his prospects of selling the property to advantage. He evidently hoped, and probably was assurred by the brokers, that within the three months he would be able either to dispose of the land or raise money by mortgage. The evidence of Ma E Byu already referred to coupled with the statements of Nya Bwa and Ba Pe strongly confirms this view.

Ma Mi admits that about the time when the bills were renewed the plaintiff told her that he was "going to send Nya Bwa with a document," for the transfer of the land for a lakh. "There was a letter on the table before them with a stamp."

It has to be noted that the defendant, as well as his witnesses say the paper which was brought by Nya Bwa, and which Davis refused to sign, though in the form of a letter bore a stamp. Nya Bwa swears he never saw any stamped agreement in the form of Exhibit H. Their Lordships think it is hardly likely that if a forgery was going to be perpetrated, the plaintiff or his agent after presenting a stamped agreement would forge the signature on an unstamped paper. If the forgery was not successful on one stamped paper, another could have been as easily substituted as an unstamped paper. The story about the letter that was presented to the defendant for execution being stamped seems due to a desire to give it additional colouring or is the outcome of imagination consequent on the bills bearing stamps.

Their Lordships have, after the most careful consideration come to the conclusion that the defence set up is not true,

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But it has been strongly urged by Counsel on behalf of the defence that as a decree for specific performance is discretionary their Lordships, having regard to the onerous character of the bargain, should not affirm the decision of the Chief Court. In the absence of any evidence of fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract, their Lordships see no reason to accede to the argument. The bargain is onerous but there is nothing to show that it is unconscionable. The defendant knew all along that a lakh was the plaintiff's limit; it is in evidence that he had frequently urged the defendant's daughter to advise him to sell the land if he was getting a higher offer. It is difficult to say under the circumstances that he took an improper advantage of his position or the difficulties of the defendant.

On the whole, their Lordships are of opinion that the decree of the Chief Court is correct and that this appeal should be dismissed with costs and they will humbly advise His Majesty accordingly.

Sanderson, Adkin, Lee & *Eddis.*—Solicitors for the appellant.

A. H. Arnould & *Son*—Solicitors for the respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

Haji Ashfaq Husain and others .. Appellants*

v.

Lala Gauri Sahai .. Respondent.

Haji Ashfaq Husain v. Lala Gauri Sahai.

Limitation Act, S. 4, *Art.* 179—*Joint-mortgage decree—Ex-parte decree set aside against one—New decree—Starting point of limitation—Practice—Procedure.*

A mortgagee obtained a decree against his mortgagors, of whom *S* was one, on 25-8.00 and it was made absolute on 21-12-0. *S* applied to set aside the decree against her which was *ex parte.* The application was granted. but finally a decree against her also was made on 15-8-02, which was eventually confirmed in appeal on 16-11-04. The decree-holder applied for an order absolute and for an order for sale on 15-12-05, but his application was granted only as against *S.* The decree-holder again applied on 21-12-05 for execution by way of sale against all defendants. *Held:*—that the execution was not barred, as time began to run only from the date of the last judgment, *i. e.*, 16-11-04; (2) That the dismissal of the prior application of 15-2 05 did not operate as *res judicata* to the application of 21-12-06, the latter being based upon the two orders absolute which were in effect one decree of the date of the latter order. (3) That it might have been more in accordance

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* 11th November, 1910.

with strict procedure if the court had set aside the whole judgment and had proceeded to retry the case against all the defendants. That the irregularity had worked no wrong and was of no real consequence.

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These were appeals against a judgment and decree of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 27th June 1907, reversing certain orders of the Subordinate Judge of Moradabad, dated the 11th April 1906 and the 5th May 1906.

DeGruyther, K. C., and *Ross* for appellants.

Eddis for respondent.

Their Lordships' judgment was delivered by

Lord Mersey.—The substantial question in this case is whether an application for the decree absolute obtained by the respondent for the sale of some property which had been mortgaged to him by the appellants is barred by S. 4 of the Indian Limitation Act, 1877. There is also a further question, namely, whether a similar application had not already been made to the court and dismissed on the 27th November 1905, so as to make the present application *res judicata*.

The litigation which has led up to this dispute has been very long, and it has been somewhat complicated, but the story can be told, for presant purposes, in a few sentences.

The respondent was the holder of a mortgage of the interest of the appellants and of a lady named Musammat Sakina in certain lands. Default was made in payment of the debt, and thereupon the respondent instituted proceedings for the recovery of the money. He also asked for a decree that if payment were not made the property should be sold.

The present appellants put in defences but the lady failed to appear. The case was tried, and the defences were found to be untrue, whereupon a decree was pronounced against all the defendants, the judgment against the lady going by default of appearance. This decree was dated the 25th August 1900, and it was made absolute on the 21st December 1901.

If nothing more had happened there should have been no difficulty about obtaining an order for execution of the decree. But before the decree absolute was made, namely on the 19th Septemper 1900, the lady Musammat Sakina had bestirred herself and had applied for a review of the judgement of the 25th August 1900 on the ground that she had never been served with process. The lady's application was refused by the Subordinate

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Judge before whom it came. This was on the 13th May 1901. The learned Judge did not believe her statement that she had had no notice of the proceedings and he was of opinion that she had been put forward by the principal defendant in the suit, the present appellant, Ashfaq Husain, in order to delay the execution. Musammat Sakina then appealed; and her appeal was allowed, the court directing "that the decree passed *ex-parte* be set aside so far as the appellant, Musammat Sakina is concerned," and that the case should be reheard upon the merits as against her. This was on the 11th March 1902. The case was accordingly set down for rehearing and Musammat Sakina then pleaded that the plaintiff had received certain sums of money from her deceased husband on account of the mortgage debt for which he had not given credit. This defence of payment had not been put forward by any of the other defendants, and at the hearing Musammat Sakina was unable to support it by satisfactory evidence. Accordingly judgment was given against her on the 15th August 1902. She then again appealed, but the High Court, agreeing with the Subordinate Judge that her witnesses were unworthy of credit dismissed her appeal. This was on the 16th November 1904. Nothing was paid and on the 15th February 1905 the plaintiff filed an application against all the defendants in the action asking that the decree of the 15th August 1902 might be made absolute, and for an order for the sale of the property. To this the appellants filed an objection alleging that the decree of the 15th August 1902 was passed against Musammat Sakina alone, and that the original decree of the 25th August 1900 passed against the appellants, "had become extinct" by operation of the Statute of Limitation.The objection was heard on the 27th November 1905, when the Subordinate Judge held that the decree of the 15th August 1902 concerned Musammat Sakina only, and that therefore no order absolute could be made against the objectors on the basis of that decree. He also found that the plaintiff had already, namely, on the 1st December 1901, obtained a decree against the objectors so that there were two binding decrees (namely, the decree against the objectors and the decree against Musammat Sakina) in respect of the same mortgage. The learned Judge therefore came to the conclusion that he could not help but disallow the plaintiff's application; and the application was accordingly dismissed. The learned Judge, however, made a decree absolute (dated the 27th November 1905) against Sakina. Later on, namely, on the 21st

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December 1905, the plaintiff filed an application against all the defendants for execution by way of sale of the property. This application was based on the decree, of the 15th August 1902, the 16th November 1904; the 21st December 1901, and the 27th November 1905, before mentioned. The present appellants filed an objection to this application on the 7th February 1906, alleging that they were no parties to the decrees of the 15th August 1902 and the 27th November 1905, and that as to the decrees of 15th Augugust 1902 and 21st December 1901 they were time-barred. These are the facts, and the first question is whether the remedy against the present defendants is statute barred. The limitation applicable to the case is to be found in the 4th section of the Indian Limitation Act, 1877, which provides that every application made after the period of limitation prescribed therefor by the Second Schedule annexed to the Act shall be dismissed, although limitation has not been set up as a defence. The Second Schedule (No. 179 provides that the time for an application for the execution of a decree shall be three years from the date of the decree or (where there has been an appeal) from the date of the final decree or order of the appellate court. The answer to the question, therefore, depends upon the date of the decree on which the application for execution is based. If the date of the decree is more than three years before the date of the application, then the respondent's remedy is statute barred, but otherwise not. Now the respondent orginally claimed a decree against all the defendants jointly in respect of a joint mortgage debt, and he obtained on the 25th August 1900 what purported to be a judgment in accordance with his claim. But it subsequently appeared that by reason of non-service of process on one of the defendants, the judgment ought not to have been given and accordingly the court reopened the matter by setting aside the judgment so far as it affected the one defendant who had not been served, and directed another enquiry to ascertain whether that defendant had any defence. It might have been more in accordance with strict procedure if the court had set aside the whole judgment and had proceeded to re-try the case against all the defendants. But it was apparently considered that such a course would involve unnecessary delay and expense, and no one objected to the procedure adopted by the court.

Thus the original judgment of the 25th August 1900 was treated by the court and by the parties as a mere step in granting of the relief for which the plaintiff was asking and

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to which, as it ultimately turned out, he was entitled, namely, a decree against all the defendants jointly. The irregularity (if any) in the procedure has, in their Lordships' opinion, worked no wrong and is of no real consequence. Subsequently and after many delays, for which the respondent was in no way responsible, it was ascertained that the defendant who alleged that she had not been served had no defence, and a decree was made against her. This decree which was dated the 16th November 1904 was the second step in granting to the plaintiff relief to which he was entitled. It supplemented and completed the decree granted on the 25th August 1900 and for the first time gave to the plaintiff that which would alone justify him in applying for the joint execution to which he was entitled. It is from the date of this last judgment (the 16th November 1904), or rather from the date when it was made absolute (the 27th November 1905), that the time under the statute began to run. It was then for the first time that the court granted a complete decree to the respondent. It follows therefore that the plaintiff's remedy is not statute barred. This seems to have been the view taken by the High Court in the judgment from which this appeal is brought, and in their Lordships' opinion it is right.

As to the second point taken on behalf of the appellants, namely, that the plaintiff is estopped in the present proceedings by the judgment given against him on the 27th November 1905 upon his application of the 15th February 1905, it is sufficient to stay that the present application is different from the application then before the court. The application of the 15th February 1905 was based on the decree of the 15th August 1902, and on that alone, whereas the present application is based upon the joint effect of the two orders absolute of the 21st December 1901 and the 27th November 1905, made against the appellants and Sakina respectively, and which two orders are in effect one decree of the later date.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed. The appellants will pay the costs.

Ranken, Ford and Co.—Solicitors for appellants.

Sanderson, Adkin, Lee and Eddis:—Solicitors for respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE, BENGAL]

Present:—Lord Macnaughten.

Sri Sri Ishwar Shyam Chand Jiu & others. Appellants*

v.

Ram Kani Ghore and others .. Respondents.

Shyam Chand *v.* Ram Kani Ghore.

Limitation Act, Art. 134—"*Transfer*"—*Mokurari lease of debutter property—Suit by successor.*

Their Lordships, following *Abhiram Goswami* v. *Shyama Charan*[1] applied in an *ex-parte* case Art. 134 of the Limitation Act to a suit by a shebait to recover property granted in mokurari lease by his predecessor more than 12 years before suit.

Obiter :—Art. 134 may not apply to such case especially in view of the substitution of the word "transfer" for "purchase" in the Article in the Act of 1908. [*Abhiram Goswami* v. *Shyama Charan*[1] doubted.]

This was an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated 31st of July 1905, reversing a judgment and decree of the Court of the Subordinate Judge of Manbhum, dated the 4th of March 1902.

The principal question for determination on the appeal was the nature and extent of the interest acquired by the respondents under a lease, dated the 6th of June 1872.

De Gruyther, K.C. (with him *J. M. Parekh*) for the appellants.

Their Lordships' Judgment was delivered by

Lord Macnaughten :—This appeal was heard *ex-parte*.

This suit was brought by the Raja of Panchakote as *shebait* of some Thakurs or family idols to recover possession of a mouzah alleged to be *debutter* and dedicated to the service of the idols. It had been alienated more than twelve years before the institution of the suit by the plaintiff's predecessor in title who granted a *mokurari* lease of the property in consideration of a fixed rent and the payment of a fine equal to the amount of two years' rent.

The defence was twofold : (1) that the property was not really *debutter* ; and (2) that the suit was barred by Art. 134 of the Limitation Act.

The Subordinate Judge of Manbhum decided both points in favour of the plaintiff.

1. (1909) I. L. R. 36 C. 1003. * 11th November 1910.

Shyam Chand v. Ram Kani Ghore.

The case was heard twice on appeal by the High Court. On the first hearing the learned Judges came to the conclusion that there was not sufficient evidence to prove that the property was really *debutter*. They dismissed the suit on that ground, saying that it was not necessary to discuss the question of limitation. The appeal was heard again on review upon the discovery of new and important evidence. On that occasion the learned Judges held that Art. 134 was a bar to the suit, and that it was not necessary therefore to consider the further evidence offered as to the character of the property.

On considering the additional evidence brought before the High Court on review, their Lordships are satisfied that the property was really *debutter*.

The only question remaining depends on the law of limitation.

On this point, attention has been called to the case of *Abhiram Goswami* v. *Syama Charan. Nandi*[1]. It is impossible to distinguish that case from the present.

Whatever might have been the inclination of their opinion if the matter had been *res integra* it seems to their Lordships that they would not be justified in reviewing on an *ex-parte* application the considered judgment of the Board delivered after full argument. They will, therefore, simply follow the decision in *Abhiram Goswami* v. *Shyama Charan Nandi*[1]. They do so with the less hesitation because the language of the article under discussion in that case and in this has been altered by subsequent legislation.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed. There will be no order as to costs either of the hearing of the suit in the courts below or of this appeal, except that the respondents must repay to the appellants the costs paid under the decree of the High Court.

E. Dalgado :—Solicitor for appellants.

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1. (1909) I. L. R. 36 C. 1003 (P.C.).

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Lingam Krishna Bhupathi Devu Garu .. Appellant*

v.

Sri Mirza Sri Pasupati Vijayarama Gajapatiraj Maharaja Manya Sultan Bahadur of Vizianagram .. .. Respondent.

Construction—Simple mortgage—Condition that the mortgagee shall take possession of, and enjoy, the mortgaged property as under a usufructuary mortgage in default of payment of interest by the mortgagor—Mortgagee's right to a decree for sale. Bhupathi Devu *v.* Gajapatiraj.

In a suit brought by the mortgagee against the mortgagor who had failed to pay the principal and interest, to enforce his mortgage, it was contended that the mortgagee was not entitled to the decree for sale on the ground that the instrument of mortgage, which expressed itself that it was a simple mortgage, provided—"If the whole or portion of the interest remains unpaid by the due date, His Highness (the mortgagee) shall take possession of the mortgaged properties immediately thereafter and enjoy the said properties as under a usufructuary mortgage." *Held,* confirming the decree of the High Court, that the mortgagee retained the position of the simple mortgagee, and as the mortgagor had not fulfilled his obligations, the decree for sale of the mortgaged property was a matter of course and perfectly right.

This is an appeal from the decree of the High Court of Judicature at Madras, dated 9th January 1908, whereby the decree of the District Judge at Vizagapatam, dated the 5th April 1904, was substantially affirmed.

The suit was brought on behalf of the Maharaja of Vizianagram, against the present appellant and his father, since deceased, to enforce a mortgage, dated the 21st May 1895, and executed by the latter to secure a loan made to them by the predecessor of the present respondent.

The sole question on the present appeal was as to the construction of the mortgage—whether under its terms the present respondent was or was not entitled to a decree for sale.

A. Cohen, K. C. (with him *Dunne*) for appellant.

Sir R. Finlay, K.C., *L. DeGruyther,* K. C. and *Brown* for respondent.

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* 15th February, 1911.

Bhupathi Devu v. Gajapatiraj.

Their Lordships' Judgment was delivered by

Lord Macnaughten:—It seems to their Lordships that this case is perfectly clear and the judgment appealed from perfectly right.

The mortgagee advanced a large sum of money on terms very favourable to the mortgagor. At the same time he retained the position of a simple mortgagee. That is so expressed in the deed itself. The mortgagor has not fulfilled the obligations he undertook. After prolonged forbearance and fifteen years after the mortgage was made, the mortgagee, whose interest is greatly in arrears, comes forward and says: "I am a simple mortgagee," and he asks the court to enforce his rights. The decree was a matter of course.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal and the appellant must pay the costs.

Chapman, Walker and Shephard:—Solicitors for appellant.

D. Grant:—Solicitor for respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE, BENGAL.]

Sheikh Mahomed Jan .. Appellant*
(*Plaintiff*)

v.

Munshi Ganga Bishun Singh & others .. Respondents
(*Defendants*).

Mahomed Jan v. Bishun Singh.

Appropriation of payment—Revenue sale—Charge of appropriation.

Where money is paid and received and appropriated in a certain way, it is not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both orginally concurred.

This was an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 6th July 1906,† which reversed a judgment and decree of the first Court of the Subordinate Judge of Chupra, dated the 16th August 1904.

The plaintiff-appellant brought the present suit for annulment of a sale held on the 26th March 1902, for default of payment of the Government revenue under the provisions of Act XI

* 28th February 1911.

† (1906) I. L. R. 33 C. 1193.

of 1859. The principal question for determination on the present appeal related to the validity of the said sale under the circumstances hereinafter mentioned. 'ahomed Jan v. Bishun Singh.

L. De Gruyther, K. C. (with him *J.M. Parekh*) for appellant.

B. Dube for respondents.

Their Lordships' Judgment was delivered by

Sir Arthur Wilson :—This an appeal from a decision of the High Court, Calcutta, overruling that of the Subordinate Judge of Chupra. The object of the suit, as brought by the plaintiff, and now appellant, was to set aside a Revenue sale, and to recover possession of the property sold. The defendants were the purchaser and others who derived title from him. In the first court the decision was in favour of the plaintiff upon grounds which it is unnecessary now to examine.

From that decision there was an appeal to the High Court, and that court overruled the decision of the first court. Various grounds were urged on the one side and on the other, on the argument of that appeal, all of which were dealt with by the learned Judges in their judgment, but of all those grounds, there is only one which it appears to their Lordships necessary now to consider.

The facts, so far as it is necessary to examine them at the present stage, can be shortly stated. The property in question is an Ijmali Kalam, forming part of the Mahal Bhawaspur. That property was put up for sale by the Collector of Chupra on the 16th September 1901, in respect of arrears of revenue, but as no bidder offered, the Collector stopped the sale, and declared that the whole estate would be put up to sale at a later date, acting under S. 14 of the Revenue Sale Law (Act XI of 1859).

On the 17th September 1901, the plaintiff (as permitted by S. 14 already referred to) paid the arrears due, and was declared the purchaser of the Ijmali Kalam. He did not, however, receive his sale certificate until the 8th February 1902. In the meantime, between the sale and the sale certificate, *kists* of revenue became payable in respect of the property in September 1901 and in January 1902.

On the 13th January 1902, the purchaser, the plaintiff-appellant, paid into the Treasury a sum of Rs. 73, appropriating that payment in the document which accompanied the payment

Mahomed Jan v. Bishun Singh.

to the Government to the January *kist*, and the payment was received and accepted on that account. Subsequently, however, the officers of the Treasury appropriated the sum paid, in the first place to the satisfaction of the September 1901 *kist*, and then, as far as the money would go, towards the January 1902 *kist*, the result being, according to this method of accounting, to leave a sum of Rs. 16-12-2 still due in respect of the January *kist*.

Subsequently, on the 26th March 1902, the Collector put up the property for sale in respect of the amount, so appearing due, of the January *kist*.

The only point which their Lordships think it necessary to dispose of in the present appeal is, whether the amount of the January *kist* in respect of which the sale was made was really due at the time of the sale, and whether therefore there was any legal power to sell.

Much was said in the argument about the bearing upon the present case of certain provisions of the Contract Act, relating to the appropriation of payments. Those enactments might perhaps have had a bearing upon the case, if the parties had not by their own actions placed the matter beyond doubt.

The money in question in the present case was expressly paid to satisfy the January *kist*, and it was received and acknowledged on that account. It requires no statutory provision to show that when money has been so paid and received and appropriated, it is not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred.

For these reasons their Lordships are of opinion that no arrears in respect of the January *kist* were due at the date of the sale, and that therefore the sale was without jurisdiction. Accordingly they will humbly advise His Majesty that the judgment and decree of the High Court should be set aside and that of the Subordinate Judge restored with costs in both courts. The respondents will pay the costs of this appeal.

E. Dalgado :—Solicitor for appellant.

Barrow, Rogers and Nevill:—Solicitors for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present:—Lord Macnaughten, Lord Shaw, Lord Mersey and Mr. Ameer Ali.

Mirza Sadik Hussain .. Appellant* (*Plaintiff*)

v.

Mussammat Kaniz Zarah Begam .. Respondent (*Defendant*).

Mirza Sadik Hussain *v.* Mussamat Kaniz Zarah Begam.

C. P. C., Sch. II (O.C., S. 510)—*Scope of—'Refuses'—Meaning of—Jurisdiction of court to appoint new arbitrator—Jurisdiction of court to proceed with suit after decree in terms of compromise—Refusal of arbitrators to act—Refusal of party to nominate another—Practice—Procedure.*

When an arbitrator is nominated by the parties his 'refusal' to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. He need not first accept and then only refuse, to constitute a refusal within the meaning of the section.

The parties to a suit entered into a compromise to refer the matter in dispute to arbitration. The court passed a decree in terms of the compromise. One of the arbitrators refused to act and one of the parties refused to name another in his stead. The court took up the matter again and "proceeded with the suit."

Held that the original decree put an end to the suit and the court could not, therefore have "proceeded with the suit." Parties who agree to set up a tribunal of arbitration are not bound to submit the case referred to another tribunal such as a District or other Judge. The only procedure open to the court under the circumstances was itself to appoint another arbitrator, and the objection as to want of jurisdiction of the District Judge to act was fatal. [; *Pugardin Ravutan* v. *Moidinsa Ravutan* 1 ; *Bepin Behari Choudhry* v. *Annoda Prasad Mullick*2 overruled.]

Appeal from a Judgment and Decree of the Court of the Judicial Commissioner of Oudh, dated the 27th November, 1906, which affirmed an Order of the Court of the District Judge of Lucknow, dated the 5th September 1906.

L. De Gruyther, K. C., and *S. A. Kyffin* for appellant.

Sir H. Erle Richard, K. C., and *B. Dube* for respondent.

The Judgment of their Lordships was delivered by

Lord Shaw:—This appeal is presented from an Order dated the 27th November 1906, made by the Court of the Judicial Commissioner of Oudh, which affirmed an Order dated the 5th September 1906, made by the District Judge of Lucknow.

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* 21st July, 1911.

1. (1882) I. L. R. 6 M. 414.

2. (1891) I. L. R. 18 C. 324.

Mirza Sadik Hussain v. Mussamat Kaniz Zarah Begam.

It appears that one Mirza Agha Hasan Khan died on the 27th December 1901. He was survived by a widow, a daughter, and a son. They were heirs of the deceased under the Mahomedan law, of the Shiah sect, and the property fell to be divided amongst them in certain proportions. Mirza Agha Hasan Khan's property, however, was situated in various districts, and while the arithmetical division of the shares fell to be determined by law, it was considered by the heirs that it would be to their advantage that, instead of a large variety of fractional portions of property being taken by each heir in subjects situate, it might be, at a considerable distance from each other, an arrangement should be carried out by arbitrators whereby the shares falling to the ladies should be consolidated in one district, and other arrangements for convenience of management entered upon. Accordingly a compromise and agreement in this sense was drawn up.

In April 1903 the respondents had brought a suit claiming administration of the estate, and on the 1st August 1905 the compromise was made, and on the following day, namely, the 2nd August 1905, the decree which raises the crucial question in this case was pronounced by the Subordinate Judge of Lucknow, which bore that "It is ordered that in terms of the compromise "herewith annexed, marked 'A.'....Plaintiffs' claim be decreed "under Sections 157 and 375, Civil Procedure Code; and as re-"gards costs, the Court orders that parties do bear their own costs." Section 157 seems to have no bearing upon the procedure and to have appeared in the judgment by mistake, but Section 375 deals with the matter of compromise of suit and provides that "if a suit be adjusted wholly or in part by any "lawful agreement or compromise * * * such agreement, "compromise or satisfaction shall be recorded and the Court shall "pass a decree in accordance therewith, so far as it relates to the "suit, and such decree shall be final so far as relates to so much of "the subject-matter of the suit as is dealt with by the agreement, "compromise, or satisfaction."

As has been pointed out, the agreement or compromise in this case went by its nature beyond the actual matter of suit between the parties. But it is also clear that the decree thus, so to speak, ratifying the compromise, was a final decree. The

Miza Sadik Hussain v. Mussamat Kaniz Zohrah Begam.

court has discharged itself of the *lis* between the parties, and by their own agreement thus ratified the settlement of the points upon which they had agreed fell to be made by the tribunal of arbitration to which the parties had consigned it.

By the agreement two arbitrators were appointed to settle, allocate, &c., the respective rights of parties. One of these, for reasons which need not be entered upon (he was the advocate for the respondents), refused to act as arbitrator. Thereupon the respondents, on the 23rd August 1906, presented a petition in the Court of the District Judge, narrating this fact and averring that "owing to his refusal to act, it has become necessary "that the Honourable Court should itself examine the schedule "and bring it in conformity with the terms of the compromise, "or, failing that, it should appoint a commissioner and direct," &c. The respondents declined to nominate another arbitrator on their behalf; and, in fact, it seems clear that they held, not only that this declinature was within their rights, but that it was also not in the power of the court to nominate another arbitrator to supply the gap which had been caused by the declinature. The court accordingly was asked to take the matter into its own hands. Before seeing how the Civil Procedure Code and the Indian decisions bear upon the point, it may be added that the District Judge acceded to the view presented and to all intents and purposes superseded the arbitration and entered upon the scrutiny of the lists of properties and the determination of the allocation—in short, performed the duties of the tribunal of arbitration as if the agreement or compromise had authorised that procedure. This was confirmed in the Court of the Judicial Commissioner of Oudh by the Order appealed from.

By Section 510 of the Code of Civil Procedure, 1882 (Act XIV), it is provided that "if the arbitrator, or, where there are "more arbitrators than one, any of the arbitrators * * dies, "or refuses or neglects or becomes incapable to act * * the "Court may in its discretion * * appoint a new arbitrator "* * or make an order superseding the arbitration, and in "such case shall proceed with the suit." What had happened in the present case was that after the arbitrator had been appointed he refused to accept office as such, or to act. It appears, however, that the courts in India have construed this section

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of the Code as meaning that the section can only apply if the arbitrator who refuses had accepted office before refusing. These decisions are, *Pugardin Ravutan* v. *Moidinsa Ravutan*[1] and *Bepin Behari Chowdhry* v. *Annoda Prasad Mullick*[2]. In both of these cases it was held that the court has power, under S. 510, to appoint a new arbitrator in the place of another only when that other had first consented to act and thereafter refused or became incapable. In their Lordships' opinion this is not a proper construction of S. 510 of the Code. It appears to their Lordships that, when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment. Their Lordships do not enter at length into the matter as it appears that any other construction would open the way to an easy defeat of the provisions of the Statute. Nor do their Lordships doubt that the decisions referred to proved in the present case an embarrassment to the courts below and have probably prevented the District Judge doing what would have supplied all that was required, namely, to appoint another arbitrator instead of the one who had declined to accept nomination. Had that been done the tribunal of arbitration would have been set up and the proceedings could have gone forward. Furthermore, the appointment was in the hands of the District Judge, and he was in no way precluded from making it by the fact that the party whose arbitrator had declined refused to assist the court by suggesting another name. In their Lordships' opinion the procedure of the courts below in this particular, and the decisions upon which they manifestly proceeded, were erroneous.

What was done, however, was (apparently under the same section which was held to make it incompetent to appoint a fresh arbitrator), to adopt the other course of superseding the arbitration and entering upon the determination of the matters submitted by the agreement. It was this latter which was done, and not proceeding with the suit. To "proceed with the suit" (to use the language of S. 510) was in the case, in their Lordships'

1. (1882) I.L.R. 6 M. 414. 2. (1891) I.L.R. 18 C. 324.

view, impossible. The suit was at an end, and something different from and going much beyond the suit had been entered upon. The decree of the 2nd August 1905 was not a decree for partition nor for administration. It was simply a decree ordering the agreement and compromise of the parties to be carried into effect, and that decree was final. It put an end to the suit, and that was the very object of the compromise. The alternative in S. 510 is impossible, because there is no suit now pending with which the court can proceed. All that the courts in India could do was to take advantage of the sections of the Code which enable them to keep the machinery of arbitration going. This could have been done, and had it not been for the decisions cited, would in all probability have been done, by simply naming a fresh arbitrator. Parties who agree to set up a tribunal of arbitration are not bound to submit the case referred to another tribunal, such as a District or other Judge. It may be regretted that the supersession of the arbitration and the interposition of the Judge himself to settle the points referred to arbitrators should not have been assented to. But the objection which has been taken—that the rights having been remitted to one tribunal have been settled by another—is, in their Lordships' opinion, a fatal objection.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed and the decrees of the courts below reversed with costs. The respondent, Kaniz Zohra Begam, mast pay the costs of the appeal.

Watkins and Hunter—Solicitors for appellant.

Barrow, Rogers and Nevill— Solicitors for respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF BENGAL.]

Present :—Lord Macnaghten, Lord Shaw, Lord Mersey and Mr. Ameer Ali.

Mir Sarwarjan .. Appellant*

v.

Fakhruddin Mahomed Chowdhury and others .. Respondents.

Mir Sarwarjan v. Fakhruddin.

Minor—Specific performance of contract for purchase of immoveable property by guardian—Mutuality—Guardian or manager—Powers.

It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor, or the minor's estate by a contract for the purchase of immoveable property ; and such a contract is not specifically enforceable by a minor on attaining majority, when there is no mutuality in the contract.

Quaere :—Whether there is any difference between the position of a manager and that of his guardian.

The Judgment of their Lordships was delivered by

Lord Macnaughten :—This is an appeal from a decree of the High Court at Calcutta affirming a decree of the Subordinate Judge of Backergunj.

All the questions raised in the litigation but one were disposed of before the appeal was taken to the High Court, and when the case was before a Division Bench of that Court that question was made the subject of a reference to the Full Bench

The reference was in the following terms :—" Can specific performance of a contract validly entered into on behalf of a minor be enforced ?"

The reference came before the Chief Justice and four other Judges of the High Court. They agreed in returning an answer which seems to be carefully guarded and is perhaps rather enigmatical. The Chief Justice observed that the question submitted to the Court was "a wide and far-reaching question." His opinion was that they could only " answer the question by saying that if a contract is validly entered into on behalf of a minor, and there is mutuality in such contract, if might be specifically enforced." The other learned Judges concurred.

* 19th and 20th June and 9th November, 1911.

Mir Sarwarjan v. Fakhruddin.

The case was then sent back to the Division Bench to be tried out on the merits. The decree under appeal to the High Court was a decree for the specific performance of an agreement for the purchase and the sale of immoveable estate. The agreement was expressed to be made between a Mr. Garth and the appellant, Mir Sarwarjan. Mr. Garth was at the time manager of the estate of the Respondent No. 1 who was then a minor.

After observing that they had already considered the evidence and had "come to the conclusion; (1) that it was a contract validly entered into and (2) that there is mutuality with regard to it; for 'the agreement made by Mr. Garth with Mir Sarwarjan would seem to be as enforceable against the minor as it is against Mir Sarwarjan,'" the learned Judges of the Division Bench stated that they saw no reason to dissent from their views already expressed and recorded "(1) that the contract was validly entered into, particularly when, as pointed out, it was for the benefit of the minor, and was accepted and ratified by him, and (2) for the reason given 'there is no want of mutuality' in respect of this agreement."

The agreement in question was entered into by an agent of Mr. Garth, without any express authority from him, but there was some evidence that Mr. Garth adopted or assumed to adopt the agreement on behalf of the minor. At any rate it was assumed in both courts and it was the opinion of the Subordinate Judge that the contract was not intended to bind the manager personally and therefore it was assumed that it was intended to bind the minor or the minor's estate. It was also assumed that the purchase was an advantageous purchase for the minor. In this judgment and for the purpose of this judgment their Lordships accept all the foregoing assumption.

The learned Judges of the Division Bench disposed of the question of mutuality at the first hearing in the following terms: "There is no want of mutuality in this case, for the agreement made by Mr. Garth with Mir Sarwarjan would seem to be as enforceable against the minor as it is against Mir Sarwarjan. The acts of a guardian in this country bind the minor. There is no difference between his position and powers and those of a

Mir Sarwar-jan v. Fakhruddin.

manager." No other or further reason in regard to his point was given by the learned Judges when the case was referred back to them.

Without some authority their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract.

Their Lordships, therefore, will humbly advise His Majesty that the appeal should be allowed, the order of the High Court discharged, and the suit dismissed.

The respondent No. 1 must pay the costs of the appeal. Any costs paid under the order of the High Court must be repaid but there will be no other order as to costs in the courts below.

T. L. Wilson & Co.—Solicitors for appellant.

Morgan, Price & Co.—Solicitors for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

Present:—Lord Macnaughten, Lord Robson, Sir John Edge and Mr. Amir Ali.

Jamna Das	..	Appellant*
v.		(*Plaintiff*)
Pandit Ram Autar Pande and others	..	Respondents
		(*Defendants*).

Jamna Das v. Pandit Ram.

T. P. A., S. 90—*"Legally recoverable"—Purchaser of equity of redemption—Agreement with mortgagor (vendor) to pay mortgage money.*

The purchaser of the equity of redemption who undertakes with his vendor (the mortgagor) to pay the mortgage money to the mortgagee is not

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* 2nd November, 1911,

a person from whom "the balance is recoverable" within the meaning of S. 90, T. P. A., and the mortgagee has no right to avail himself of the purchaser's contract with the mortgagor to pay the money. **Jamna Das v. Pandit Ram.**

This was an appeal from a judgment and decree of the High Court of Judicature for the North-Western Provinces at Allahabad which affirmed a judgment and decree of the Court of the Subordinate Judge of Mirzapur.

Sir E. Richards for the appellants.

L. DeGruyther, K. C. and *B. Dube* for the respondents.

The Judgment of their Lordships was delivered by

Lord Macnaughten:—This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay his mortgage-debt. Therefore he is not a person from whom, in the words of S. 90 of the Transfer of Property Act, "the balance is legally recoverable."

Their Lordships will therefore humbly advise His Majesty that this appeal must be dismissed with costs.

Solicitors for appellant—*Rankens, Ford and Chester.*

Solicitors for respondent—*Barrow, Rogers and Nevill.*

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Assignor and assignee—*Direction to pay consideration to third party—Non-payment—Assignor's right to sue* :—Where a person assigns property (decrees) in favour of another for an ascertained value to be paid by the assignee to a third party, such a direction is *prima facie* intended for the benefit of the assignor ; and if the assignee does not

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pay it to the third party as agreed upon, the assignor will be entitled to recover the same irrespective of the fact whether he (the assignor) was compelled to pay it or was otherwise damnified. *Obiter*:—It may be otherwise where the assignee is himself interested in the payment to the third party or has entered into direct relations with the third party on the faith of the original direction and has rendered himself liable to make the payment to him. *Sivasubramania* v. *Gnanasambanda Pandara*, 21 M. L. J. 359 ; *Bachu Chenchu Ramaiyar* v. *Apparaju Subbaramaiyar*, 9 M. L. T. 79 referred to ; *Dorasinga Tevar* v. *Arunachellam Chetti*, I. L. R. 23 M. 441; *Daswant Singh* v. *Syed Sham Ramjan Ali*, 6 C. L. J. 398 approved. *Pandia Doraiswami Tevar* v. *Lakshmana Chetty*, 14 M. L. J. 284 ; *Thangamma Nachiar* v. *Subbammal*, 16 M. L. J. 20 ; *P. Narayana Moorthi Iyer* v. *Marimuthu Pillai*, I. L. R. 26 M. 322, *Kumara Nath Bhattacharjee* v. *Nabakumar Bhattachrjee*, I. L. R. 26 C. 244 *and Izat-un-nissa Begam* v. *Kunwar Pertap Singh*, I. L. R. 31 A. 553 (P. C.): distinguished.

Ragunatha Chariar v. *Sadagopa Chariar.* 983

Banker and Customer—*Banker as Secretary and Treasurer—Fiduciary relationship—Mixing up of moneys—Voluntary payment, defined* :—A. B. and Co. were the Secretaries and Treasurers of the plaintiff Co. and as such held the moneys belonging to the plaintiff company. Three months after a resolution by the directors of the plaintiff company that a sum should be invested in the purchase of Government pro-notes, A. B. and Co. purchased the suit pro-notes and soon after presented a petition for insolvency and a vesting order was made in a suit by the plaintiff company against the Official Assignee. *Held* :—That A. B. and Co. held the money in a fiduciary capacity and not as the bankers of the plaintiff company. Per *Abdur Rahim, J.*:—That A. B. and Co. did not misappropriate the moneys by the mere fact of their having mixed up the company's money with their own ; that even otherwise, there was no voluntary payment in the circumstances of the case. Voluntary payment defined.

Ramsay & Co. v. *The Official Assignee of Madras* 921

——————*Fiduciary relationship—Demand and promise to pay, effect of*:—A creditor cannot transform his debtor into a trustee by merely demanding payment. A simple demand and promise to pay the money does not amount to an agreement to hold the money due for a special purpose.

The Official Assignee v. *Krishna Bhatta* 125

Bengal Acts—Cess Act (IX of 1880, B. C.) Ss. 6, 72, 76, 80, 81 and Schedule E.—*Proprietor of land—Coal mines—Royalty—Cess on royalty—Annual net profits—Liability to pay cess—Policy of Cess Act* :—Where the plaintiff, who was the owner of landed property leased it to various parties for the working of coal mines, and who, besides the rent of surface land, received, under the designation of royalty, a percentage on the coal raised by the lessees or mine-owners, had been assessed for 'cess' under the provisions of the the Cess Act (IX of 1880, B.C.) in respect of the royalty received or receivable by him from the coal mines on his estate: *Held*, that the return required under S. 72 of the Act was

Bengal Acts—(*Contd.*) PAGE.

not with regard to the mine-owners' profits, but had reference to the general net profits of the property; that the royalty receivable by the plaintiff was part of the 'annual net profits' of the mine within the meaning of those words in Ss. 6 & 72 of the Act; and that the plaintiff had been properly assessed with 'cess" thereon. In S. 81 of the Act the words 'owner' is used in the sense of proprietor, but liability for the 'cess' lies on both 'occupier' and 'owner' in the case of mines, etc., as in the case of land it lies on holders of estates or tenures or rayats, the policy of the Act being that all persons who benefit by the maintenance and construction of 'roads and other means of communication' or 'works of public utility' out of the cesses, should bear the liability of paying the same.

Manindra Chandra Nandi v. *The Secretary of State for India.* (Mr. Ameer Ali) 365

Bengal Tenancy Act, Ss. 188, 30 and 7 (1)—"*Acting together*"—*Suit for enhancement of rent—Parties—Joint landlords*:—The Bengal Tenancy Act prohibits one or some of two more joint landlords from suing to enhance the rent unless both or all of the "fractional landlords". join in the suit as co-plaintiffs. [Raja Pramada Nath Roy *v.* Rajah Ramani Kanta Roy, L. R. 35 I. A. 73 distinguished]. If a person is made a defendant because he is unwilling to act together with the plaintiff, he cannot be deemed to be 'acting together with the plaintiff' within the meaning of S. 188 of the Act by his being placed on the record as defendant. *Obiter*: A suit for the recovery of rent does not require the authority of the Bengal Tenancy Act and consequently stands on a different footing.

Jatindra Nath Chowdhry v. *Prasanna Kumar Banerji* (Lord Macnaughten) 92

Cantonment land—*House from before the time of the formation of cantonment—Presumption—Licensee.*

Mere possession or occupation of a bungalow on cantonment site affords no presumption whatever that the owner or occupier or his predecessors in title were owners in fee.

Where at the time the cantonment was formed, compensation was given to all owners of sites for surrender of their occupancy rights, the presumption would be, even assuming that the suit house was there from before the time of the formation of the cantonment, that the owner of the suit site was similarly compensated.

Held:—That the owners of the suit house were mere licensees, that the lands in question had been lawfully resumed, and that the owners need not be paid compensation on the basis of private ownership.

Ghaswala v. *The Secretary of State for India in Council.* (Lord Robson) 1101

Caste Disabilities Act—Regulation VII of 1832 and Act XXI of 1850—*Effect of convert's rights in* 1845—*Revival of barred right—Convert from Hinduism to Mahomedanism—Family settlement—Compromise of suit—"Alienation"—Distinction—Test—Hindu Law—Reversionary suit*:—The effect of S. 9 of Regulation VII of 1832 (Bengal) and afterwards of Act XXI of 1850 which extended the principles of Regulations VII of 1832 to the whole of British India is virtually to set

Caste Disabilities Act—(*Contd.*) PAGE

aside the provisions of the Hindu Law which penalises renunciation of religion or exclusion from caste. A Hindu became a convert to Mahomedanism in 1845. *Held* that the convert's son who remained a Hindu did not acquire any enforcible right to his father's share in the joint family property which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice, and even if the enactments permitted it, no suit could be brought to enforce the son's right after the lapse of 12 years from the time the cause of action arose, and the right being barred in 1857 nothing in Article 142 of Act IX of 1871 or Article 141 of Act XV of 1877 revived the barred right.

Khunni Lal v. *Gobind Krishna Narain* (Mr. Ameer Ali.) ... 645

Caveat emptor: applicability to COURT SALES : *See* EXECUTION SALE ... 969

Charter Act, S. 15:—*Revision from interlocutory orders*:—S. 15 of the Charter Act is sufficiently wide to admit of interference by the High Court from interlocutory orders, though it may be doubted whether the words of S. 115, C P. C., were intended to apyly to interlocutory orders.

Nagaraja Pillai v. *Vythianatha Iyer* 484

C. P. C., S. 11 (O. C. S. 13)—"Court of competent jurisdiction"—*Original court and not trial court—"Heard and decided"—Prior decision of same court based on a previous decision of inferior court, not "heard and decided*:"—The words "competent jurisdiction" in S. 13 of Act XIV of 1882 relate to the competency of the trial court, and the fact that the appellate court in the previous litigation would have been competent to try the subsequent suit does not make the previous adjudication *res judicata* if the original court in the prior litigation is not. S. 13, C. P. C., in terms requires for the bar a hearing as well as final decision by a court competent to try the later suit. A decision of a superior court in a second litigation in accordance with the decision of an inferior court in a previous litigation passed by reason of S. 13, is no *res judicata* in a third litigation which the original inferior court would not be competent to try by reason of the decision in the second litigation by the superior court, the matter not being "heard and decided" by it in the second litigation. The law of *res judicata* does not compel a court trying a later suit to hold that the decision in the earlier suit is correct. It merely estops the parties and their privies from showing that the prior decision was incorrect.

Valeswara Iyer v. *Muthukrishna Iyer* 57

——————*Appealable value of the Privy Council—Evasion of bar by including untenable claim*:—A plaintiff cannot be allowed to evade the bar of *res judicata* by including in a later suit a clearly untenable claim (*i. e.*, one on the face of it barred by limitation) and thus increasing the value of the subject-matter so as to be capable of being appealed to the Privy Council.

Venkatanarasimha Appa Row v. *Narasimha Charyalu*. ... 551

——————*Right and duty to perform a service—Distinction—Relief when to be granted*:—A decision between the parties as to whether the plaintiff was entitled to use a seal bearing the inscription "Dharmakarta" by the District Munsif's Court, cannot operate as *res judicata* in

C. P. C.—(*Contd.*) PAGE.

respect of the subsequent suit brought in a District Court for a declaration that the plaintiff is Dharmakarta of various temples. The distinction between rights and duties is in most cases a distinction without a difference. There is such a thing as right to perform a duty; and where a duty is cast upon a man in virtue of his connection with an institution or an abstract personality (as distinguished from a specific individual who might absolve him from performance) and where it is primarily for the benefit of such an institution or personality he may reasonably claim the aid of law to prevent his being obstructed in performance of the same; and where the right has ceased to be beneficial to the institution or personality the relief should be refused.

Pedda Jiyangar Varu v. *Mahant of Tirupathi.* 730

————**Expl. (2)—" Directly and substantially in issue "**—*Heard and decided—Rent suit—Propriety of patta, issue on, how far directly and substantially in issue—Second suit for rent of subsequent fasli—Extent of holding, question of:*—Plaintiff brought a suit for rent due for fasli 1316. Defendant raised the plea that the patta tendered was not a proper patta in that it mentioned a larger extent of land as comprised in his holding than was really the case. The plaintiff had previously brought a suit for rent for fasli 1314 and had obtained a decree. The patta then tendered was similar to patta for the suit fasli and the issue in the previous suit was " whether plaintiff tendered pattas to the 1st defendant and whether the pattas so tendered were proper." The decision was that there was tender and that there was nothing objectionable in the patta. *Held*—:Per *Sankaran Nair, J.* (*Munro, J.* dissenting).—That the decision in the prior suit was not *res judicata.* Per *Sankaran Nair, J.*—(1) The title to the land comprised in the patta was not directly and substantially in issue in the previous suit for rent, a decree for rent not necessarily involving the decision that a proper patta had been tendered. (2) There was no clear finding as to the ownership of the land entered in the previous suit. (3) Explanation (2) to S. 11, C.P. C., does not dispense with the necessity of a finding upon the issue by the Judge in the previous suit.

Bammidi Bayya Naidu v. *Bammadi Paradesi Naidu* ... 344

————*Mortgage suit—Prior mortgagee's rights:*—In a mortgage suit by a puisne mortgagee, the prior mortgage was recited in the plaint and the District Munsif, while dismissing the suit, found the amount due on the prior mortgage. The puisne mortgagee appealed to the District Judge but did not, in his grounds of appeal, take any objection to or make any mention of the finding on the question of the prior mortgage and the decree of the District Judge was silent upon the point. *Held*:—That the finding about the prior mortgage by the Munsif could not be incorporated by implication into the decree of the District Judge and the finding did not operate as *res judicata* against the prior mortgagee. (*Srinivasa Rao Sahib* v. *Yamuna Bai Ammal*, I. L. R. 29 M. 84. referred to. *Sri Gopal* v. *Pirthi Singh*, I. L. R. 24 A. 429: distinguished.)

Arunachala Reddi v. *Perumal Reddi* 635

————*Probate proceedings—Revocation, question of—Question in issue*

in probate proceedings:—The bare decision in a probate proceeding that two prior wills of the testator had not been revoked by a third will is not *res judicata* in a subsequent suit where the question is how far the dispositions in the prior wills were affected by the third will.

Maryammal v. *Kaliyammal* 485

——————*Suit by karnavan for possession on the basis of the prior decree no res judicata* :—*See* MALABAR LAW—KARNAVAN.

——————"**Heard and decided**"—*Consent decree*:—A consent decree passed for rent due to the plaintiff for certain faslis on the basis of the admission by the defendant in the case will not be *res judicata* in a subsequent suit for rent due in respect of subsequent faslis on the question of the share which the plainttff is entitled to.

Bacha Sahib v. *Karuppanna Pillai* 449

——————*Compromise decree, nature of—Error of law, no ground of attack* :— S. 13, C. P. C. (1882), as such, is not applicable to compromise decrees. The basis of a compromise decree is a contract between the parties to the litigation, and though the principles applicable to contracts may have to be considered in determining the rules of estoppel applicable to such decree, yet it cannot be regarded as a mere contract but stands on a much higher footing. Indeed in certain respects compromise decrees are even on a higher footing in certain matters as regards the estoppel they create than decrees by courts passed on contest. A compromise decree, unlike decrees passed on contest, cannot be impeached on the ground of error of law. The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise must depend on the answers to the following questions :—Did the parties decide for themselves the particular matter in dispute by the compromise ? Was the matter expressly embodied in the decree of the court passed on the compromise, or was it directly involved in, or was it the basis of what was embodied in the decree ? For settling this point, it would be legitimate, and sometimes necessary, to look into the pleadings between the parties in the suit terminated by the compromise decree. Even if the compromise was made before the defendant put in his written statement, it would be still proper to look at the allegations in the plaint to understand the terms of the compromise. It is, no doubt, open to the parties to agree to terminate a suit in a particular manner without any questions raised by the plaintiff or put in issue between the parties being determined, but whether the compromise proceeded on such an understanding is a matter of construction in each case, and no hard and fast rule applicable to all cases can be laid down. Whatever is necessarily involved in the decree pronounced cannot be reopened by either party. To this extent Expl. II to S. 13, C. P. C. (1882), is applicable to compromise decrees.

Varada Chariar v. *Ramaswami Chetty* 709

——————**S. 24**—*Notice—Want of irregularity*—Transfer of a suit without notice to parties as required by S. 24, C. P. C., when the transfer is at the instance of parties is a material irregularity, but their Lordships did not interfere in the case as the District Court could have effected the

C. P. C.—(*Contd.*) PAGE

transfer *suo motu* without notice.

Mathura Dass v. *Venkat Rao* 829

——S. 47 (O. C. S. 244)—*Suit to set aside sale against stranger purchaser—Maintainability—Stranger-purchase whether, and how far, representative of parties to suit:*—A suit against the auction-purchaser to recover a temple office sold in execution of a money-decree against the holder of the office is not maintainable under the Civil Procedure Code (Act XIV of 1882) unless the sale be set aside in execution. Per *Wallis, J*:—S. 244, C. P. C., is a bar to the suit. It is well settled that the provisions of S. 244 prohibit a suit by a party or his representatives against an auction-purchaser to raise a question which, as between the judgment-debtor and the decree-holder, must have been determined under S. 244. [*Manikka Odayan* v. *Rajagopal Pillai*, I.L.R. 30 M. 507: explained]. Per *Krishnaswami Aiyar, J*:—S. 244, C.P.C., is no bar. The auction-purchaser derives his rights from the sale but the sale not having been set aside in execution the party to the execution proceedings, should not be permitted to impeach it except by application to the executing court. *Obiter*:—A stranger-purchaser cannot be the representative of either the decree-holder or the judgment-debtor. The true rule is where the decree is a mortgage-decree, the purchaser in execution will be the representative of the judgment-debtor. Where property is attached and sold under a money-decree, a stranger-purchaser obtains the rights of the judgment-debtor but is not the representative of either the judgment-debtor or the decree-holder. [*Manikka Odayan* v. *Rajagopal Pillai*, I. L. R. 30 M. 507 dissented from.]

Narayana Iyengar v. *Rangaratnam Pillai* 928

——*Appeal—Order declaring decree executable—Preliminary and final orders*:—The determination of any question within S. 47 is a decree and the decision of the question whether a decree executable or not is certainly a decree. An order that execution should issue and that a commissioner should be appointed for partition is a decree and is appealable. [*Venkatagiri Aiyar* v. *Sadagopachariar*, 14 M.L. J. 550; *Narayana Pattar* v. *Gopalakrishna Pattar*, I. L. R. 28 M. 355; *Ram Rupal* v. *Rup Kuari*, I.L.R. 6 A. 269 (P.C.) and *Bhup Indra Bahadur Singh* v. *Bajai Bahadur*, I.L.R. 23 A. 152 (P. C.) referr- to.] When the law gives a person two remedies he is entitled to avail himself of either of them unless they are inconsistent. [*Mussamatt Golab Koer* v. *Badshah Bahadur*, 13 C.W.N. 1197 referred to.] Where two orders are passed in execution, the second after and in consequence of the first, and the statute gives a right of appeal against both, an appeal is competent against the first order alone even though the second order has been passed before the filing of the appeal itself; and if the first order is reversed in consequence, the second order will *ipso facto* cease to have effect.

Lakshmi v. *Mani Devi* 1063

——S. 73, O. 21, rr. 6, 7, 8—"*Receipt of assets*"—*Sale—Date of deposit and date of full payment—Transfer of decree for execution—Application for rateable distribution before copy of transferred decree is received—Attachment in execution of Munsif's decree—Sale by District*

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Court—Right to share in sale proceeds—Order of events :—"Assets are received," in the case of sales of immovable properties, within the meaning of S. 295, C.P.C., only on the date of the full payment of the purchase-money and not on the date of the preliminary deposit, and the purchase-money becomes the assets of the judgment-debtor only then and not on mere deposit. (*Ramanadhan Chettiar* v. *Subramania Sastriar*, I. L. R. 26 M. 179 and *Muthalagiri* v. *Muthayan*, I. L. R. 6 M. 357 followed.) A court to which a decree is sent for execution may not be competent to execute it before copy of the decree is received; but when once an order is made sending a decree to another court for execution, that by itself is sufficient to entitle the decree-holder to apply to the court to which the decree is sent for execution for rateable distribution of his share of the assets for the purposes of S. 73, C.P.C., (Act V of 1908). Where assets are realized by the District Court and the judgment-creditor seeking distribution is the holder of a decree of the Munsif's Court who had attached the property, the right to share in the proceeds realized by sale of attached property is independent of a transfer of the decree for execution to the District Court and arises by virtue of his attachment. A transfer of the decree of the Munsif to the District Court is unnecessary to entitle the petitioner to rateable distribution in the sale proceeds of the attached property. [*Nimbaji Tulsiram* v. *Vadia Venkatti*, I. L. R. 16 B. 683 followed and *Clark* v. *Alexander*, I. L. R. 21 C. 200 approved.] Where the application for execution is made on the same day in which the assets are received court is bound to ascertain the order in which they occurred.

Arimuthu Chetty v. *Vayapuri Pandaram* 505

———**S. 92 (O. C. S.539.)**—*Suit for the removal of a trustee and for the appointment of a fresh trustee*:—A suit for the appointment of a new trustee requires sanction under S. 539, C.P.C.

Ghulam Ahmed v. *Sheik Mahomed Yusuf* 450

————————*Scope of—No removal of trustee possible under the section* :—In a suit under S. 539, C. P. C. of 1882, an existing trustee cannot be removed. [*Rangasawmi Naiken* v. *Varadappa Naiken*, I. L. R. 17 M. 463 referred to.]

Krishnayya v. *Subbayya* 784

————————*Scheme suit —Effect of—Bar to subsequent suit by trustee to establish private rights—Hereditary right to trusteeship—Proof*:—A scheme once settled under by court in respect of a public trust cannot be altered except by the court and then only on substantial grounds; and consequently, a scheme framed by a court under S. 539 (Act XIV of 1882) is a bar to a subsequent suit by a trustee who was not a party to the scheme suit, to establish his private rights with reference to the trust which is established, would interfere with a charitable scheme settled by court. The erroneous order of court refusing to make him a party to the previous scheme suit cannot give the private individual a right to sue which he otherwise would not have had. His only remedy, if any, would seem to be to induce the Collect-

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or to ask for a modification of the court's scheme under S. 92 of the new code.

Rama Das v. *Hanumantha Row* 952

——**S. 95 (O. C. Ss. 491, 497)**—*Appeal from award of compensation for improper attachment.*—An appeal lies against an order awarding compensation for improper attachment. [*Narasinga Bakshi* v. *Govinda Bakshi*, I. L. R. 24 M. 62; distinguished ; *Lokanath* v. *Amir Singh*, I. L. R. 28 A. 81 not followed.]

Kandappa Chetty v. *Chinnappa Goundan* 460

——————*Scope of—No bar to regular suit—Tort—Wrongful attachment—Essentials for relief—"Malice" and "Want of reasonable and probable cause"—"Malice"—"Special damage"—Meaning of—Damages, measure of—Cr. P. C., S. 250* :—S. 95, C.P.C. is no bar to a regular suit for damages for wrongful attachment before judgment. It creates a special jurisdiction in the court trying a suit to award compensation as incidental relief and gives an alternative remedy in cases of wrongful attachment and in no way interferes with the principles regulating suits for damages for abuse of court's process. The section allows a limited remedy without proof of malice, which it is open to a party to avail himself of if he chooses. Remedy provided by S. 95, C. P. C., compared with the analogous remedy provided by S. 250, Cr. P. C. In a suit for damages for wrongful attachment, the ordinary rule followed in cases of damages for malicious prosecution, that the defendant would not be responsible unless he had acted with malice as well as want of reasonable and probable cause, applies. If the object of the defendant in obtaining attachment before judgment be merely to put pressure upon the plaintiff to pay his dues promptly and not to prevent any apprehended alienation by him, then the plaintiff is guilty of malice. If the object be the levying of black mail, the coercion of the accused in respect of some unconnected matter, the obtaining of compensation or restitution from the accused—that would amount to malice. Recklessness regarding the truth or otherwise of the allegations would also amount to malice.

Manjappa Chettiar v. *Ganapathi Gounden* 1052

——**S. 100 (O. C. S. 584)**—*Second Appeal—Question of law—Inference from facts*:—Where from admitted facts a particular conclusion is the *only* inference that can be drawn by a court and the lower appellate court fails to draw that inference, the matter may be said to be one of law into which it would be competent to the High Court to enter. But where more than one inference is possible, the fact that the lower appellate court made one instead of another is no ground of law justifying interference in second appeal.

Mallikarjuna Prasada v. *Venkata Vasudeva* 156

——**S. 104 (1), Cl. (f)—Sch. II, Cl. 21 (O.C.S. 526)**—*Appeal from decree in terms of award converted into one from order filing award—Arbitration—Estoppel—Internal procedure*:—Though no appeal lies from a decree in terms of the award *qua* decree except in so far as it is in excess of or not in accordance with the award, yet their Lordships treated an appeal so filed as one from the order filing an award under

C. P. C.—(*Contd.*) PAGE.

S. 104, Cl. (*f*), C. P. C. Where one of the parties consented to the proceedings before the arbitrator being of an informal character, he cannot afterwards seek to impeach the award upon the ground of irregularity in the conduct of the proceedings.

Sitaramaiya v. *Pichaiya* 1005

———**S. 115 (O.C.S. 622)** "**failure to exercise jurisdiction**"—*Dismissal of application as barred—Limitation of twelve years from the date of decree—Appellate decree*:—If a Court rejects an application under an erroneous view that it is barred, it fails to exercise a jurisdiction vested in it within the meaning of S. 115, C. P. C. Whether an appeal is preferred from a decree, it is from the date of the appellate decree that limitation runs for the purposes of S. 48 of the Code of 1908.

Narasaya Hegade v. *Vittaprabhu* 1020

————————*Dismissal of suit on the ground of discrepancies between the pronote and the plaint*:—It amounts to a failure to exercise jurisdiction on the part of a Judge if he dismisses a case barely on the ground of discrepancies between the suit pronote and the plaint based on it; and the High Court is bound to interfere with the judgment in revision.

Maharaja of Vizianagaram v. *Suryanarayana* 452

————————**Material irregularity**—*Practice—Procedure when another remedy open—Garnishee proceedings in firm's name bad—Presidency Small Cause Courts Act*, *S.* 36 *and Rule* 223:—A firm of partners cannot be proceeded against in their firm name; nor can garnishee proceedings be instituted against certain individuals in their firm name. The institution of proceedings in the firm name implies absence of notice to the individuals specifically, which is a material irregularity. The High Court does not usually interfere in revision where there is another remedy open to parties. It is only where a suit is contested that a re-hearing by the Full Court can be asked for in respect of an order passed by a judgment, but an application to set aside an *ex-parte* order in garnishee proceedings cannot be treated as a suit, and consequently no re-hearing being permissible, the High Court can interfere in the case.

Murugappa Chetty v. *Ranganayakulu Chetty* 525

———*Pronote—Suit on—Onus—Admission in pleadings or evidence*—Defendant's case and plaintiff's case both disbelieved. *See* PRACTICE—PROCEDURE—NEGOTIABLE INSTRUMENTS, S. 118... 1013

———**S. 141 (O. C. S. 647)**—"*Procedure*," *meaning—Reference under O.* 46, r. 1 *in an application under S.* 83, *T. P. A.*, *incompetent*:—S. 141, C. P. C., does not give a party to a proceeding, which is not a suit, a right of appeal. It refers only to the mode of trial and the procedure incidental thereto: and it does not include a reference under O. 46, r. 1, which is incompetent in proceedings which are not suits.

Damodara Menon v. *Kelappa Menon* 613

———**S. 154—(O. C. S. 310 A)**—"*Any present right of appeal*"—*Statute of procedure—Construction—Essentials of application of S.* 310-*A*:—The right of appeal in a pending action is not a matter of procedure; and where a person had filed an appeal under

C. P. C.—(*Contd.*) PAGE.

an old Procedure Code which gave him a right of second appeal if the decision went against him, the passing of a new Code which did not give a right of second appeal in a similar case will not take away the appellant's right of second appeal. The words "any present right of appeal" in S. 154, C.P.C., do not mean anything more than that no right of appeal which has become vested in a litigant shall be affected by the present Code. S. 310-A (Act XIV of 1882) confers a special right on the judgment-debtor and before he can avail himself of benefit of the section he must comply strictly with its terms. A deficient deposit cannot be made good after the time allowed by the Court appropriating deposits paid on other accounts by the judgment-debtor.

Kalinga Hebbra v. *Narasimha Hebbra* 631

———**O. 2, rr. 1 and 2 (O. C. Ss. 42, 43)**—*Scope of—Buddhist Law—First suit for divorce—Second suit for partition—No bar*:—Ss. 42 and 43 are aimed against a multiplicity of suits in respect of the same cause of action. An objection founded upon the sections should be treated as a preliminary point, and when no notice of the point is given by the defendant either in the defence, or at the trial, or in the grounds of appeal first delivered, she should not be allowed to raise it subsequently except upon terms which would indemnify the plaintiff for the defendant's omission to raise it at the proper time. A Buddhist husband first sued his wife for divorce on the ground of misconduct. The wife denied the misconduct but eventually consented to a decree for divorce. The husband subsequently brought a suit for the recovery of property which he alleged his wife had fraudulently kept in her possession and for a partition of their joint property. The shares of the respective parties depended according to the Buddhist law vary much on the grounds of divorce. *Held* :—The second suit was not barred by Ss. 42, 43, C.P.C., the causes of action for divorce and partition being different. The cause of action for the divorce was the misconduct of the wife, but the cause of action for partition was the divorce of the wife founded on that misconduct. If the court should be of opinion that a petitioner has unnecessarily severed his claim for partition from a claim for divorce, it may, of course, punish the plaintiff by the exercise of its discretion as to costs, but such a severance does not come within the mischief aimed at by Ss. 42, 43, C. P. C., so as to bar the claim to a partition which may be founded on the decree for divorce itself.

Maung Pe v. *Ma Lon Ma Gale.* 756

———**O. 5, rr. 17, 20 (O.C. Ss. 80 to 82)—Service of summons**—*Mode of effecting service—Defendant absent in foreign territory*:—Service ought primarily to be made on the defendant personally and every reasonable effort should be made to effect such service. But if it appears that reasonable efforts have been made to effect personal service but without success, the Code permits of the summons being affixed to the outer door of the residence of the defendant. When the officer is justified in taking the latter step, such service would not be open to objection. Where the officer was informed that the defendant had gone to a foreign territory and that it was not known when he would return, it is not necessary that

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service should be taken to the defendant in the foreign territory, especially when the defendant was moving from village to village therein. *Abraham Pillai* v. *Donald Smith*, I.L.R. 29 M. 324 doubted. *Sankaralinga Moodelly* v. *Ratna Sabapathi Moodelly*, I. L. R. 21 M. 324 approved.

Visvanathan Chetty v. *Arunachellam Chetty* 978

——— **O 7, r. 10 (O. C. S. 51)**—*Plaint,—Return of—Practice, as to old stamp—Credit to be given to old stamp:—See* COURT FEES ACT, S. 30 ... 533

——— **O. 18, r. 15 (O.C.S. 191)** "*Concluded the trial*"—*Remand—Trial before another Judge—De novo trial*:—The trial of a suit was concluded by the Judge; on appeal the appellate court remanded the suit to the court of first instance for disposal according to law on the substitution of fresh parties on the record, and in the meanwhile the Judge who first concluded the trial had been succeeded in office by another. *Held*: —That there should be a *de novo* trial, and that S. 191 of the Code of 1882 did not apply.

Krishna Bai v. *Collector of Tanjore*... 80

——— **O. 21, r. 2 (O. C. S. 258)**—*Suit for refund of money paid a second time owing to the default of decree-holder to certify—Limitation*:—*See* LIMITATION ACT, ART. 17 518

——— **O. 21, r. 2 (O. C. S. 257 A.)**—*Scope and effect of S. 257 A—Waiver—Public Policy*:—The prohibition contained in S. 257 A., C.P.C. (1882), is not based on any rule of public policy rendering agreements in contravention of the section illegal. It is merely unenforceable in execution proceedings or by a fresh suit as the case may be. The rule is merely enacted for the benefit of the individual judgment-debtor and one reason for the rule was probably that litigant parties should not have the right to interfere with the decrees of courts, a reason which would probably indicate that the rule is applicable only to execution proceedings, and it is open to a judgment-debtor to waive the benefit of the rule.

Varda Chariar v. *Ramasawmi Chetti* 709

——— **O. 21, r. 4 (O. C. S. 368.)**—*Ejectment suit—Effect of abatement against one defendant as regards other—Wrong order for withdrawal of suit with leave—Effect on second suit*:—In an ejectment suit against several trespassers where one of the defendants dies and the plaintiff fails to bring his legal representative on record, he can still proceed against the other defendants in the suit. [*Joy Gobind Saha* v. *Manma Nath Banerji*, I. L. R. 33 C. 580 and *Upendra Kumar Chakravarthi* v. *Sham Lal Mandul*, I.L.R. 34 C. 1020 followed.] *Obiter*:—The result will be different in a suit for taking the accounts and winding up of the affairs of partnership. [*Rajchunder* v. *Ganga Das Sen*, I.L.R. 31 C. 487 referred to.]

Perumal v. *Karupan* 574

——— **O. 21, r. 32 (O. C. S. 260, Cl. (2))**—*Scope of—Applicability of section to decree directing abstention*:—S. 260, C.P.C. (1882), applies to cases where the judgment-debtor is restrained from doing an act, *e.g.* as in this case, from taking water which the decree-holders carry through a *thodu*.

Manikaram v. *Narayanan* 465

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——**O. 21, r. 53 (O.C.S. 273)**—*Attachment of decree—Effect of attachment—Decree allowed to be barred by attaching creditor—Collusion—Damages*:—Attachment of a decree prevents the execution by the decree-holder thereof until and unless any of the events mentioned in S. 273 C. P. C., happens; [*Pathumma* v. *Idivi*, 13 M. L. J. 265; *Adhar* v. *Lal Mohan*, I. L. R. 24 C. 668 not followed. *Sami* v. *Krishna*, I. L. R. 21 M. 417 distinguished; and consequently, the attaching creditor who attaches the decree, if he prevents the execution of the decree and allows it in collusion with the judgment-debtor to be barred is liable in damages to the decree-holder whose decree was attached and allowed to be barred.] The only person who could execute a decree under attachment is the attaching creditor. Any application by the decree-holder of a decree under attachment, for execution would be infructuous and an infructuous application will not save limitation.

M. Husani v. *Jani*, I. L. R. 27 A. 619, *Gurupadappa* v. *Virabadrappa*, I. L. R. 7 B. 459 and *Puma Chandra* v. *Radha*, I. L. R. 33 C. 867 referred to

Unni v. *Pathutti* 577

——**O. 21, r. 63 (O. C. S. 283)**—*Order adverse to judgment creditor*:—An order under S. 283, C. P. C. need not be solely an order relating to the right to physical possession of the property but may be with reference to the right to claim the property in dispute ....

Rama Aiyar v. *Palaniappa Chetty* 756

——**21, rr. 80, 81 (O. C. Ss. 302 and 303)**—*Sale of negotiable instrument—Transfer by vesting order—Right of transferee—Vesting order obtained after suit but before decree*:—A negotiable instrument can be transferred otherwise than by indorsement as an actionable claim. Rule 80 of O. 21, C. P. C., is merely an enabling section and where a court passes a vesting order under Rule 81 of O. 21 in respect of the negotiable instrument, the transferee is entitled to sue on it on the strength of the vesting order; and it is enough that he obtains the vesting order before decree.

Muthulingam Pillai v. *Packiam Fernandez* 422

——**O. 21, rr. 97, 99 (O.C.Ss. 328, 331)**—*Complaint of obstruction preferred beyond "one month"—Registry as suit not proper*:—It is illegal to register an application under S. 328, C. P. C., filed after one month from the date of obstruction as a suit. *Obiter*:—Where a suit is found barred by limitation, it is not open to a court to allow the plaintiff to withdraw the suit with liberty to bring a fresh one, if the fresh suit is one which would be barred by the decision in the earlier suit.

Valliammai v. *Shanmugam Pillai* 664

——**O. 21, r. 99 (O. C. S. 331)**—*Scope of—Government's right to come in after grant of patta*:—S. 331 of the Code of 1882 applies only where the resistance or obstruction has been occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor. When Government grants a patta for land it ceases to have possession of any kind whatsoever and the fact that charge is made for *jenmabhogam* in addition to the assessment

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does not affect the matter ; and consequently the Government is not entitled to come in under S. 331. [*Pullanapally Sankaran Nambudri* v. *Vittil Thalakrat Muhamad*, I. L. R. 28 M. 505 followed.]

Karunakara Menon v. *Secretary of State for India* 409

——— **O. 23, r. (1) (O. C., S. 375)**—*Jurisdiction to grant leave without defendant's consent—Leave on Mistaken view* : - A Court has jurisdiction to grant leave to institute a fresh suit whether the defendants consent to it or not. Where a court wrongly purports to give leave to withdraw a suit with leave to file a fresh suit as with the consent of the defendant while the defendant himself was dead and there was no one brought on the record as legal representative. *Held* :—That no objection could be taken to the second suit on the ground that the order granting leave was made on a misconception of facts or that the leave was inoperative, the prior order not having been set aside in due course.

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——— **O. 23, r. (1), Cl. (3), (O. C., S. 373)**—"*Instituting a fresh suit*" *Proceedings in execution against defendants against whom suit was withdrawn—Obstruction by exonerated defendants* :—Where a suit is withdrawn against certain defendants with leave to file a fresh suit and in execution the said defendants obstruct delivery, the decree-holder is precluded from proceeding with his application to remove the obstruction by O. 23, r. 1 (S. 373, O. C.)

Biram Beni Ammal v. *Syed Shumsuddin* 404

——— **O. 26, rr. 13, 14 (O. C. S. 396.)**—*Commission to examine witnesses—Party's right to*:—A party to a suit has a right to the issue of a commission to examine a witness beyond the prescribed distance, apart from the question whether he would be ultimately benefitted by it.

Sitamma v. *Subraya* 889

——— **O. 32, r. 7 (O. C. S. 462)** "*On behalf of a minor*"—*Hindu Law—Decree directing payment of money to father alone—Father foregoing benefit by compromise in appeal—No necessity for sanction*:—The appointment of a Hindu father as guardian *ad litem* will not deprive him of his capacity to act on his own behalf; and a compromise *bona fide* entered into by him of a disputed claim foregoing money payable only *to him*, though as representative of the family of which he is the head, will be binding on the minor members of his family who are parties to the litigation, and S. 462 C. P. C. (1882) is not applicable to such a case.

Ganesha Row v. *Tulja Rani Row* 1093

——— **O. 39, r. 2, Cl. (3) (O. C. S. 493)**—"*Court granting the injunction*"—*Meaning—Not the court to which the suit has been transferred for trial*:—An application under Cl. (3) of rule 2 of O. 39, C.P.C., cannot be transferred for trial subsequent to the passing of the *ad interim* injunction. "The court granting the injunction" does not include the court to which the suit has been transferred subsequent to the passing of the *ad interim* injunction. *Semble* :—The *ad interim* injunction itself would probably be enforceable by the court to which the suit has been transferred.

Mathura Dass v. *Venkat Rao* 829

C. P. C.—(*Contd.*) PAGE

———**O. 34, rr. 7, 8 (T. P. A., Ss. 92, 93)**—*Mortgage—Redemption suit—Application by mortgagor for sale on failure to deposit—Competency*:—It is competent to a mortgagor to apply for sale where a decree directing a sale has been passed under S. 92, T. P. A. in a suit for redemption. [Dictum of *Bhashyam Aiyangar, J.* in *Vedapuratti* v. *Vallabha Valia Raja*, I. L. R. 25 M. 300 approved. *Vallabha Valiaraja* v. *Vedapuratti*, I. L. R. 19 M. 40 not followed.]

Govinda Taragan v. *Veeran.* 941

——— **O. 40, r. 1 (O. C. S. 503)**—*Receiver, ad interim—Just and convenient—Suit against Hindu widow—No allegation of specific waste*:—A *bona fide* possessor should not ordinarily be displaced from any of the just rights attached to his title unless there be some equitable ground for interference. To justify the appointment of an *ad interim* receiver in a suit against a Hindu widow who is in *bona fide* possession of the property, in virtue of her legal title to it, and which possession she would be admittedly entitled to for her life even if plaintiff succeed in the suit (the suit being one for declaring an alleged will of the last male owner a forgery) there should be some equitable ground for such appointment, and a court will be acting wrongly in appointing a receiver on bare grounds of expediency in the absence of specific proof of waste, etc.

Sivagnanathammal v. Arunachellum Pillai 821

———**O. 46, r. 1, (O. C. S. 617)** does not authorize a court to invoke the jurisdiction of another court any more than it authorizes a party to do so by way of appeal. Consequently, a court cannot make a reference under O. 46, r. 1, in an application under S. 83, Transfer of Property Act.

Damodhara Menon v. *Kalappa Menon* 613

——**Sch. II (O. C. S. 510)**—*'Refuses'—Scope of—Jurisdiction of court to appoint new arbitrator—jurisdiction of court to proceed with suit after decree in terms of compromise—Refusal of arbitrators to act—Refusal of party to nominate another—Practice—Procedure*:—When an arbitrator is nominator by parties his 'refusal' to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. He need not first accept and then only refuse to constitute a refusal within the meaning of the section. The parties to a suit entered into a compromise to refer the matter in dispute to arbitration. The Court passed a decree in terms. One of the arbitrators refused to act and one of the parties refuse to name another in his stead. The Court took up the matter again and proceeded "with the suit." *Held* that the original decree put an end to the suit and the Court could not therefore have proceeded with the suit. Parties who agree to set up a tribunal of arbitration are not bound to submit the case referred to another tribunal such as a District or other Judge. The only procedure open to the Court was itself to appoint another arbitrator and that the objection as to want of Jurisdiction if the District Judge to act was fatal; *Pugardin Ravutan* v. *Modinsa Ravutan*, I. L. R. 6 M. 414; *Bepin Behari Choudry* v. *Annoda Prasad Mullick*, I. L. R. 18 C. 324 overruled.

Mirza Sadi Hussain v. *Mussamat* 1151

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C. P. C., Sch. II, para 17 (O. C. S. 523)—Scope of—O. 23, r. 3— *Adjustment—Bare agreement to refer to arbitration not an adjustment—Decree—Appeal—Order under S. 523 of the Old Code*:—Orders whether under S. 525 or under S. 523 of the Old Code are decrees and are appealable. A reference to arbitration of a matter which is the subject of litigation in a civil court does not fall within the scope of paragraph 17 of Sch. II, C. P. C. The classification contained in *Gulam Khan* v. *Mahommed Hussain*, I. L. R. 29 C. 167 (P. C.) holds good even under the new Code. A mere agreement to refer to arbitration is not an adjustment within the meaning of the word in O. 23, r. 3, C. P. C.

Venkatachalla Reddi v. *Rangiah Reddi* 990

C.P.C., (O.C. S. 353)—*Appeal—Statute—Construction—Right of appeal not a matter of procedure* :—A right of appeal is not a mere matter of procedure and must be governed by the law in force at the time when the proceedings in the Original Court commenced ; and cannot be taken away by a new Procedure Code passed after the institution of the proceedings in the original court.

Salimamma v. *Valli Husanabba Beari* 764

Compensation for improvements—*Purchaser's rights—Stranger purchaser* :—*See* EXECUTION SALE 969

Compromise decree—Resjudicata—Distinction between compromise decrees, decrees by default and by confession of judgment pointed out.

Vardachariar v. *Ramaswami Chetti* 709

————————Registration if necessary when compromise beyond the scope of suit.

See Partichelamanna v. *Parti Rama Row* 870

Construction—*Simple mortgage—Condition that the mortgagee shall take possession of and enjoy the mortgaged property as under a usufructuary mortgage in default of payment of interest by the mortgagor—Mortgagee's right to a decree for sale* :—In a suit brought by the mortgagee against the mortgagor who had failed to pay the principal and interest, to enforce his mortgage, it was contended that the mortgagee was not entitled to the decree for sale on the ground that the instrument of mortgage, which expressed itself that it was a simple mortgage, provided—"If the whole or portion of the interest remains unpaid by the due date, His Highness (the mortgagee) shall take possession of the mortgaged properties immediately thereafter and enjoy the said properties as under a usufructuary mortgagee." *Held*, confirming the decree of the High Court that the mortgagee retained the possession of the simple mortgage, and as the mortgagor had not fulfilled his obligations, the decree for sale of the mortgaged property was a matter of course and perfectly right.

Bhupathi Devu v. *Gajapatiraj* 1147

Contempt of court—*Contempt of inferior court—Jurisdiction of the High Court—Common Law jurisdiction inherent.—Charter Act*, S. 15 :—The High Court has the Common Law jurisdiction to deal with contempt of an inferior court, but not under S. 15 of the Charter Act.

In re Venkat Rao 832

Contract—*Construction—Goods supply of—"Passing of goods"—Warranty of quality implied from knowledge of purpose—Passing of employee of seller—Essentials of passing of* :—When the persons who enter into a contract for supply of goods to be used for a particular purpose (*e.g.* sleepers for Railways) are informed of the purpose for which the goods are wanted they must have taken to be impliedly warranted that the goods supplied were reasonably fit for that purpose. The appellant entered into a contract with the respondent's assignor for the supply of sleepers for the Railway and the contract contained the following clause. "The passing of our (the suppliers') Moulmein and Rangoon friends, the Bombay, Burmah Trading Corporation Limited, is as usual final as regards both measurement and quality." *Held* that it did not mean that the contractors can supply anything they chose but that the supply should be according to the standard set up expressly or impliedly under the contract or at the least the requirement that the sleepers were reasonably fit, as sleepers of the dimensions described for use by the Railway Company: that the right conferred by the clause on the suppliers amounted merely to the right to determine by and through the skill and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied. The point is not whether the men employed "to pass" acted honestly according to the best of their skill and judgment, but whether they ever approached the question they had to determine namely the conformity of the goods supplied with, the contract under which they were supplied and if they never applied their minds to that but merely determined that the sleepers were fit to be sent out as the manufactures of their employers, there cannot be any passing of the sleepers within the meaning of the Contract Act.
Bombay Burmah Trading Corporation v. *Aga Mahamad* 1110

Contract Act, S. 2.—*Third party—Beneficiary's right of suit* :—*See* RIGHT OF SUIT 918

———**S. 16 A.**—*Undue influence—Onerous transaction.* Even though the bargain was onerous their lordships did not refuse specific performance, there being nothing to show that it was unconscionable.
G. *W. Davis* v. *Maung Shwe Go* 1127

———**S. 38**—*Payment to one of several joint promisees in collusion, no payment to all*:—Even assuming that payment to one of several joint creditors will operate as a good discharge as against all, yet, a payment fraudulently made solely for the benefit of one of the several creditors and not being for the benefit of all, will not operate as a good payment. [*Baikunt Nath Chakrabarti* v. *Hara Lal Pal*, 13 C. L. J. 234 and *Veerasami* v. *Ibramsa*, 19 M. L. J. 220 referred to.] A manager of a joint Hindu family can himself sue for a debt due to the family without impleading the other members of the family. [*Kishen Prasad* v. *Har Narain Singh* 21 M. L. J. 378 followed.]
Sheik Ibrahim Tharagan v. *Rama Iyer* 509

———**Ss. 39, 73**—*Breach of Contract—Measure of damages—Difference between contract rate and market rate—Market rate as on what*

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date:—Per *Chief Justice* and *Wallis, J.* (*Ayling, J.* dissenting)—In the case of a breach of contract to sell goods, the measure of damages is the difference between the contract rate and the market rate as on the date fixed for performance and not as on the date of breach, whether the action be brought before or after the date fixed for performance. There is no difference between the English and Indian Law on the point. Per *Ayling, J:*—The damage is to be assessed on the difference between the contract price and the market price on the day of the breach of the contract. The English law is not applicable to India in the face of S. 39 of the Contract Act. Per *Curiam* :—*Held* on the facts of the case that (1) there was a completed contract in the case ; (2) that the breach occurred on the day when the defendant wrote the letter which plaintiffs rightly treated as a breach; (3) that the defendants' case having been that they were entitled to claim a formal transfer, it was not open to them to raise the objection that the contract itself was invalid.

Krishna Jute Mills Coy. v. *J. Innes* 182

———**S. 69**—*Not exhaustive—"Interest"—Pecuniary Interest* :—
The Contract Act is not exhaustive, and S. 69 of the Act applies to cases of payment to a third person and not to a case where a person is bound under the law to make a payment directly to the person who has incurred the expense. The interest referred to in S. 69 is pecuniary interest.

Ranganayaki Ammal v. *Ramanuja Aiyangar* 600

———**S. 87**—*Sale of goods not in existence—Appropriation—Evidence:*—
The question whether there was appropriation of the goods by their owner for the benefit of a particular creditor is one of fact and the law does not require any particular mode or form of appropriation. If there has been a specific appropriation, then the consignor, if he is still in possession of the goods, will hold it merely as trustee for the consignee. Timber was prepared with the help of money advanced by plaintiffs to the 1st defendant under an agreement that they were to be sent to the plaintiffs so that the plaintiffs would sell and appropriate the sale proceeds towards the discharge of the debt owing by the 1st defendant to the plaintiffs, and the timber, having been despatched from the forest where it was cut in pursuance of this agreement, was in the course of transit when it was attached by the 2nd defendant as property of the 1st defendant. The timber was intended for the plaintiffs and it had been cut and despatched under the directions of two persons appointed under the power-of-attorney executed by the 1st defendant. The sole object of which was that these two men should carry on the 1st defendant's business in timber in order to discharge the large debt owing by the 1st defendant to the plaintiffs: *Held* that the plaintiffs acquired a right to the timber as soon as it was cut.

Venkataratnam v. *Ramanna* 413

Corporation—*Powers—Levying taxes and farming out:—Farming out and incidental to levying taxes:—See* MADRAS, CITY MUNICIPAL ACT S. 334. 21 M.L.J. 788. MADRAS DISTRICT MUNICIPALITIES ACT S. 191. 21 M.L.J. 790.

Costs—*Deed—Construction—Conflicting views presented by both parties—Real character of deed upheld—Registration Act, S. 17—Family settlement—Want of registration—Inoperative as regards immoveable property:*—

Costs—(*Contd.*) PAGE.

The contest in the case was about the validity and effect of two instruments, one of 1884 and the other of 1893. The pleadings of both the parties were in one way *before* the court found against the deed of 1893 and quite the reverse *after the finding*. *Held* that, notwithstanding the conflicting views presented by the appellants, their Lordships were bound to give effect to the real character of the instrument but without their costs in the Privy Council and the court below. *Held* that an instrument the effect of which was in contest in the case was executed as a family arrangement and intended to be immediately operative, final and irrevocable and was, consequently, a settlement and not a will; and that the same was inoperative as regards immoveable properties for want of registration.

Umrao Singh v. *Lachman Singh* 637

——**Difficulty of apportionment**—*Procedure*:—Where it is difficult to apportion costs between the parties in view of the peculiar nature of the disputes between the parties and the necessarily arbitrary manner in which most of the items had to be valued: *held* that equity will be equally well served by each party being ordered to bear his own costs.

Pedda Jiya Aiyangar v. *Mahant of Tirupati* 730

Co-tenants—*Suit for possession—Decree, form of—Suit in exclusive right*:—The plaintiff, a co-widow, sought to recover possession of properties from her husband's brother, the first defendant in her own exclusive right. The second defendant, the other widow, supported the first defendant. She had received Rs. 400 under an arrangement with him. The first defendant's contention of non-division was found against him. *Held*, that under the circumstances plaintiff was entitled only to a decree for her half share of the properties. If one of two co-tenants sues on behalf of the other co-tenant also, the plaintiff is entitled to recover the whole; otherwise he is entitled to recover his share unless the suit is based on allegations of prior possession and dispossession. [*Durjan Singh* v. *Durbijoy Singh*, 9 C. L. J. 623 at 626 referred to.]

Rama Naicken v. *Muthayammal* 997

Courts deportment to Practitioners.—Magistrates and other judicial officers cannot be too careful in their deportment towards the practitioners of their courts, whether they were qualified vakils or private pleaders, so as not to give any cause to the public for thinking that one practitioner is favoured at the expense of others.

Vyasa Row v. *King Emperor* 284

Court Fees Act, S. 7, Cl. (iv), (b), Sch. I, Art. 1, Sch. II—Art. 17 (vi), Partition suit—"*Suit to enforce right to share on the ground that it is joint family property*," *meaning of*:—Per majority (*Ayling J. contra*):—A suit for partition of joint family property, where the plaintiff is in joint possession with the other co-parceners, is governed by Art. I, Sch. I, of the Court Fees Act and not by Art. 17 (vi) of Sch. II of the Act. A suit for partition by a member of a joint Hindu family is governed by S. 7, Cl. (iv) (*b*), of the Court Fees Act. Meaning of the words, "suit to enforce right to share," "right to share," and "on the ground that it is joint family property" explained. Per *Ayling, J.*:—Cl. (iv) (*b*) of S. 7 appears to be designed to cover merely the rare, but quite

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possible, cases where the plaintiff's status as a co-parcener is in dispute, and is sought to be enforced, and a suit for partition of joint family property, where the plaintiff is in joint possession with others, is governed by Art. 17 (vi) of Sch. II.

Rangiah Chetty v. *Subramania Chetty.* 21

———— **S. 30—C. P. C., O. 7, r. 10**—*Plaint, return of—Practice, as to old stamp—Credit to be given to old stamp*:—When a plaint is returned by one court for presentation to another court, the latter court should give credit to the old stamp on the plaint.

Visweswara Sarma v. *T. M. Nair* 533

———— **Sch. II, Arts. 1, 11**—*Appeal against order in probate proceedings*:—Article 1 of Schedule II of the Court Fees Act is applicable to an appeal from an order in probate proceedings and not Article 1 of Schedule II ; and no *ad valorem* fee need be paid on it

Rodrigues v. *Mathias* 481

Cr.P.C., S. 103—*Search list—Other evidence admissible*:—S. 91 of the Evidence Act does not apply to a search list prepared under S. 103, Cr. P. C.—*See* EVIDENCE ACT, S. 91. 281

———— **S. 110**, C. (*f*)—*Evidence of general repute inadmissible*:—Where a person is solely charged under Clause (*f*) of S. 110. of the Criminal Procedure Code, evidence of general repute is not admissible. *Emperor* v. *Bidyapath*, I.L.R. 25 A. 273; *Katai Haldar* v. *Emperor*, I. L. R. 29 C. 779 ; *Wahid Alikhan* v. *Emperor*, 11 C.W.N. 709; *Parasulla* v *Emperor*, 13 C. W. N. 244 referred to.

Muthu Pillai v. *Emperor* 488

———— **S. 147**—"*Dispute likely to cause breach of the peace*"—*Use of well*:—S. 147 does not prohibit the lawful use of a public way or right and a Magistrate has jurisdiction to protect, by an order under S. 147, persons exercising their rights (as in this case the right to draw water from a well) when the same is threatened to be interfered with by others.

Hindus of Kannamapalaiyam v. *Kaikkolar Christians* 487

———— **Ss. 180, 188**—*Dacoity committed in British India—Stolen property found in Native State—Native Indian British subject—Trial—Certificate of Political Agent, necessity for*:—The general provisions of S. 180, Cr. P. C., are controlled by S. 188, Cr. P. C., and where an offence is committed by a native Indian subject of His Majesty in the territory of a Native State, he can be tried for the offence in a court in British India only if the Political Agent of the State certifies that the charge ought to be tried in British India.

Sessions Judge, Tanjore v. *Sundara Singh* 441

———— **Ss. 195, 537**—*Want of sanction—Mere irregularity*:—A conviction is not vitiated by the absence of the preliminary sanction required under S. 195 of the Cr. P. C. in the absence of any prejudice to the party even though it be that objection for want of sanction was taken by the accused before the trial.

Abdul Razack Sahib v. *Emperor* 753

———— **S. 195, Cls. 6. 7 (C)**.—*Jurisdiction of appellate bench of High Court to hear appeal from sanction order of Presidency Small Cause Court—High Court—Original and appellate side of—Original and appellate jurisdiction—Meaning of*:—Both the original and the appellate

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sides of the High Court constitute but one court though the jurisdictions are different. An appellate bench of the High Court is competent to dispose of an appeal from an order of sanction granted by the Presidency Small Cause Court. [*Sew Bollock Singh* v. *Ramdin Bania*, 14 C.W.N. 806 referred to.] Appellate and original jurisdictions defined. The effect of Cl. 7 (*c*) of S. 195, Cr. P. C., is merely to designate the Court to which an appeal lies under that clause and not to describe the nature of the jurisdiction which it exercises. Its effect is to make the High Court the appellate tribunal in dealing with sanction orders under S. 195, Cr. P. C., of the Presidency Small Cause Court: and the High Court exercises its appellate jurisdiction in an appeal under S. 195 from an order of sanction by the Presidency Small Cause Court.

Jamna Doss v. *Sabapathy Chetti* 1074

———— **S. 203**—" *Record his reasons*"—*Reference to Police report when enough*:—An order of dismissal under S. 203, Cr. P. C. should state reasons. A reference to the police report for the reasons may be a sufficient compliance with the provisions of the section, only if the police report is made a part of the record.

Amed Bee v. *Ameena Bee* 492

———— **S. 250**—" *The person upon whose complaint or accusation the accusation was made*:—A person was ordered to be prosecuted by the Assistant Superintendent of Police under S. 211, I. P. C. The Station House Officer preferred a charge sheet and presented it to the Magistrate who tried and discharged the woman and passed an order for compensation against the S. H. O. *Held* that the S. H. O. was not a person upon whose complaint or information the accusation was made within the meaning of S. 250, Cr. P. C. *In re Kesar Lakshman*, I. L. R. 1 B. 175 ref. to.

Subramania Pillay v. *Pakia Nadachi*. 845

————*Compared with* S. 95, *C. P. C.* :—*See* C. P. C., S. 95 1052

———— **S. 257**—*Cross-examination of witnesses by accused. Per Curiam*: —It is open to a Magistrate even after a case has been closed and at any time before judgment is pronounced to give an opportunity to the accused to cross-examine the witnesses for the prosecution and to examine the witnesses for the defence even if the accused had to avail himself of such opportunity even at an earlier stage of the proceedings. And it always depends upon the circumstances of each case whether a belated application should be granted or not. Where the accused's attitude is deliberately designed to harass the Court, the Magistrate will not be acting improperly by refusing his application.

Viyasa Rao v. *King Emperor* 283

———— **S. 269**—" *With the aid of jurors as assessors*"—*All jurors and not only some of them*:—Where an accused is charged at the same trial with respect to offences some of which are triable by a jury and some by assessors, he should be tried in respect of the latter with all the jurors as assessors, and not only some of them assessors.

Pingai Pakirappa v. *King Emperor*... 520

———— **S. 360**—A deposition read out in the presence of the accused and his pleader, but while another witness in the case was being examined, is a deposition good in law so as to found a prosecution for per-

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jury on it, especially when no objection was actually taken to the reading out of the deposition when the examination of the other witness was going on.

In re Muthukumara Reddy 411

——— **Ss. 423, Cl. I (b); 237, 238**—*Relation interse*—"*Alter a finding*"—*Scope of S.* 423, *Cl.* I (*b*) :—The finding which an appellate court may alter under S. 423, Cl. I (b), may relate either to an offence with which the accused was separately charged in the lower court or to one of which he might be convicted without a distinct charge. In cases not falling within Ss. 237 and 238, Cr. P. C. the appellate court cannot convict a person of an offence with which he was not charged in the first court, but where he has been charged with a particular offence, and the first court has recorded a finding on that charge, the appellate court can alter the finding.

Hanumappa v. *Emperor* 805

——— **Ss. 476, 195**—"**Inquiry**"—"*Judicial proceeding*"—*Order based on what is not legal evidence bad—Evidence in preliminary enquiry under S.* 202, *Cr. P. C.* Per *Sundara Aiyar, J.* (*Ayling, J.* dissenting) :—An order under S. 476, Cr. P. C., based partly on what is not legal evidence, *e.g.*, on a statement made without oath in the investigation, is bad in law. Per *Sundara Aiyar, J.*:—An order under S. 476 passed by the first court does not cease to be operative *ipso facto* by the order of an appellate court reversing that of the court of first instance. A preliminary inquiry under S. 202, Cr. P. C., is not a "judicial proceeding." The words "when any civil * * court is of opinion that there is ground for inquiring" in S. 476, Cr. P. C., mean when there is legal ground for inquiring. Courts have a heavier responsibility on them while proceeding under S. 476 than while giving sanction under S. 195, Cr. P. C. A Magistrate might not act illegally in ordering prosecution under S. 476 on the sworn statement of the complainant alone, but an order based on it and on the statement of complainant's witnesses not made on oath is illegal. *Per Ayling, J.*—Exceptionally strong reasons are required to justify an order under S. 476 in cases where the complainant has not been allowed to adduce the whole of his evidence in support of his complaint.

Kachi Madar Labbai v. *Emperor* 795

——— **S. 491**—*De facto guardianship—Penal Code, S.* 361:—*De facto* guardianship is sufficient to sustain a prosecution under S. 361, I. P. C. and as against strangers, would entitle the *de facto* guardian to an order for restoration of the ward to his custody under S. 491, Cr. P. C.; but where the custody is not illegal and improper the proper procedure is to restore the minor to his lawful guardian under Cl. (*a*) of S. 491, Cr. P. C.

Muthusami Sastri v. *Narayana Sastri* 195

——— **S. 526.**—*Village Magistrate—Adjournment of case on the ground of an intended application to High Court for transfer—Practice—Procedure*:—A Village Magistrate will be acting illegally in trying an accused without granting an adjournment when the latter applies for an adjournment of the hearing for the purpose of moving the High Court for a transfer from the file of the Village Magistrate.

Thota Narayadu v. *Emperor* 755

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Damages, *measure of—Suit for wrongful attachment* :—*See* C. P. C., S. 95. ... 918

Decree—*Appeal decree—Execution—Time fixed for payment—Jurisdiction of executing Court to extend*:—Specific directions contained in the decree or order of an appellate court (*e. g.*, directions to pay money within a certain time) are beyond the judicial discretion of the lower court and hence must be implicitly followed by the latter court; consequently the first court cannot in execution extend the time fixed by the appellate court in its decree (*e. g.*, for the payment of money).

Mohideen Kuppi v. *Maria Kami* 1018

———*Construction—Held* that a consent decree which merely declared the right of defendant to remain in possession of some of the plaint lands could not be construed as a decree directing delivery of posses-sion of the remaining lands to plaintiff.

Lakshmi v. *Mani Devi* 1063

Decree, form of—co-tenants—*Suit by one for exclusive possession*:—*See* CO-TENANTS 997

Decree—Maintenance decree—*form of*:—*See* HINDU LAW—MAINTENANCE 493

———**Mortgage decree**—*Form of—Combined decree—Legality* :—*Per Curiam.*—A mortgage decree containing both a direction for sale as well as a personal decree, though irregular in form according to the provisions of the Transfer of Property Act is not a nullity; and if allowed to remain unimpeached cannot be called in question in execution. Per *Abdur Rahim, J.* :—A direction that the defendant do pay a certain sum of money, *prima facie* imposes a personal liability, though no doubt the words are not conclusive of the question. It may be that other clauses of the decree, if read together without direction, might show that all that was meant by what is *prima facie* such direction, was to declare the amount for which the defendant was liable and the only immediate remedy intended to be given was against the mortgaged property. But where a decree is clear in its terms there can be no reason for such a construction.

Raja of Kalahasti v. *Varadachariar* 1036

Deed—*Construction—Mortgage or charge?—Simple mortgage, essentials of*:—A mortgage deed ran as follows:—" In default I shall on the security of the house site belonging to me * * * pay and make good the principal and interest." *Held* : *Per Curiam*:—That the instrument created a mortgage. *Madho Misser* v. *Sidh Binaick*, I. L. R. 14 C. 867 disapproved.

Balasubramania Nadar v. *Sivaguru Asari and another*... 562

———**Kanom**—*Saswatom right* :—*Held* : That the words " there will be no objection to the land being held by you and your Anandravars " followed by the qualifying words " as long as you and your Anandravars shall live" have not the effect of creating a *saswatom* right in the donees.

Kunhambu v. *Kerala Varma Valia Rajah* 56

Dekhan Agriculturists' Relief Act (XVII of 1879)—*Suit for redemption—Form and reality of the suit—Specific Relief*:—Specific Relief under the Dekhan Agriculturists' Relief Act (XVII of 1879) could not be granted in a suit, which was in form a suit for redemption, but in

Dekhan Agriculturists Relief Act—(*Contd.*) PAGE.
reality was a suit to recover property of which the rightful owner had been deprived by fraud.
Mussammat Bachi v. *Birchand Jeomal* 89

Discretion—*Government Board—Discretion given by statute—Judicial discretion—Court's power to interfere with arbitrary exercise of discretion*: —The discretion given by S. 4 of the Public Service Superannuation Act of 1903 (New South Wales) to fix the gratuities of retiring public servants is not an arbitrary discretion but a discretion to be exercised reasonably, fairly and justly ; and where it is plain that the award of gratuity was intended to be unreal and unsubstantial, though made under the guise of exercising discretion, in that the Board threw in only a farthing for each year of service after a certain period, in the calculation of the gratuity :—*Held*—That it was at best a colorable performance and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament.
Leslie Williams v. *Haines Thomas Giddy* 641

Distraint for larger amount than what is actually due—*Illegal—No distinction between sale and distraint*:—*See* MADRAS ACTS RENT RECOVERY ACT 570

Divorce (Act IV of 1869), S. 17—*Jurisdiction of High Court to rescind decree nisi on reconciliation between parties*:—The High Court has jurisdiction to rescind the decree of the District Judge in cases coming before it for confirmation under S. 17 of the Divorce Act, if the parties have become reconciled to each other, and not merely to decline to confirm the decree.
William Dare v. *Bella Dare* 529

Easement—Light and air—*Obstruction to ancient lights—Remedy by injunction—Cities and villages—No difference—Defences that are not open* :—If a man's ancient lights be interrupted, it is no answer to say there are remedies which he can provide for himself by making changes in his own tenement ; nor is it an answer to say that defendant is willing to provide fresh rights for him in another way. A party causing an injury, to another cannot object to appropriate relief being granted to his opponent on the ground that he would suffer serious injury by being compelled to undo his mischief : There is no difference in the applicability of the law as regards interference with ancient lights to builders in cities and to builders elsewhere. *Semble*:—There is no difference between the law of England and the law in India with respect to granting relief by way of injunction in cases of obstruction of easement to light and air.
Muthukrishna Aiyar v. Somalingamuni Nagendrien 742

————**Right to light and air**—*Right of action—Specific Relief Act, Ss.* 54, 56—*Injunction—Damages* :—In cases of obstruction to light and air, injunction is the rule ; and damages the exception. There is no rule of law that the plaintiff will not be entitled to an injunction if he can so alter or rearrange his house as to neutralize the effect of the defendant's building. *Held* also that, in the circumstances of the case, whether the Indian law as contained in S. 28 of the Easement Act is wider than the English Law as laid down in *Colls Home and Colonial*

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Stores, Limited (1904) A. C. 179 at 182 or not, the test laid down by the English law was satisfied in the case and that the plaintiff was entitled to an injunction. *Ramanjulu Naidu v. Aparanji Ammal.* 313

Estoppel—Lessor and Lessee—*Jenm right* :—*Held* also that the demisee was estopped in the case from contesting the title of the demisor and that no express admission of jenm right by the demisee otherwise than by the acceptance of the demise was necessary in the circumstances of the case to estop the demisee from denying the demisor's jenm right.

Kothayya Kanara v. *Ganapathi* 550

———**Essentials**—*Cause of action* :—There can be no estoppel when truth was known to the person pleading it: Nor can it be invoked to defeat a plain provision of law. A cause of action cannot be founded on an estoppel nor does an estoppel arise from a representation of a mere intention—*e. g.* an intention to pay promptly.

Krishna Chetti v. *Vellaichami Thevan* 1077

———**Mistaken view of the law**:—A mistaken impression of law regarding the validity of an adoption is not a ground on which an estoppel can be based. The rule of estoppel applicable to persons taking under an instrument as regards their competency to deny the title of others taking under the same instrument has no application to cases where title is acquired solely by presumption. [*Rajijalakshmi* v. *Suryanarayanan*, 3 M. L. J. 100 considered. *Dalton* v. *Fitzerald*, (1897) 2 Ch. 86 distinguished.]

Aiyana Chariar v. *Lakshmi Ammal* 500

Evidence—*Appreciation—Conflicting story as to a vital issue of fact*:—In dealing with a case where parties are at issue on a vital question of fact, *e.g.* as to the terms of an agreement—the safe principle is to consider what story fits in with the admitted circumstances.

G. W. Davis v. *Maungshwe, Go.* 1127

Evidence Act, S. 90—Scope of—*Presumption—application of, where copy only is produced*:—The presumption as to the genuineness of an ancient document under S. 90 of the Evidence Act can be applied even where the original is not produced, but only a copy is produced. [*Khetter Chunder Mookerjee* v. *Khetter Pant Sreeterutro*, I. L. R. 5 C. 886; *Ishir Prasad Singh* v. *Lalijas Kunwar*, I. L. R. 22 A. 294 followed.]

Haji v. *Sankaran Nair* 981

———**S. 91**—*Cr. P. C.*, *S.* 103—" *Matter required by law to be reduced to the form of a document—Search list—Other evidence admissible—S.* 91 *of the Evi dence Act does not apply to a search list prepared under S.* 103, *Cr. P. C.*:—When a search has been conducted under S. 103, Cr. P. C., other evidence than the search list is admissible regarding the things seized in the course of the search and regarding the places in which they were found.

In re Solai Naick 281

———**S. 92**—*Scope of—Proof of fraud not excluded* :—S. 92 does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the

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conveyance. It certainly does not preclude the evidence of a charge of fraud on the part of a party in relation to matters antecedent to the deed.
Maung Kyn v. *Me Shwa* 1105

——**S. 92** (6)—*Sale deed—Evidence that no consideration was intended to pass*:—Evidence is admissible to show that consideration for a deed of sale was not intended to pass.
Hanif-unnisa v. *Faiz-unnisa* 1126

——**Ss. 133, 114, Ill.** (b)—*Accomplices' evidence—Corroboration—How far essential*—Per *Sankaran Nair* and *Abdur Rahim*, *JJ.*—(*Ayling*, *J.* dissenting) :—A conviction based upon the uncorroborated testimony of an accomplice is, in the absence of special circumstances, unsustainable and the High Court can interfere in revision. The existence of special circumstances is a matter into which the High Court can go in revision. Per *Ayling*, *J.*—Where the lower court convicts an accused on the uncorroborated testimony of an accomplice, the matter is not one for revision by the High Court, but one of appreciation of evidence by the lower court. Per *Abdur Rahim*, *J.*—The evidence of one accomplice is not sufficient corroboration of the evidence of another accomplice; and previous statements made by an accomplice are not such corroboration of his evidence in court as to justify a conviction by itself. The corroboration required is corroboration by means of untained evidence.
Vyasa Rao v. *The King-Emperor* 283

Execution—*Decree against assets of deceased—Representative's plea of assets—Onus* :—Once it is admitted or proved that the man sought to be made liable under a decree obtained against a deceased person had come into possession of assets belonging to the estate of the deceased judgment-debtor, it is for him to satisfy the court as to the extent of the assets received by him and to account for them. [*Magalomi Gerudiah* v. *Narayana Rungiah*, I. L. R. 3 M. 359 referred to.]
Govardhan Dass v. *Krishna Dass* 1096

Execution sale—*Fraud—Misrepresentation by judgment-debtor's pleader—Auction-purchaser not responsible*:—*Held* in a suit to set aside an execution sale on the ground of fraud and misrepresentation by the judgment-debtor's pleader that he was going to apply for an adjournment of sale and consequent omission to be present and bid at the sale that there was no fraud, and even if the alleged representation of the judgment-debtor's pleader be true, the auction-purchaser was not responsible.
Bishun Chand v. *Bijoy Singh* 652

——*Interest sold—Question of fact—Consideration*:—*See* HINDU LAW—WIDOW 236

——*Purchaser's rights—Stranger purchaser—Value of improvements by purchaser—Eviction—Good faith—Test—Caveat emptor*:—If one enters upon land as a stranger purchaser in execution sale and effects improvements thereon, he is entitled to compensation therefor upon a reversal of such judgment and sale irrespective of any question of his *bona fides*. *Zain-ul Abdin Khan* v. *Mahammad Ashgur Alikan*, I. L. R. 10 A. 166 explained; *Mallikajun* v. *Narhari*, I. L. R. 25 B. 357 referred to. But even if the proposition so stated is too broad and good faith must be proved on the purchaser's part in making

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the improvements, the good faith required does not go beyond an honest belief in the purchaser in the validity of his title. Where it was merely found by the lower appellate court that the auction purchaser in execution sale effected the improvements after an application was put in to set aside the decree for fraud, and there was no allegation that the auction purchaser was aware of the non-service of the notice which constituted the fraud:—*Held*:—That there was no duty on the part of the purchaser to make due inquiries regarding the regularity of the sale proceedings and that he was entitled on eviction to the value of the improvements he has effected. *Obiter*:—There is no covenant for title implied in a court sale *i. e.*, the auction purchaser takes only the interest in the property sold, which his judgment-debtor had in law at the time of the sale. The scope of the doctrine does not extend to the consequences of defects or irregularities in the proceedings leading up to the sale, which might render it void or voidable. S. 51, Transfer of Property Act, is also inapplicable to a purchaser in court sale.

Mathunsa Rowthan v. *Apsa Bin* 969

Executor—*Adverse title cannot be set up by after acceptance. See* HINDU LAW—JOINT FAMILY 669

Family settlement—*Compromise of suit—Alienation—Distinction—Test—Hindu Law—Reversion suit*:—The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life tenant. But where the compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is, then it is not an alienation open to the attack of reversioners. A Hindu became a convert to Mahomedanism in 1845. His son who was a Hindu predeceased him and the father died soon after. There was litigation between the son's daughters and the father's daughter's son about the succession. The parties compromised it by taking 8½ and 7½ annas share each respectively. *Held* in a suit by the daughter's son attacking the compromise that the compromise was a family settlement and not an alienation by the daughters.

Kunni Lal v. *Krishna Gobin Narain* 645

Fine—*right of fining*—Trustee's powers to fine a Subordinate.

See RELIGIOUS ENDOWMENT—TRUSTEES 730

Ganjam and Vizagapatam Agency Rules—*Rules* 20 *and* 18—*Petition against order under Rule* 18:—A petition lies to the High Court under Rule 20 from an order of the Agent under Rule 18 summarily dismissing an appeal. [*Jagannadha* v. *Godanna*, I. L. R. 16 M. 229 dissented from.]

Venkatramadas v. *Raghunatha Patro.* 887

Good Faith—*Test*:—*See* EXECUTION SALE 969

Guardians and Wards Act, S. 7 (2)—*Guardian, appointment, effect of, on mother's powers*:—When a guardian is appointed by court under the Guardians and Wards Act for a minor's property, persons other than such guardians cannot legally bind the minor's estate. The want of authority of a *de facto* guardian is a good defence to a suit brought

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by a mortgagee to enforce his mortage against a minor, though in a suit by the minor to set aside the mortgage, a court might equitably decline to grant relief until the plaintiff compensates the mortgagee to the extent of the benefit derived by him.

Krishna Chetty v. *Vellaichami Thevan.* 1017

———**Ss. 29, 38, Sub-secs. 41, 43**—"*Any person*"—*Right to be heard*:—The words "any person" do not mean only a relative or friend, but are wide enough to cover applications by persons other than relatives or friends of the minor.

Venugopal Bahadur v. *Thayammal.* 885

Hindu Law—Adoption by widow—*Suit to set aside—Onus of proof*:—Where the parties who rely on an adoption admit the interest of the party who impeaches the adoption as presumptive reversionary heir, the onus is on the party who relies on the adoption to establish it, notwithstanding the fact that a widow's estate intervenes between the presumptive reversionary heir and his right to possession.

Rajagopala Reddi v. *Govinda Reddi* 445

———*Title by prescription*:—A person can acquire property by long possession as adopted son of another under an invalid adoption but it cannot give him the status of an adopted son or put an end to his position as a member of his natural family.

Ayanachariar v. *Lakshmiammal* 500

———**Debt**—*Father's debt—Decree, against father & son—Onus of proof that decree is not binding on son*:—Where a suit is brought against a Hindu father and son in respect of a debt incurred by the father, it is upon the son to make out that the moneys were not in fact advanced or, if they were, that he was not liable for the original debt under the doctrine of pious obligation and for want of family necessity. [*Periasawami Mudaliar* v. *Sitharama Chettiar*, I. L. R. 27 M. 243; *Chidambaram Mudaliar* v. *Koothaperumal*, I. L. R. 27 M. 326 followed; *Chandra Deo Singh* v. *Mala Prasad*, I. L. R. 31 A. 176 approved.]

Malayandi v. *Subbaraya* 521

———*Family necessity—Marriage expenses of daughter—Sudra family*:—The marriage expenses of a daughter in a Sudra family is a family necessity. [*Kameswara* v. *Veeracharlu*, 20 M. L. J. 855; *Narasimham* v. *Venkatanarasayya*, I. L R. 27 M. 206 approved.]

Malayandi Goundan v. *Subbaraya Goundan* 521

———**Guardianship of children**—*Sanyasi's right—Conversion to Brahmoism—Father's right to keep daughters unmarried*:—A Hindu father is quite free to keep his daughters unmarried till their 16th year and even after that. A Hindu who becomes a *Sanyasi* loses his rights of guardianship over his children and cannot regain them by reverting back from *sanyasam*; and consequently, he does not regain his right of guardianship by becoming a Brahmo.

Muthusawmi Sastri v. *Narayana Sastri* 195

———**Joint family—Alienation of undivided share—Alienee's rights**—*Fluctuation of share*:—The mortgagee of a Hindu is entitled to proceed against the share of a son subsequently born in the family property mortgaged to him. An alienee of the interest of an

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undivided co-parcener in a joint Hindu family takes the co-parcener's interest as it stood on the date of alienation.

Ramachandram Pillai v. *Kalimuthu Chetti* 246

———**Joint family**—*Coparcener's rights, nature of*:—*Per Sundara Aiyar, J. Obiter.* The proposition that a Hindu coparcener has no right to a definite share of the property is only true in the sense that his share is liable to fluctuations of increase and decrease as between himself and his coparceners and also in the sense that until partition he cannot claim, as between himself and his coparceners, exclusive title to any particular item of the family estate or any definite share of the income of the estate. An alienee's position is quite different and he obtains title to the alienee's share in the property transferred as it stood on the date of the alienation.]

Doraisami v. *Nondisami Saluvan* 1041

———**Joint family**—*Father's power of alienation—Gift to daughter:* —*Held* that a gift of 8 acres of ancestral land by a Hindu father to his daughter after marriage when the family was possessed of 200 acres of land was valid. [*Churaman Sahu* v. *Gopi Sahu*, I.L.R. 37 C. 1; *Ramaswamy Aiyar* v. *Venguduswami Aiyar*, I.L.R. 22 M. 113; *Kudutumma* v. *Narasimhacharyulu*, 17 M. L. J. 528; *Kamakshi Ammal* v. *Chakrapani* Chettiar, I. L. R. 30 M. 452, referred to.]

Anivillah Sundararamaya v. *Cherla Seethamma* 695

——————*Father's power's of alienation*:—A sale or mortgage of joint family property by a Hindu father for a justifiable necessity is binding on the sons even though the transaction be unsupported by an antecedent debt. [*Venkatramanaya* v. *Venkatramana Das*, I. L. R. 29 M. 200 distinguished.]

Veerabadram v. *Jagannadha Row* 443

——————*Suit—Manager's right of suit without impleading others*:—The ordinary rule is that all persons in whom the right to any relief exists should be joined as plaintiffs; but it cannot be laid down that in no case has a person a right to sue on behalf of himself and others, where the procedure laid down in S. 30, C.P.C. of 1882, is either not applicable or has not been taken advantage of. There is no reason why there should be any difference in this respect between a joint family in Malabar and one elsewhere. There are several statutory exceptions to the rule; there is no reason why there should not be other exceptions based not on any legislative provision but on the substantive law applicable to the parties; and the case of the manager of a joint Hindu family is such an exception.

Sheik Ibrahim Tharagan v. *Rama Iyer* 509

——————*Suit by managing members—Limitation Act*, S. 22:—Members of a joint Hindu family who are the sole managers of the family business are competent to enter into contracts in their own names and sue on the said contracts; and it is not necessary that in those suits they should join other members of the family as co-plaintiffs. Where in such a suit the other members who were unnecessary parties were added after the period of limitation: *Held* that the suit was not liable to be dismissed under S. 22 of the Limitation Act. The defendant is entitled to insist on all persons with whom he expressly contracted

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being made parties to the suit. [*Kattushin Khanna* v. *Vallotil Narayanen*, I. L. R. 3 M. 234 and *Alagappa Chetty* v. *Vellian Chetty*, I. L. R. 18 M. 32 doubted. *Arunachella Pillai* v. *Vythialinga Moodeliar*, I. L. R. 6 M. 27 approved. *Ramsebukk* v. *Ram Lal* and *Imam-ud-din* v. *Liladhar*, I. L. R. 14 A. 524 referred to]

Kishen Parshad v. *Har Narain Sing* 378

———————**Impartible Zemindari**—*Debts how far binding on successor—Hanuman Prasad's case—Onus of proof—Enquiry by lender*:—An unsecured debt of the Zemindar of an impartible Zemindari, not incurred for family necessity, is recoverable from the estate in the hands of the next heir taking by survivorship. [*Nachiyappa* v. *Chinnasami*, I.L.R. 29 M. 453 declared no longer law; *Raja of Kalahasti* v. *Achigadu*, I. L. R. 30 M. 454; *Zemindar of Karvetnagar* v. *Trustees of Tirumalai Tirupati, &c. Devasthanams*, I. L. R. 32 M. 429 followed.] There is nothing in principle to confine the observations of the Judicial Committee in *Hanuman Prasad's* case, 6 M. I. A. 393 as to the sufficiency of a *bona fide* and reasonable enquiry to the case of alienations only. They apply with equal force to simple money debts as well. No doubt, ordinarily something more than the mere representation of the borrower is necessary to constitute resonable enquiry on the part of the lender, especially when the borrower's interests are likely to be opposed to those of the reversioner or the infant heir or other person whose manager he or she may happen to be. But the representations of the borrower are not merely evidence but may, in particular circumstances, be sufficient, to shift the onus from the lender to the person impeaching the debt or alienation. [*Sarat Chandra Banerjee* v. *Bhupendra Nath Basu*, I. L. R. 25 C. 103 referred to.] When a brother of the last male owner and the last male owner's widow were in joint possession of a Zemindari under a compromise, the same being liable to be divested on adoption by the widow: *Held*, that the brother and the widow represented the estate completely and a debt contracted or alienation made by the brother must be dealt with on the footing of an alienation by the widow. *Hanuman Prasad's* case, 6 M. I. A. 393 explained.

Maharaja of Bobbili v. *Raju Kaminayini Bangaru* 593

———————**Inheritance**—*Mitakshara —Priority—Great grandson of great grandfather—and great grandson of grandfather—Dravida School —Test of consanguinity and spiritual benefit—Respective applicability to the Madras School*:—The word "sons" in the text of Mitakshara Ch. II, S. 4, *v.* 2; S. 4, *v.* 7 and 8 and S. 5, *v.* I, does not include grandson. Where the petition is between two collateral sapindas included among the enumerated heirs preference should be given to the sapinda belonging to the nearer line. As between the great-grandson of the great-grandfather of the last male owner and the great-great-grandson of the grandfather, the latter is entitled to succeed in preference to the former. *Obiter*:—It may be that all other tests being equal the superior effiacy to oblations would be a legitimate ground for giving preference, though it is difficult to conceive of a case among the sapindas in which the nearness of line would not be present as a determining factor. The question may arise only among bandhus of the same class and then the quality or the quan-

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tity of the spiritual benefit which they confer on the propositus may be a good ground for preference.

Subramania Pillai v. *Muthusami Pillai* 856

———————**Marriage**—*Marriage expenses—Right and duty to give girl of deceased Hindu in marriage—Mother's Right to be paid for expenses*:—The mother of a Hindu girl whose father is dead being the proper guardian of the person of the girl is entitled to select a bridegroom for her and to give her in marriage ; and in order to entitle her to do so it is not necessary for the mother to show that her father-in-law wrongly and improperly refused to perform the marriage. The mother is entitled to be paid the reasonable expenses of the marriage of her daughter by the husband's coparceners. The liability is one that arises under the Hindu Law and not under the Contract Act. The texts relating to the duty of the father's co-parceners to give away a deceased Hindu's daughter in marriage deal only with the religious rite of making the gift or *danam* of the bride ; they are only directory and not obligatory even from a religious point of view ; they create no legal right or obligation ; they do not prescribe any special rules with respect to selecting a bridegroom or of disposing of a girl in marriage (as opposed to the ceremonial act of giving) ; and, consequently, the right to select a bridegroom vests in the guardian of the girl as part of the general rights of guardianship.

Ranganaikammal v. Ramanuja Aiyangar 600

———————**Maintenance of Widow**—*Decree, form of—Liability of property—Extent of liability*:—A partition effected among the members of a Joint Hindu family subsequent to the institution of a maintenance suit by an undivided coparcener's widow will not affect her right to a decree charging her maintenance on the whole property of the joint family as it was on the date of the plaint. [*Hemanjini* v. *Kedar Nath*, I. L. R. 16 C. 758 at 763 (P. C.) distinguished.] A widow of an undivided coparcener has a right to have her maintenance charged on the entire joint family property and not merely on the share of those coparceners of her husband whose share might be said to have been accelerated by her husband's death, *i. e.*, the share of the husband's branch of the family. [*Jayanthi Subbayya* v. *Alamelu Mangamma*, I. L. R. 27 M. 45 at 48 explained.] *Obiter.*—It may be that a decree for maintenance would not be forceable against a member of the joint family which gave something more than the interest of her deceased husband which had passed by survivorship.

Subbarayulu Chetty v. *Kammalavalli Thayaramma.* 493

———————*Marriage expenses of daughters a necessity* :—*See* HINDU LAW—DEBTS 421

Hindu Law—Payment to one of several co-parceners when good :—*See* PARTNERSHIP. 508

———————**Partible property—Severance of self-acquisitions and joint property**—*Onus*:—In a joint Hindu family governed by the *Mitakshara*, the father kept his own earnings separate from the property that came to him at the time of partition. He also left at his death documents which would clearly show how much of the

Hindu Law—(*Contd.*) **PAGE.**

assets left by him were his own acquisitions and his disposal. All the testator's papers came at his death into the hands of the defendant. *Held.*—That the courts in India rightly drew the inference that the material documents were withheld by the defendant because they would disprove his story.

Srinivasa Moorthy v. *Venkata Varada Iyengar...* 669

———**Partition decree, effect of**—*Appeal, effect of, on decree —Subsequent deaths and births, effect of*:—Partition may be effected by consent or by decree; and, in both cases, once it is properly effected, either by consent or by decree it is not affected by subsequent births or deaths among the parties to the partition. Decrees which are right at the time when they are passed, whether for partition or otherwise, are not varied by reason of subsequent events; and severance effected by a partition decree correct at the time it was passed, is not effected by the subsequent filing of an appeal therefrom. Where the legal representative (the mother of a deceased party to an appeal from a partition decree) applied to be brought on the record and the other sharers objected to it on the ground that the share survived to them. *Held*:—(1) That the legal representative should be brought on the record for the adjudication of the very question of the deceased's share surviving to the rest of the sharers ; (2) that the severence between the parties was effected by the partition decree of the first court ; and (3) that the legal representative (the mother) became entitled to the deceased's share irrespective of the pendency of the appeal. [*Subbaraya Mudali* v. *Manicka Mudali*, I. L. R. 19 M. 345 followed. *Sakharam Mahadev* v. *Harikrishna Dangha*, I. L. R. 6 B. 113 not followed. *Joy Narain Giri* v. *Grish Chunder Myti*, I. L. R. 4 C. 444 ; s. c. 5 I. A. 228 and *Chidambaram Chettiar* v. *Gauri Nachiar*, I. L. R. 2 M. 83 referred to. *Sangili* v. *Mookhan*, I. L. R. 16 M. 350 and 353 doubted].

Thandayuthapani Kangiar v. *Ragunatha Kangiar* 240

———**Stridhan**—*Inheritance—Priority—Step-daughter and husband's great-grandfather's great-grandson* :—As between a woman's step-daughter and the woman's husband's great-grandfather's great-grandson, the former is the preferential heir to her stridhan.

Manja Pillai v. *Sivabagyathachi* 851

———**Succession—Deed altering mode of succession**—*Test*:—Two brothers, Hindus, subject to the Dayabhagha law, executed a document by which they purported to provide for the permanent devolution of their respective properties in the direct male line including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule; and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs or their descendants. *Held*, on a construction of the document, that it could not be construed to be a gift to the son of the executant defeasible in the event of his death without male issue ; that the sole intention of the executants was to alter the rule of succession in their family which they had power to do and that the instrument was consequently void. [*Tagore* v. *Tagore*, L. R. I. A. Sup. 47 followed.]

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The question in all these cases is not whether the gift over was given in the event which happened afterwards but whether it was good in its creation.

Purna Sashi Bhattacharji v. *Kalihan Rai Chowdhuri* 1119

——————— **Widow—Alienation for discharge of husband's debts**—*Onus* :—Where a widow sells a portion of her husband's estate to pay off alleged debts of her husband, the onus is upon her to prove that the debts were owing by the husband.

Bhawani Kunwar v. *Himmat Bahadur* 641

——————— **Widow—Maintenance**—*Wrongful withholding—Arrears—Costs*:—What a Hindu widow is entitled to for her maintenance is an amount which in the opinion of the court would be required to enable her to live comfortably according to the standard of comfort obtaining in the community to which she belongs, regard being had also to the extent of property out of which she is entitled to maintenance. No hard and fast rule can be laid down that she is entitled to a particular fraction of the income, although she can in no event claim more than the income of the share of the estate which her husband would have been entitled to if a division had taken place during his lifetime. A wrongful withholding in the sense of a morally improper withholding is not necessary to entitle a widow to arrears of maintenance ; nor is demand essential for the purpose. She may no doubt waive her right, but waiver cannot be necessarily inferred in every case from the fact of separate residence alone. Arrears will be refused only in cases when the person liable to make the payment had justifiable grounds for inferring " that the claim was abandoned" and had in consequence not set aside any portion of his annual income to meet such claim. [*Raja Yerralagadda Mallikarjuna Prasada Naidu* v. *Rajah Yerralagadda Durga Prasada Naidu*, I. L. R. 24 M. 147 referred to.] Where a widow was removed by her relations after her husband's death from her husband's home for the sake of her protection : *Held* that the circumstances of the case did not establish waiver. In a suit for maintenance the defendant need not be allowed proportionate costs on the amount disallowed to the plaintiff unless the claim be an exorbitant one. The object of such a suit is to ascertain the liability of the family estates, and the costs of doing so should ordinarily come out of the estate.

Rangathayi Ammal v. *Munusawmi Chetty* 707

——————— **Widow, powers of—Decree against widow—Execution sale—Interest sold**—*Question of fact—Considerations—Debt—Onus of proof of necessity—Widow's rights over net income—Compound interest on debt—Court sale and voluntary sale by widow—Manager, powers of alienation—Alienee's rights* :—Where a decree is obtained against a Hindu widow, even if the decree is based on the widow's contract and does not give a charge on the husband's estate and the reversioners had not been made parties to the suit or execution proceedings, the decree-holder would be entitled to have the entire estate sold and if in fact the entire estate was sold and bought by the purchaser, the reversioners could not defeat the purchaser. There is no difference in this respect ; between a court sale and a voluntary sale by the widow for the discharge of the husband's debt. [*Giribala*

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Dassi v. *Srinath Chandra Singh*, 12 C. W. N. 769. *Narana Maiya* v. *Vasteva Karanta*, I. L. R. 17 M. 208 disapproved]. The real question in all such cases is what was in fact sold : and that question is one of fact. The sale certificate is though an important piece of evidence on the question, yet not conclusive. The frame of the suit, the judgment, the decree the execution proceedings, the advertisements for sale, the adequacy or in adequacy of the purchase-money and the conduct of the parties, are all circumstances which may legitimately be considered in the determination of the question. [*Boistub Churan Tevaree* v. *Govind Parshad Tewaree*, 13 W. R. 203 ; *Asmal Bibee* v. *Ram Kant Roy Chowdhry*, 19 W. R. 251 ; *Ankhu Ram* v. *Nand Kishore*, I. L. R. 1 A. 236 ; *Nagenderchunder Ghose* v. *Sreemutty Kaminee Dossee*, 11 M. I. A. 241 ; *General Manager of the Durbhanga Raj* v. *Maharaj Coomar Ramput Singh*, 14 M.I.A 605 ; *Kistomoyee Dassee* v. *Prosunno Narain Chowdry*, 6 W.R, 304 ; *Baijan Doobey's case*, I.L.R. 1 C. 133; *Jugal Kishore* v *Jotendro Mohun Tagore*, I.L.R. 10 C. 985 ; *Deendayal's case*, I.L.R. 3 C. 198; *Suraj Bunsi Koer* v. *Sheo Persad Singh*, I.L. R 5 C. 148; *Girdhari Lal* v. *Kuntoo Lal*, L.R. 1 I. A. 321; *Sambunatha Pande* v. *Golap Singh*, I. L. R. 14 C. 572; *Pettachi* v. *Chinnatambi*, I. L. R. 10 M. 241 ; *Daulat Ram* v. *Mehr Chand*, I. L. R. 15 C. 70 ; *Nanomi Babuasin* v. *Madhun Mohun*, I. L. R. 13 C. 21 ; *Mahabir Pershad* v. *Moheswar Nath Sahai*, I. L. R. 17 C. 584 ; *Bhagbut Pershad Singh* v. *Girja Koer*, I. L. R. 15 C. 717 ; *Abdul Aziz Khan* v. *Appayasami Naicker*, I.L.R. 27 M. 131; *Jiban Krishna Roy* v. *Brojo Lal Sen*, I.L. R. 30 C. 550 ; *Brojo Lal Sen* v. *Jiban Krishna Roy*, I. L. R. 26 C. 585; *Narana Maiya* v. *Vasteva Karanta*, I. L. R. 17 M. 208; *Giribala Dassi* v. *Srinath Chandra Singh*, 12 C. W. N. 769 ; *Veera Soorappa Nayani* v. *Errappa Naidu*, I. L. R. 29 M. 484 ; *Devji* v. *Sambhu*, I. L. R. 24 B. 135 ; ref. to]. The mere description of the widow as Zamindarini is in no way a determining factor to lead to the inference that the interest sold was the whole estate. A Hindu widow is entitled to the entire net income of the husband's estate after the payment of peishcush and other similar charges ; and she is not bound to pay her husband's debts out of her income. [*Ramasami Chetty* v. *Mangaikarasu Nachiar*, I. L. R.18 C, 311 ; *Debi Dayal Sohoo* v. *Bhan Pertap Singh*, I.L.R. 31 C. 433; referred to]. A Hindu widow can agree to pay compound interest on loans contracted by her for necessity and it depends on the exigencies of the circumstances in which a loan is incurred whether a provision for compound interest should be held to be reasonable or otherwise [*Huroo Nath Rai Chowdhri* v. *Randhir Singh*, I. L. R. 18 C. 311]. Where the question of necessity for an alienation by a widow is raised after a long lapse of time(as in this case 40 years) it would be unreasonable to insist on strict and definite evidence of necessity, and it is not the law that,if a person *bona fide* lent money on the security of the estate in order to enable the widow to meet the Government dues, he must lose his money unless he can show that the widow's difficulties had not been brought about by gross mismanagement. The law on the powers of a Hindu father manager of the family and widow to bind the entire estate by his or her dealings and the rights of the alienees, reversioners and others examined and summarized.

Marudaga Nachiar R. Savadi Triumalai Kolundu Pillai. 321

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———**Widow's right to recover arrears of maintenance**—*Demand unnecessary—Waiver, proof of—Vrithams, cost of*:—No demand is necessary to entitle a widow to arrears of maintenance. Where defendant pleads waiver of a widow's right to arrears ofmaintenance, it is upon him to show that the plaintiff agreed to waive her right or led the defendant to believe as a reasonable man that she would not claim arrears. [See *Raja Yeralagadda Mallikarjuna Prsada Nayudu* v. *Raja Yerlagadda Durga Prasada Naidu*, I. L. R. 24 M. 147 (P. C.)] A Hindu widow is entitled to the cost of performing such *vrithams* as such are usually observed by widows. [*Sreemathy Nittokisore Dossee* v. *Jogendro Nath Malick*, L. R. 5 I. A. 55, referred to.]

Subramania v. *Muthammal* 482

———**Widow**—*Suit for possession by one of his co-widows—Others colluding—Decree, form of—Suit in exclusive right.*

See CO-TENANTS 997

———**Wife's right of residence in family dwelling house**—*Husband's power of alienation of dwelling house*:—A Hindu wife has not during her husband's lifetime, a right to reside in the family house like the widows ot deceased co-parceners, and a husband is, consequently, competent to dispose of his family dwelling house, even though it has the effect of depriving his wife of her residence therein. The text of Katyayana "except his whole estate and his dwelling house what remains after the food and clothing of his family, a man may give away whatever it be whether moveable or immoveable ; otherwise it may not be given " cannot be taken literally so as to debar a Hindu husband from alienating his family dwelling house to the detriment of his wife's residence in it.

Olagayee v. *Avadai Ammal* 303

Idol—*Worship, right of—Proof—Worship at particular place*:—Where worship to an idol is offered at places other than the temple it should not be inferred, without distinct evidence or circumstance necessarily leading to the conclusion that any right exists to offer it at the particular place. The right of worship, including any special right of worship a person may possess, is a civil right but the mere fact that a person has offered worship at a particular place for a number of years would not necessarily give him a right to do so. [*Nagiah Bathadu* v. *Muthachari* 11 M. L. J. 215 considered.]

Subba Reddi v. *Narayana Reddi* 1028

Inam—*Land revenue in kind granted as inam—Effect of Government commutation of revenue into cash, on inam—Agreement to accept revenue at 'olugu' rate by inamdar, effect of—Reversion to revenue in kind*:—Where an inam was the *tirva* in kind or the right to receive a share in the produce which the Government would be entitled to receive, it does not necessarily follow that because the Government has for a long term of years commuted its right to a share in the produce for a money payment that the inamdar is bound to do the same. Even if the inamdars once agreed to accept the revenue, at the *olugu* rate prevailing in the village it is open to them to revert either to a division of the produce or to commutation at an altered rate.

Srinivasiengar v. *Sivasubramaniam Pillai* 126

Inam—(*Contd.*) PAGE.

———*Resumption effect of—Extinguishment of incumbrances—Jadaba service—Madras Regulation VI of* 1831:—Resumption of an inam consists in putting an end to the grant and remitting the services and requiring the holders to pay full assessment ; and consequently resumption of inam lands in possession of mortgagees does not extinguish the mortgages. Jadaba (bearer) service is a personal service and inams in respect of that service are not covered by Regulation VI of 1831.

Veeranna v. *Kannama* 962

Inam in a Zemindari— *Presumption as to the nature of inam—Occupancy right—Proof—Ejectment*:—The presumption in the case of an inamdar in a Zemindari is that what was given as inam was only the melwaram right. I. L. R. 30 M. 502 [S. A. 705 of 1909. foll : *Marapa Tharalu* v. *Telukula Neelakanta Behara*, I.L.R. 30 M. 502 dist.]. The fact that the tenants have not proved that their predecessors were always in occupation or that ryots whose connection with them was not proved were cultivating in a few stray years is not evidence that the inamdar exercised the right of ejecting the cultivators and giving the land to new cultivators. The fact that the rent paid has not been uniform is not evidence that the defendants have no occupancy right in the absence of evidence that money rents had been fixed for the land.

Bhadrayya v. *Bappayya*... 803

Injunction—Objection to light and air—*Substantial deprivation of light and air—Injunction the rule and damages the exception*:—See EASEMENT. 313

Insolvency (Presidency) Act, Ss. 7, 27—Salary of insolvent—*Vesting of—Rights of creditor*:—The salary of an insolvent vests in the Official Assignee, but he cannot get rid of it until the court makes an order under S. 27 of the Insolvency Act. The insolvent has a right to object to the attachment of his salary by any creditor of his on the ground that the salary was not his, but became vested in the Official Assignee.

Ranganatha Rao v. *Ananda Chariar* 78

Landlord and tenant—Compensation *for building on ejectment—T. P. A.*, S. 108 (*h*)—*Right to removal of superstructure or compensation after expiration of tenancy*:—Plaintiff took a lease about twenty years before suit of a site in the City of Madras from defendant's predecessor in title. Ten years thereafter plaintiff erected a building thereon to the knowledge of the defendant's predecessor. In the next year, defendant bought the land and the plaintiff attorned to him to hold the site at a certain rent, to quit at one month's notice removing the superstructure. *Held*:—Per *Chief Justice* (agreeing with *Wallis, J.*).—That the plaintiff tenant was entitled neither to the removal of the superstructure nor to compensation after the expiry of the tenancy. Per *Sankaran Nair, J.*—S. 108 (*h*), T. P. A., is only an enabling section. It does not take away rights pre-existing by virtue of the common law or the usage of the country. Where a brick building is constructed with the consent of the owner, an agreement to pay compensation to the tenant should be implied. He is equally entitled to remove it after the termination of the tenacy. *Held* also on the facts of the case that the building was on the site before the lease, that the plaintiff was holding only the site as

Landlord and Tenant—(*Contd.*) PAGE.

tenant and the house as owner ; and that the defendant landlord could not recover the house which was not let by him and which was not subsequently attached to the ground ; and that if the landlord wanted the building he should pay for it.

Angammal v. *Aslami Sahib* 891

——————*Ejectment Suit—Presumption as to nature of tenancy in Ryotwari land* :—It cannot be laid down that in all cases of ryotwari lands, the cultivating tenant cannot have in any case a right of occupancy in the land. A person suing in ejectment must in the first instance prove that the defendant came into possession under a contract of tenancy, before he could claim to eject the latter. Whether a presumption of tenancy from year to year will be drawn in any particular case will depend upon the length of possession of the tenant, the presence or absence of variation in the rate of rent, the manner in which the tenant has been dealing with the land and the other circumstances of the case.

Veeranan Ambalana Peria Kampalam v. *Annasawmi Aiyar* ... 846

——————*Forfeiture for non-payment of rent—False plea of discharge—Period of grace—No relief* :—Forfeiture for non-payment of rent when a period of grace is provided for in the lease cannot be ordinarily allowed, especially when the tenant falsely pleads discharge.

Mahalakshmi Amma v. *Lakshmi* 960

——————*Limitation—Adverse possession—Essentials* :— There is no presumption that a tenant who encroaches on his land-lord's lands intends to hold possession purely for the benefit of the land-lord, and in the case of an encroachment by the tenant on the adjoining lands of the landlord, the tenant acquires a title by adverse possession encroached land as a tenant irrespective of the knowlege of the landlord of such encroachment. The true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. [*Guru Doss Roy* v. *Issur Chunder Bose*, 22 W. R. 245 approved ; *Ishan Chandra Mitter* v. *Raja Ram Ranjan Chakerbutti* 2 C.L.J. 125 ref. to ; *Maidin Saiba* v. *Nagapa*, I. L. R. 7 B. 96 ; *Krishna Govinda Jawadar* v. *Banku Behari Saha* 13 C. W. N. 698 ; *Wali Ahmed Chowdry* v. *Totameah Chowdry*, I. L. R. 31 C. 397 ; *Prohlad Teor* v. *Kedarnath Bose*, I. L. R. 25 C. 302 doubted.]

Muthurak Koo Thevan v. *R. G. Orr* 615

——————*Rent sale—Adjournment—Inadequacy of time—Court's duty to raise issue on absence of allegation of injury—Madras Acts—Rent Recovery Act*:—The adjournment of a rent sale under the Rent Recovery Act by the selling officer from the date fixed for the sale, whether valid in law or not, is at the most only an irregularity and cannot invalidate the sale in the absence of substantial injury to the defaulter. Though it is open to a court to consider any question of irregularity in a rent sale, even though the point has not been raised,

Landlord and Tenant.—(*Contd.*) PAGE.

yet in the absence of any allegation of consequent substantial injury, it should be presumed there was none and the framing of an issue on the point is unnecessary and improper.

Thyagaraya Chettiar v. *Sivapada Mudaly* 1008

——————*Zamindar and farmer—Water-cess—Liability for—Right of suit against farmer for water-cess*:—A farmer cannot apply for sanction under S. 11 of Act VIII of 1865 for enhancement of rent due in respect of any increase in produce to the ryots by water supplied from Government source; the Zamindar only can do so; and consequently the Zamindar cannot maintain a suit against the farmer for money due in respect of such use of water by the ryots when he has not applied for sanction for the increase of rent on that score.

Batchu Raju v. *Raja Rao* 1031

——————*Permanent intermediate Tenure—Onus*:—When the holder of an intermediate tenure between the Zemindar and the cultivating ryots contends that his tenure is a permanent tenure and there is no document on the language of which he can make out such a permanent tenure, the burden is upon him to establish the permanency of his tenure by other evidence in the case. The fact that for a period of 33 years an unvarying money rent was paid is not enough to establish the permanency of the tenure.

Linga Reddi v. *Venkatakrishna Rao* 166

——————*Rent—Payment of lower rate by defendant's vendors by reason of usage—Pleadings—Purchser's liability to pay usual rate.* Where a zamindar claims a certain rate of rent from his tenants, but the tenants plead a lower rate which was paid by their vendors (Velamas) and the landlord sets up a certain usage by which lower rates were charged from Velama tenants, and the usage was found by the Court:—*Held* that the tenants were bound to pay the rate claimed, there being no question of plaintiff's seeking to enforce payment of rent *by reason* of usage *from* defendants; and consequently no question arises as to the defendants' knowledge of the usage before their purchase. [*Manavikrama Raja* v. *Rama Pattar*, I. L. R. 20 M. 275 distinguished.]

Appa Rao v. *Brahmayya.* 1098

Land Tenure—*Tenant holding over*:—A tenant holding over on the expiration of a lease and paying rent is a tenant from year to year and his possession is not adverse to that of the landlord until the date of the termination of the tenancy.

Linga Reddi v. *Venkata Kishna Rao.* 166

Legal Practioners Act—Unfounded allegations against Judge *in the exercise of his office*:—A vakil will be guilty of professional misconduct if he makes unfounded allegations involving a reflection on the conduct of a judge in the exercise of his office and seeks to put them on record. The vakil in the case presented a petition to the Sessions Judge on the day after the summing up to the assessors and before judgment was delivered, in which he alleged, without any foundation for the allegation, that the Judge, before the arguments were over, came to court with a draft judgment, and that the said draft was for

Legal Practitioners Act.—(*Contd.*) PAGE.

conviction. *Held*, that the vakil was guilty of professional misconduct for which he must be reprimanded.

In re a Vakil 70

——————— **S. 13** (*f*)—*Reasonable cause—Rule 27—"Enters into any trade or business"—Usurious money-lending transactions*:—A pleader who entered into usurious and oppressive money-lending transactions, using the name of his minor son as a screen, did not give the notice required by Rule 27 of the Rules under the Legal Practitioners Act. The transactions were numerous, continuous and systematic. *Held* that, there was reasonable cause for an order of suspension or dismissal within the meaning of S. 13 of the Legal Practitioners Act.

Kunmetta Chinnrappa v. *Thimma Reddi* 559

Letters Patent, cl. 12 " Dwell " :—Where the defendant took up a hired house in Madras, meaning to remain there several months, and was actually living there when the suit was instituted, he could not be heard to say he was not " dwelling " within the jurisdiction of the Madras High Court.

Srinivasa Moorthy v. *Venkatarama Aiyangar*... 669

———**Cl. 15—"Judgment,"** *meaning of—Appeal—Interlocutory orders —Orders and independent proceedings, stay of execution,etc.—Exercise of discretion in discretionary matter:—Per Curiam:*—No appeal lies from an order of a Judge on the Original Side of the High Court declining to frame an issue asked for by one of the parties to the suit. Per *Chief Justice*:—The word "Judgment" in Cl. 15 of the Letters Patent does not include all orders in civil proceedings. It includes orders in proceedings though interlocutory. The test is not the form of the adjudication but its effect on the suit or proceeding in which it is made. If the effect is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained), *e.g.*, an order in an application for an interim injunction, for the appointment of a receiver is a "judgment." [3 M. H. C. R. 384 doubted; 26 M. 437, 1 M. 148 approved; 27 M. 432, 14 M. 88, 28 M. 28 diss. from; 30 M. 143, 24 M. 252 approved.] An adjudication on matters of discretion is appealable, if the effect is to dispose of the suit so far as the court making the adjudication is concerned. Per *Krishnaswami Aiyar, J.* :—The word " judgment in Cl. 15 of the Letters Patent covers interlocutory or preliminary judgments as well as a final judgment but it does not include an interlocutory order. But the right or liability with reference to which the court adjudicates or declines to do so must be the substantive claim or liability and not a right to a particular judicial procedure or a detriment suffered in being denied the benefit of a rule of procedure. Orders in incidental proceedings, *e.g.*, those for attachment and arrest

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before judgment, temporary injunction, appointment of a receiver, stay of execution and security for costs are appealable. The order of a single judge refusing to exercise his discretion or exercising it in a particular way is also appealable, though it may be that the appellate court may decline to interfere on the ground of its being a discretionary matter. Per *Chief Justice and Krishnaswami Aiyar, J.*—An order refusing to issue a commission is not a Judgment.
Tuljara v. *Alagappan* 1

Lien—*Vendor and purchaser—no presumption of intention to relinquish by taking personal security from third person* :—*See* T. P. A., S. 55 ... 849

Limitation—Adverse possession—Possession adverse to mortgagor *not adverse to simple mortgagee* :—The interest in immovable property which is affected by adverse possession is the interest and that interest only, which the person who was entitled to immediate possession at the time the adverse possession began, has at that time. If such a person has the entire interest when the adverse possession begins, he cannot by afterwards transferring the whole interest, as by sale or by transferring a part of the interest as by mortgage, prevent the operation of prescription upon the entire interest, unless he also interrupts the possession which is adverse. If, however, while still in possession he transfers a part of his interest, the transferee will not be affected by the subsequent possession of a third party, if under his transfer he is not entitled to possession of the property. Possession adverse to the mortgagor is not adverse to a simple mortgagee whose mortgage was prior in date to the commencement of adverse possession. [*Ramasawmy Padayachi* v. *Ponna Padayachi*, 21 M. L. J. 397 not followed.]
Parthasarathi Naikan v. *Lakshmana Naikan* 468

———**Adverse possession of mortgaged property**—*Effect of, on mortgagee*:—The existence of a mortgage at the time of the commencement of adverse possession of mortgaged property cannot prevent the person in possession from acquiring ownership of the land both as against the mortgagor and mortgagee—unless it be the case that the adverse possession was intended to be limited to the mortgagor's interest only. The mortgagee's cause of action arises against the adverse holder on the date on which the latter obtained such adverse possession of the mortgaged estate. [*Aimadar Mandal* v. *Makhan Lal Dey*, I.L.R. 33 C. 1015 and *Venkatachalla Achari* v. *Subramania Chetty*, I. C. 264 dissented from ; *Health* v. *Pugh*, 6 Q. B. D. 345 (1882) ; 7 A. C. 235, distinguished ; *Ammu* v. *Ramkrishna Sastri*, I.L.R. 2 M. 226, *Rama Coomar Sen* v. *Prosunna Coomar Sen*, (1864) W. R. 375, *Prannath Roy Chowdry* v. *Rookea Begam*, 7 M. I. A. 323 at p. 335, *Sheoumber Sahoo* v. *Bhowanudeen Kunwar*, 2 N. W. P. H. C. R. 223, *Karan Singh* v. *Bakar Ali Khan*, I. L. R. 5 A. 1; 9 I. A. 99 relied upon.]
Ramaswami Chetty v. *Ponna Padayachi* 397

———**Adverse possession—Status as adopted son**—*Property can be acquired and not status* :—*See* HINDU LAW—ADOPTION ... 500

———**Adverse possession—Trust**—*Oudh lands—Settlement* :—The onus of proving the testamentary capacity of a testator lies on those by whom the will is propounded, and the evidence held to discharge that

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obligation is not displaced by the mere proof of serious illness and of general intemperance of the testator. Evidence of circumstances of the character that there was motive and opportunity for the exercise of undue influence by the persons propounding a will, and that some of them in fact benefited by the will to the exclusion of other relatives of equal or nearer degree, may suggest suspicion and would certainly lead the court to scrutinize with special care the evidence of those who propound the will, but is not by itself sufficient to set the will aside on the ground of undue influence. In order to set aside the will on the ground of undue influence there must be clear evidence that such influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.

Bur Singh v. *Uttama Ram.* 100

———**Trust—Settlement**—*Obligation to release the property settled*:—At the time of the first settlement of Oudh in 1859 a lady applied as *malik* for settlement of the villages in suit. Her claim was opposed by a Nawab, who was in possession, on the ground that he was entitled to remain in possession until certain monies which he had disbursed on her account, were paid off. That objection was upheld and the settlement was made with the Nawab "in accordance with possession," and the lady was directed to proceed by a separate application to get the property released by payment of the money due by her. In 1867, when the regular settlement of the Province was in progress, the lady's application for settlement of the villages with her was again resisted by the Nawab on the ground that they were included in the *sanad* granted by Government to him, and dismissed on the 31st October 1868. The suit was instituted in 1905 to recover possession of half a share in the villages, and it was contended that the proceedings in 1859 constituted the Nawab a trustee on behalf of the body. *Held* that the co-relative obligation that lay on the Nawab to release the property on payment of the money did neither create a trust nor constitute the Nawab a trustee for the lady; that in 1867, when the lady applied for the regular settlement, an adverse title was distinctly set up by the Nawab and from 31st October, 1868, the date of the dismissal of her application, the Nawab's possession was adverse to the lady; and that the suit was, therefore clearly barred. [*Hassan Jafar* v. *Mahammad Askari*, L. R. 26 I. A. 229 distinguished.]

Mahomed Bakar v. *Mirza Muhammed Bakar* 109

———**of Uraima right**—*Denial of right and exclusion*:—*Held* that the consistent denial of plaintiff's right to the Uraima right from 1875 down to 1892 by the defendants coupled with the actual exclusion of the plaintiff from all management was sufficient in law to put an end to the plaintiff's Uraima right by lapse of time.

Kesavan Nambudri v. *Abhikesava Vathiar* 175

———**Act**—*How far a law of procedure*:—*Obiter*:—Limitation is a law of procedure for some purposes; *e. g.*, when questions of private international law have to be decided and a court has to settle the law of which state should be applied in case of conflict.

Sree Krishna Doss v. *Alambu Ammal* 777

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———**Act, Ss. 4, 14**—*Not to be cumulatively read—Computation of time—Suit filed in wrong court—Tacking on of time during recess of wrong court* :—Where a plaintiff filed a suit in a wrong court, the time for filing it having expired during the recess of that court on its reopening day and the plaint was returned subsequently to be presented to the proper court: *Held* that the plaintiff would not be entitled to deduct the time between the expiry of the limitation period and the day of the reopening of the court in which he wrongly filed the suit first, even though he may be entitled to invoke the benefit of S. 14 by reason of a *bona fide* mistake as to the time during which his suit was pending in the wrong court after having been filed there once and also to deduct the time during which the proper court was closed.

Mohidin Rowthen v. *Nallaperumal Pillai* 1000

———**S. 4, Art. 179**—*Joint-mortgage decree—Ex-parte decree set aside against one—New decree—Starting point of limitation—Practice—Procedure*:—A mortgagee obtained decree against his mortgagors, of whom S. was one, on 25-8-00 and it was made absolute on 21-12-00. S. applied to set aside the decree against her which was *ex-parte*. The application was granted but finally a decree against her also was made on 15-8-02, which was eventually confirmed in appeal on 16-11-04. The decree holder applied for an order absolute and for an order for sale on 15-12-05, but his application was granted only as against S. The decree-holder again applied on 21-12-05 for execution by way of sale against all defendants. *Held* :— that the execution was not barred, as time began to run only from the date of the last judgment, *i.e.*, 16-11-04 ; (2) That the dismissal of the prior application of 15-2-05 did not operate as *res judicata* to the application of 21-12-06, the latter being based upon the two orders absolute which were in effect one decree of the date of the latter order. (3) That it might have been more in accordance with strict procedure if the court had set aside the whole jndgment and had proceeded to retry, the case against all the defendants. That the irregularity had worked no wrong and was of no real consequence.

Haji Ashfaq Husain v. *Lala Gauri Sahai* 1140

———**S. 7**—"*Discharge can be given*"—*Decree in favor of members of Hindu joint family—Competency of managing member to give discharge* :—The managing member of a Hindu joint family is competent to give a valid discharge of a decree-debt due to the family within the meaning of S. 7 of the Limitation Act IX of 1908. [Observations of *Bhashyam Aiyangar, J.* in *Periasawmi* v. *Krishnayyan*, I. L. R. 25 M. 431 at 439 declared to be no longer law.]

Duraisawmi Sastrial v. *Venkatarama Iyer* 1088

———**Ss. 8, 7, Art. 44**—*Whether Art. 8 controls Art. 44—Hindu Law—Guardian's alienation of minor co-parcener's property—Right of each co-parcener to recover property alienated, distinct—Alienee from co-parcener, rights of*:—Per *Abdur Rahim, J.*:—S. 8 of the Limitation Act applies to a suit to which Art. 44 would be applicable. S. 8 is applicable to a case where the property sought to be recovered belonged to more than one plaintiff as Hindu co-parceners, all of whom were minors at the date of alienation but one or more of whom attained majority more than three years before the suit. *Obiter* :—It is a well estab-

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lished rule of construction of the Limitation Act that the sections control the application of the articles in the schedules except so far as the language of any particular article precludes the application of any section. Per *Sundara Aiyar, J* :—Ss. 7 and 8 are inapplicable except where the starting point fixed by the schedule is postponed by reason of disability ; and consequently Ss. 7 and 8 are inapplicable to cases to which Art. 44 applies. Where a guardian for two minor Hindu co-parceners alienates property, the cause of action for each to recover his share of the alienated property is distinct from the others, and S. 8 of the Limitation Act has no application to the case. Where one of the plaintiff-co-parceners is barred, in respect of his right to sue to recover the alienated properties and his right to recover his share is extinguished, the other co-parcener can sue to recover only his share of the alienated properties *Obiter* :—The proposition that a Hindu co-parcener has no right to a definite share of the property is only true in the sense that his share is liable to fluctuations of increase and decrease as between him and his co-parceners and also in the sense that until partition he cannot claim, as between himself and his co-parceners, exclusive title to any particular item of the family estate or any of the share of the income of the estate. An alienee's position is quite different and he obtains title to the alienor's share in the property transferred as it stood on the date of the alienation.

Doraisawmi v. *Nondisawmy Saluvan* 1041

———**S. 10**—*Acknowledgment, what is*:—*Held*, that a letter which ran as follows "with reference to your letter, I have to inform you that I wish to examine the accounts, as my accounts do not show such an amount mentioned in your letter" was no acknowledgment within the meaning of S. 19 of the Limitation Act. *Obiter* :—S. 19 of the Limitation Act is so worded as to suggest that where there is an acknowledgment for starting a fresh period of limitation, the right acknowledged must be of the same description as the right which is the subject of the suit. In a suit for the balance due upon taking accounts an admission that accounts must be taken and settled would be a pertinent acknowledgment, but it might be taken otherwise in a suit brought to recover a definite sum of money.

Andiappa Chetty v. *Devarajulu Naidu* 1025

———**S. 12**—*Time taken to obtain copies of judgment and decree*:—Under S. 12 of the Limitation Act, in computing the period of limitation prescribed for an appeal, both the time taken for obtaining a copy of the decree and the time taken for obtaining a copy of the judgment should be excluded even though the application for the one was made after the copy of the other was ready. [*Raman Chetty* v. *Kadiruvelu*, 8 M. L. J. 148 followed.]

Silamban Chetty v. *Ramanadham Chetty* 152

———**S. 20**—*Payment by principal—Whether saves limitation against surety*:—Payment by principal does not save limitation against the surety. [*Gopal Daji* v. *Gopal Bin Sonu*, I. L. R. 28 B. 428 followed].

Srinivasa Varadachariar v. *Echammal.* 455

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———————— **Art. 11**—*Effect of order—C. P. C.*, (1882), *S.* 283—*Order adverse to judgment-creditor—Subsequent purchaser from judgment-creditor—Effect of order in claim proceedings on purchaser*:—It may be that subject to certain limitations an auction-purchaser, is the representative of the judgment-debtor and not of the decree-holder; but a person who is the assignee of the judgment-creditor-purchaser in court sale is bound by an order against the judgment-creditor in claim proceedings even though the judgment-debtor was no party to the proceedings. The judgment-creditor, if he is the identical party against whom an order is made in claim proceedings, cannot afterwards say that he is not bound by the order by reason of his subsequent purchase of the property. An order under S. 283, C. P. C., (of 1882) need not be solely an order relating to the right to physical possession of the property but may be with reference to the right to claim the property in dispute.

Rama Aiyar v. *Palaniappa Chetty* 756

———————— **Art. 11**—*Suit for refund of money paid a second time owing to the default of decree-holder to certify* :—The cause of action for recovery of money paid to a third person, the attaching creditor of the decree-holder a second time by reason of the decree-holder's default to certify payment arises when the judgment-debtor paid the second time, and the suit, if brought within three years from the date of the second payment, will not be barred by limitation. *Obiter* :—The case may be otherwise if the suit is for refund of money paid to the decree-holder himself a second time.

Arji Manappa Chetti v. *Arji Shunmugappa Chetti*. 518

———————— **Arts. 62, 29, 49, 120**—*Suit by assignee of decree against attaching creditor for refund of assets realized*:—A suit by the assignee of a decree against the attaching creditor of a decree for recovery of money received by the latter in execution when the assignee himself was not in a position to execute the decree his claim petition and the subsequent suit having stood dismissed at the time of realization, is governed by Art. 120 and not by Art. 29 or 59 or even by Art. 62. In order that Art. 62 may apply, the money must have been actually or constructively received by the defendants for the plaintiff's use.

Ramaswami Chetty v. *Hari Krishna Chettyar* 705

———————— **Art. 65**—*Suit against surety—Cause of action*:—A surety's liability arises from the contract of guarantee and not by the mere fact of the loan. Time runs against him from the date of default and Art. 65 applies to the suit against him.

Govardhana Doss v. *Krishnayya* 457

———————— **Art. 85**—"*Mutual account*"—*Meaning—Test.* Per *Chief Justice*:—As a general rule payments made on account by one party and credited by the other, whether in money or in goods, do not render the accounts mutual. Per *Ayling, J* :—For an account to be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. [*Hirada Basappa* v. *Gadigi Muddappa*, 6 M. H. C. R. 142 and *Velu Pillai* v. *Ghose Mahamed*, I. L. R. 17 M. 293 referred

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to.] Defendants borrowed money from plaintiffs: they obtained goods of various kinds through them and they made payments from time to time by sending in coffee. *Held* Per *Curiam*:—That the accounts were not "mutual."

Shiev Gowda v. *Fernandez* 391

———**Art. 90**—*Principal and agent—Suit for recovery of money entrusted to defendant for payment to third party*:—A suit for recovery of money paid by the plaintiff to the defendant for payment to a third person, on default of payment to the third person, is governed by Article 90 of the Limitation Act.

Rungasawmi Aiyangar v. *Srinivasa Aiyangar* 453

———**Art. 111**—*C. P. C.* (*Act VIII of* 1859), *S.* 246—*Scope of enquiry—Judgment-debtor if a necessary party to inquiry under S.* 246—*Estoppel—Demisor and demisee*:—The judgment-debtor cannot be regarded as necessarily a party, to an investigation under S. 246 of Act VIII of 1859; and in the absence of proof of service of notice on him, he is not bound to set aside an order in claim proceedings within one year from the date of the order. The court, under S. 246 of Act VIII of 1859, could only make an order releasing the property from attachment or disallow the claim—a claim *objection to the sale* of the property in execution. The rights of any claimant to some interests in the property, *e.g.*, to an equity of redemption in the possession of the judgment-debtor cannot form the subject of an inquiry under S. 246 of Act VIII of 1859.

Kottayi Kanaran v. *Ganapati* 550

———**Art. 134**—"*Transfer*"—*Mokurari lease of debutter property—Suit by successor*:—Their Lordships, following 36 I. A. 148, applied in an *exparte* case Art. 134 of the Limitation Act to a suit by a shebait to recover property granted in mokurari lease by his predecessor more than 12 years before suit. *Obiter*:—Art. 134 may not apply to such case especially in view of the substitution of the word "transfer" for "purchase" in the Article in the Act of 1908. [36 I. A. 148 doubted.]

Shyam Chand v. *Ram Kaur Ghore* 1145

———**Arts. 144, 148—Adverse possession**—*Mortgage—Part failure of consideration—Mortgagee in possession claiming greater amount—No adverse possession—Mortgagor and mortgagee—Accounts*:—Where part of the consideration for a mortgage is void or fails or the mortgagee makes default in paying it, the mortgage is good to the extent of the consideration that has validly passed. If a mortgagee is entitled to possession under a mortgage even though the consideration was paid only in part, time cannot run in his favour for the acquisition of a larger interest by his mere assertion of it to the knowledge of the mortgagor. The article applicable to a suit for redemption in the case is Article 148 and not Article 144. *Obiter*.—Where a usufructuary mortgagee is in possession of the mortgaged property under a covenant that he should appropriate the income towards the interest on the whole amount and the balance towards the principal, without paying the whole amount of consideration for the mortgage:—*Held*, that the

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whole surplus remaining after the discharge of the claim for interest on the consideration to the extent to which it was paid, should go towards the discharge of the principal due.

Tirumal Raju v. *Muthial Naidu* 169

——**Art. 182**—"*The date of the decree*"—*Portion of—amount left unspecified and left to be determined—Cause of action when arises*:—The intention of the Legislature is to treat a decree as a whole, although only a part, and sometimes a very small part, may be the subject of an appeal, or an application for review or amendment. Different starting points for portions of a decree against the same defendant seem to be contemplated only in the case where the decree directs payment on different dates. Where a portion only of the amount decreed is left to be ascertained in future limitation for the execution of the whole decree runs from the date of ascertainment. Where a decree directed payment of certain specified amounts and also the costs incurred in the lower appellate court which it said "will be ascertained and taxed by that court" *Held* that limitation for execution of the whole decree ran from the date of the ascertainment of the unspecified sum.

Vydianatha Aiyar v. *Subramanian Pattar* 546

——**Art. 182** —"*Not provided for by......*"—*Scope of exception—Transfer of decree—Effect of proviso—C. P. C., S.* 48—*Limitation law how for a law of procedure*:—The exception relating to Art. 182 makes the court which passed the decree the test for determining the limitation for execution and not the court to which the decree is transferred for execution. Although a decree is transferred by the court which passed it to another court for execution, the control of the execution is still in several respects in the hands of the former court. So when a decree of the Presidency Small Cause Court is transferred to the City Civil Court for execution, Art. 182 of the Limitation Act, and not S. 48, C. P. C. governs the case for purposes of limitation.

Sree Krishna Doss v. *Alumbu Ammal* 777

Madras Act Cess Act VII of 1865—S. 1—II—"*At pleasure*"—*Arrears Cess when in arrears ?—Levy to be within the fasli—Levy for past years invalid*:—Liability to pay cess does not attach itself by the mere use of the water. It is at the pleasure of Government to levy or not to levy cess for water used. The liability arises only on and after the imposition of the cess. The cess has to be imposed within the fasli: and consequently an order charging water cess for faslis other than the fasli in which the order is made (*Eg.* for a period of ten years) prior to the levy is illegal. *Per Chief Justice*:—The word "arrears" in S. 2 of the Act means payments which have become due and have remained unpaid after the levy was made; and the Government have no power to collect the rate for a period before the levy is made.

Raja Ramachandra Appa Row v. *The Secretary of State for India.* ... 786

——**Civil Courts Act**—*Transfer of part-heard appeal to Sub-Judge's file*:—A District Judge is not competent to transfer an appeal heard in part and remanded by his predecessor to the Subordinate Judge's file.

Chinnathayammal v. *Chikkana Chetti.* 480

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———**City Municipal Act, S. 334**—*Farming out license fees "ultra vires"—Corporation—Levying taxes and farming, out not incidental to each other*:—The power to farm out is not incident to the power of levying taxes; and the Madras Corporation has no power to farm out license fees due under S. 335 of the Madras Municipal Act.

Corporation of Madras v. *Masthan Saib* 788

———**Court of Wards Act, I of 1902, S. 47**—*Limitation—C. P. C. (Act XIV of 1882), S. 325 A*:—There is nothing in the language of S. 47 of the Court of Wards Act to show that only the last clause of S. 325-A, C. P. C. of 1882, and not the whole of S. 325-A, has been made applicable to proceedings for execution in the civil court.

Umade Raja v. *Bali Row* 464

———**District Municipalities Act, Ss. 10, 250**—*Rule 36—Jurisdiction of civil courts to question validity of Collector's order—Suit for damages and suit for injunction—Difference*:—The validity of the Collector's order under rule 36 of the election rules framed under the Madras District Municipalities Act passed in substantial conformity with the requirements of the rules cannot be questioned in a civil court. [*Bhai Shankar* v. *Municipality of Bombay*, I. L. R. 31 B. 604 at 609 referred to. *Vijiaraghava* v. *Secretary of State*, I.L.R. 7 M. 466; *Sabapat Singh* v. *Abdul Gaffur*, I. L. R. 24 C. 307; *Lalbhai* v. *Municipal Commissioner of Bombay*, I. L. R. 33 B. 334 distinguished]. *Obiter*:—It may be that the Collector's order passed without any inquiry at all or based on grounds those set forth in Rule 35 is liable to be impeached in a civil court. A suit for damages stands on a different footing from a suit for declaration and injunction against the Municipal Council in respect of an election.

Nataraja Mudaliar v. *The Municipal Council of Mayavaram* ... 878

——————————**Ss. 191, 92**—*Corporation powers—Farming out and levying taxes—Contract Act, Ss. 11, 12—Farming contract 'ultra vires.'*:—The power of farming out is not a necessary incident to the right of levying the tax. The powers of Mofussil Municipalities are limited and circumscribed by the District Municipalities Act and extend no further than what are expressly stated therein. A Municipality has no right to farm out its right to collect slaughtering fees, and a farming contract for the collection of slaughtering fees is both *ultra vires* and void. [*Abdulla* v. *Mahomed*, I. L. R. 26 M. 156 distinguished. *Corporation of Madras* v. *Masthan Saib*, 21 M. L. J. 788 followed.]

Kumbakonam Municipal Council v. *Abbah Saib*... 790

———**Estates Land Act, 3, cl. (7). S. 6, Cl. (1)**—*"Final decree."—By the Full Bench*:—Where an appeal from a decree in ejectment passed under the old law is heard after the date of the commencement of Madras Act I of 1908, the defendant being a ryot in possession of ryoti land on such date, he is entitled to claim a right of occupancy under S. 6, Cl. (1) of the Act notwithstaning the original decree. The words 'final decree" in Cl. (7) of S. 3, mean a decree which has ceased to be modified on appeal. *Per. Chief Justice*:—*Obiter*—Where a landlord obtains a decree in ejectment before the commencement of the Act and executes it before the commencement of the Act, the ryot

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could not claim the benefit of the first part of S. 6. Per *Krishnaswami Aiyar, J*:—The final decree of competent civil court referred to in the definition of 'old waste' is a decree obtained in a proceeding independent of that in which the question of occupancy right is dealt with under S. 9, Cl. (1) or the presumption under S. 23 is made.—*Kanakayya* v. *Janardhan Padhi*, ... 31

———**Estates Land Act, S. 6**—"*Now in possession*"—*Refusal to accept patta* :—Possession is necessary at the date of the Act to enable a tenant to acquire occupancy right under S.6 of the Madras Estates Land Act. Refusal to receive patta relieves the landlord from offering draft muchilika for execution or to wait till the expiry of the time fixed in the patta for execution of the muchilika before suing for ejectment.
Rangaswami Iyengar v. *The District Board of Tanjore* 728

———**Forest Act XIV of 1882—Ss. 25, 16, 17—Proviso to S. 25**—*Extinguishment of rights—Prior order of reservation, if necessary*:—S. 25 of the Madras Forest Act is a drastic enactment. A notification under S. 25 operates in exactly the same manner as one under S. 16 to which S. 17 is a mere corollary. It is purely discretionary with the Government to make an enquiry before issuing a notification which has the effect of extinguishing private rights. S. 25 gives legislative sanction to forest reservation made before the Act in all cases in which the Government thinks fit to take action under S. 25. The fact that the whole of the land reserved by the notification under S. 25 was included in the notification before the Act is a good defence to the objection that the original reservation was bad in that it included lands not at the disposal of Government before the Madras Forest Act. Where Government contemplated the issue of a further notification in respect of certain area in 1879, but did not so issue, but proceeded to issue a notification under S. 25 after the passing of the Madras Forest Act: *Held* :—That the reservation was not bad for want of a final order prior to the passing of then Act and that there was no legal obligation on Government to issue a further and final notification of reservation before the Act and that an order of the Government in 1881 directing demarcation and survey in accordance with the earlier order of 1879 without adding anything regarding the issue of any further notification operated as a prior reservation for the purposes of S. 25.
Subramania Pillai v. *The Secretary of State for India* 132

———**Local Boards Act (V of 1884), S. 51**—*Board of Revenue's power*:—*See* MADRAS REGULATION VII OF 1817 336

———**Rent Recovery Act, S. 7**—*for larger amount than what is actually due—Illegality—No distinction between sale and distraint*:—A distraint for a larger amount of rent than what is actually due is wholly void and cannot be held valid even to the extent of the rent actually due. [*Venkatakrishna Pillai* v. *Muthialu Reddi*, 20 M. L. J. 821; *Periakaruppa Pillai* v. *The Manager of the Lessees of Shivagunga Zemindari;* I. L. R. 31 M. 22; *Ramachandra* v. *Naragarasawmi*, I.L.R. 10 M. 229 not followed; *Varna Deva Desikar* v. *Murugesa Moodelli*, I.L.R. 29 M. 75 followed; *Shunmooga Moodelly* v. *Palmattikuppu Chetti*, I. L. R. 25 M.; 613; *Bashyakarlu Naidu* v. *Gurudappaneni Subbanna*, I. L. R. 27 M. 4, *Munisami*

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Naidu v. *Perumal Reddi*, I. L. R. 23 M. 613 referred to.] A distraint and a sale stand on the same footing in this respect.

Narasimha Naidu v. *Sathayya.* 57

——————**S. 11—Enhancement**—*Collector's sanction*—The rule as to the Collector's sanction for enhancement of rent does not apply to a case where the landlord merely claims to revert to *varam*, in the absence of contract.

Mallikarjuna Prasada v. *Venkata Vasudeva Row.* 156

———**Revenue Recovery Act, S. 3**—*Defaulter—Landholder—Levy of water-cess—Proprietor primarily liable and not tenant* :—Where the Government levies water-cess by reason of increase in water supplied in consequence of improvements made by the Government, the zemindar is the person primarily liable to pay it, and he can, if circumstances justify his doing it, only demand an enhancement of rent from the tenants on obtaining the sanction of the Collector under S. 11 of Madras Act VIII of 1865. [*Nynappan Servai* v. *Secretary of State*, S A. No. 597 of 07 not followed. *Zamorin of Calicut* v. *Sitarama*, I. L. R. 7 M. 405 and *Secretary of State* v. *Ashtamurti*, I. L. R. 13 M. 89 referred to. *Subramania Chetty* v. *Mahalingaswami Sivan*, I. L. R. 33 M. 41 and *Vidyapurna Thirtha Swami* v. *Ugganu*, 20 M. L. J. 640 followed]. The proprietor is the "land-holder" and also the person liable to become a "defaulter" within the meaning of the Revenue Recovery Act.

Kothilinga Setu Royar v. *Sahasranama Iyer* 662

———**Ss. 3, 4, 5, 26**—*Defaulter—Vendors and purchasers—Liability to pay revenue accrued due before sale*:—A person who becomes the registered proprietor of land on a certain day becomes liable to pay the arrears of revenue remaining due on it on that day and becomes a "defaulter" within the meaning of the Act on failure to pay the same.

Subbayya Garu v. *The Secretary of State for India* 656

Madras Regulation VI of 1831—does not cover Jadaba (bearer) Service:—*See* INAM 962

Mahomedan Law—*Transfer of property for a term in lieu of dower, validity of—Not a gift of life estate*:—A transfer of property to a Mahomedan lady for a term (here for her life) by the husband in consideration of dower must be regarded as a sale and not as a gift of a life estate [*Sahiba Begum* v. *G. Atchamma*, 4 M. H. C. R. 115; *Ghulam Mustafa* v. *Hurmat*, I. L. R. 2 A. 854; *Abbas Ali Shaikdar* v. *Karim Baksh Shaikdar*, 13 C. W. N. 160 referred to] and such a transaction is unimpeachable under the Mahomedan Law.

Bibijanbi v. *Hazarath Saib* 958

Malabar Law—*Karnavan, powers of—Raising funds for defence of members in a rioting case*:—A Karnavan will be within his rights in raising money on the security of his family property for the defence of the family members charged with rioting, if the money could not otherwise be procured for the defence.

Subbu Shettethi v. *Krishnacharya* 159

Malabar Law—(*Contd.*) PAGE.

——**Karnavan—Prior suit by Anandaravans**—*Karnavan colluding with defendants for possession of property—Decree—Second suit by karnavan for possession on the basis of the prior decree—Res judicata* :—A suit by a *karnavan*, claiming right to possession under a decree in a former suit by the *anandaravans*, as the only person entitled to represent the *tarwad*, is maintainable and not barred by *res judicata*, though it may be, that in the prior suit by the *anandaravans*, he opposed the claim which the decree recognized. A *karnavan* does not cease to be a *karnavan* or lose his right to possession by the mere fact that he was unwilling to prosecute a suit and that the *anandaravans* consequently happened to combine to bring a suit for possession on behalf of the *tarwad* and obtained a decree.

Rama Kurup v. *Shekara Kurup* 87

——**Uraima right**—*Right of Widow*:—*Held*, on admission, that according to Malabar law and custom a widow cannot exercise the *Uraima* right in a *Devaswom.*

Adhikesava Vathiar v. *Kesavan Nambudri* 178

Malice, definition of :—*See* C. P. C., S. 95 1052

Marriage—*Presumption—Proof—Legitimacy—Forms and ceremonies—Capacity of mind.*—The objection to a marriage on the ground of mental incapacity must depend on a question of degree. *Held* that in the case before their Lordships the evidence of mental infirmity was wholly insufficient to establish such a degree of that defect as to rebut the extremely strong presumption in favour of the validity of marriage. To matters of form and ceremony, the established presumption in favour of marriage undoubtedly applies. Where a man and a woman were proved to have been recognised by all persons concerned as man and wife, so described in important documents on important occasions and their daughters were respectably married as would be natural in the case of legitimate children :—*Held*, that these facts following as they did upon ceremony of marriage which undoubtedly took place, though its validity is attacked, afforded an extremely strong presumption in favour of the validity of the marriage and the legitimacy of its offsprin g.

Mouji Lal v. *Chundrabati Kumari* 933

Master and servant—Suspension whether and when incidental to power of dismissal—*See* TRUSTEE AND ARCHAKA 580

Mesne profits—*Assessment of deductions for public taxes—Efficient management, uncollected taxes, etc.—Onus*:—In the ascertainment of profits due for the period during which a defendant was in possession of plaintiff's lands decreed to the latter: *Held*, that the defendant cannot claim any deductions towards (1) any remissions he made voluntarily to tenants on grounds of their poverty and failure of crops as distinguished from sums, which he may show as irrecoverable from them ; (2) any deductions (*e.g.*, $2\frac{1}{2}$ p. c. paid to the Court Wards in this case) by way of contribution towards a specially effective mode of management adopted in his own interests; (3) or anything as uncollected rent. The onus is in the first instance on the plaintiff to prove the amount of mesne profits, from his property, but if the defendant has it in his power to

Mesne profits—(*Contd.*) PAGE.

prove separately the income derived from plaintiff's property as distinguished from his own, the onus will be shifted on to him. *Obiter*:—Ordinarily in calculating mesne profits, the person in possession is entitled to deduct the public taxes like the water-tax paid by him to Government; but where he is entitled to recoup himself by collecting it from the ryots in actual cultivation of the land and it is admitted he took muchilikas from them for the purpose, no such deduction can be made.

Surya Rao v. *Subbayamma Row* 965

Minor—*Deed by mother without describing herself as guardian—No presumption of guardianship*:—Where a deed is executed by a minor and his mother without the latter describing herself as a guardian it would be a violent presumption to treat the mother as acting for the minor.

Krishnan Chetti v. *Vellaichami Thevan* 1077

———**Hindu Law**—*Trading partnership—Liability on bills drawn by guardian's agent—Extent*:—A minor member of a joint Hindu trading family is liable on bills drawn by the manager whether it be for purposes connected with the business or unconnected with it and in fraud of the family; but his liability is limited to a share in the business. The rule is different in the case of a minor who is the sole owner of the business. There the creditors have no direct recourse against the minor or his estate but as the guardian is liable to indemnity for the liabilities properly incurred out of the assets of the minor embarked in the business, creditors have been held entitled to proceed directly against such assets; but where a guardian has no right to indemnify against the assets in the business, as where he has acted improperly, his creditors also will not have the right. A guardian of a minor—sole proprietor in a partnership—cannot in any view be justified in giving any larger powers to the agent than are reasonably necessary, and a guardian will be acting improperly in giving her agent power to draw bills in favour of himself or his firm; and if, as the result of giving such power, the guardian finds himself involved in liability for the fraud of the agent she has no right of indemnity against the assets of the minor in the business nor are her creditors entitled to claim any relief against the minor or his assets.

Krishna Murthi v. *The Bank of Burmah, Ld.* 620

———**Loan for necessaries**—*Onus contents of deed*:—Where a creditor of a minor's estate seeks relief on the basis of his having lent for necessaries, it rests upon him to have taken care that the bond is so drawn up as to render the minor's estate in law liable for the debt.

Krishnan Chetti v. *Vellaichami Thevan* 1077

———**Specific performance of contract for purchase of immoveable property by guardian**—*Mutuality—Guardian or manager—Powers*:—It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property; and such a contract is not specifically enforceable by a minor on attaining majority, when there is no mutuality in the contract.

Minor—(*Contd.*) PAGE.

Quaere :—Whether there is any difference between the position of a manager and that of his guardian.

Mir Sarwarjan v. *Fakhruddin* 1156

Mortgage—Charge—*Distinction between. Per Krishnasami Aiyar, J* :— *Obiter.* A charge may be created on the happening of a condition where the condition itself is first stipulated and the condition happens afterwards. A covenant to pay is essential for a simple mortgage. It is not necessary that there should be a formal transfer of any interest in property in words : Nor is it necessary to constitute a simple mortgage that the instrument should state that the mortgagee shall recover his money by sale.

Balasubramania Nadar v. *Sivaguru Asari* 526

——**Construction**—*Simple mortgagee* :—See CONSTRUCTION, page 17 *supra*.

——**Equitable mortgage by deposit of title deeds** *Essentials*:— Where the only document that is deposited shows no kind of title in the depositor to the property and there are documents in existence showing his title to the property which are not deposited, an equitable mortgage cannot be said to have been validly created.

Venkataramayya Pantulu v. *Narasinga Row* 454

——**Prior and puisne mortgagees**—*Suit by for prior mortgagee without impleading puisne mortgagee and purchase by prior mortgagee of the equity of redemption—Puisne mortgagee's rights—Redemption, a right and not a liability—T. P. Act, S.* 67:—A first mortgagee who has purchased the mortgaged property in execution of a decree on his mortgage is not entitled to a decree for possession against a puisne mortgagee with possession who was not impleaded in the first mortgagee's original suit, even subject to the puisne mortgagee's right of redemption. The puisne mortgagee's rights (whatever they were) at the date of his mortgage—whether to possession (if his mortgage be one with possession and the previous mortgage without it) or to sale or foreclosure under S. 67, T. P. Act—remain altogether unaffected by the first mortgagee's suit to which the former was no party. He has also the right to redeem the prior mortgage, which is preserved in law in spite of the purchase by the prior mortgagee of the equity of redemption. But redemption is a right which the puisne mortgagee may seek to enforce and not a liability which he may be compelled to discharge ; and consequently, if he is unwilling to redeem, he cannot be deprived of his original right to institute proceedings for sale or foreclosure (whatever it was) under S. 67 as second mortgagee. A second mortgagee is entitled to the same rights as the first mortgagee with reference to his security, having regard to the nature of mortgage. The purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage. These rights are unaffected by the suit of the first mortgagee to which they were not made parties or the decree therein or the sale held in pursu-

Mortgage—(*Contd.*) PAGE.

ance of the said decree. The purchaser in such a suit, whether it is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage, but only those that subsist in him at the the date of the suit.

Mulla Vittil Seethi v. *Achuthan Nair* 213

———*Priorty—Estoppel of prior mortgagee*:—A prior mortgagee who concurs in inducing the subsequent mortgagee to advance his money as a first charge cannot afterwards turn round and claim priority over that charge in favour of his own mortgage.

Raman Chetty v. *Steel Brothers and Co., Ltd.* 936

———*Priority—Novation, if and when—Extinguishment of security*:—The law imputes to a person the intention to act according to his own interest. This rule is not affected by the general principle laid down in *Bank of Tasmania* v. *Jones*, (1893) A. C. 313 ; that a party, though not a party to the contract, may be entitled to the benefit of a contract which operates as a novation. *Held*, that a person who held an equitable mortgage over certain property, obtained a decree for sale and had some balance due to him in respect of the mortgage did not lose his priority by subsequently taking a regular mortgage for the amount so due under the decree and for an additional amount, in favor of a puisne mortgagee before the decree 811

———*Redemption—Clog on—Lease and mortgage—Single transaction—Lease to last beyond the discharge of mortgage*:—Leases between a mortgagor and a mortgagee to last during the pendency of a mortgage are not bad in themselves. (*Mahomed* v. *Ezekiel*, 7 Bom. L. R. 772, 779, referred to), but where the documents (the lease and the mortgage) form one transaction and contemplate the continuance of the lease after the discharge of the mortgage, the transaction is a fetter on the equity of redemption which the court ought not to enforce. The fact of the existence of two documents does not by itself show that the transactions were independent of each other

Authivedu v. *Subbiah* 1011

———**Subrogation—Discharge of prior mortgage** *binding on third party—Subsequent mortgage of other property by one of the mortgagors*:—A second mortgagee from a certain person applied part of the mortgage money in discharge of a prior mortgage which bound the interest of a third person. There was an express statement of an intention to keep alive the discharged mortgagee. There was no intermediate incumbrance against which the prior mortgage might be presumed to be kept alive; and the rates of interest stipulated under the mortgage differed from that provided in the earlier one. *Held*, that the second mortgage was not binding on the third person's interest. [*Mohesh Lal* v. *Mohunt Bawan Dass*, I. L. R. 9 C. 961 followed. *Gokal Das Gopal Das* v. *Purammal Premshuk Das*, I. L. R. 10 C. 1035 distinguished. *Surjiram Marwari* v. *Barhamde Dass Pershad*, I. L. R. 2 C. L. J. 288; *Bisseswar Prasad* v. *Lala Surman Singh*, 6 C. L. J. 134 and *Govindasawmi Devan* v. *Doraisawmi Pillai*, 20 M. L. J. 381 referred to.]

Kalagayya v. *Yanadamma* 180

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Mortgage suit—*Onus of proof of title to mortgage:*—It is for the mortagagee to prove the title of the mortgagor in a mortgage suit. *Held* on the facts that the mortgagee had failed to make out the title of the mortgagor to mortgage the properties, the mortgagee himself having been aware that the property belonged to a mutt and that the mortgagor was one of the claimants to the mahuntship and had not succeeded in establishing his title.

Madho Persad v. *Ramrattan Gir* 389

———*Redemption suit—Application by mortgagor for sale on failure of deposit—Competency :*—*See* C. P. C., o 34, *rr* 7 AND 8 941

Municipal election—*Collector's order, Jurisdiction of Civil Courts to question :*—*See* MADRAS ACTS—DISTRICT MUNICIPALITIES ACT ... 878

Murder and Robbery—*Evidence, presumptive—Recent and unexplained possession of stolen property:*—In cases in which murder and robbery have been shown to form parts of one transaction, recent and explained possession of stolen property, while it would be presumptive evidence on the charge of robbery, would similarly be evidence against the robber on the charge of murder.

The Public Prosecutor v. *Chirreddi Munnayya*... 1071

Negotiable Instruments—*Assignments otherwise than by endorsement—Writing if necessary:*—A negotiable promissory note can be assigned otherwise than by endorsement ; [*Mahammed Kumar Ali* v. *Ranga Row*, I. L. R. 24 M. 654 *followed*] and it is enough that the transfer is evidence by a partition list, as in this case, even if writing be necessary to satisfy the requirements of S. 130 T. P. A.

Venkata Reddi v. *Lakshmi Narasimha* 80

———**Execution sale—Vesting order:—Effect of** *transfer other than by endorsement.*—*See* C. P. C., O. 31, rr. 80, 81 422

———**Discharge of debt by bill of exchange or hundi—Presumption of conditional discharge**:—The general presumption is that a a bill of exchange or hundi given for a debt operates only as a conditional discharge of the debt. The execution of a formal receipt for the amount covered by the bill of exchange or hundi is not sufficient to rebut the presumption of conditional discharge. An endorsement of receipt on the pro-note is on no better footing.

Palaniappa Chetty v. *Arunachelam Chetty* 432

———**Liability of person other than the maker**:—In the case of a negotiable instrument, the signature of one person in his own name cannot justify a decree against another person although the debt might have been borrowed for the benefit of the trading partnership of both. [*Somasundaram* v. *Krishnamurthi*, 17 M. L. J. 526 and *Subba Narayana vathiar* v. *Ramasawmi Iyer*, I. L. R. 30 M. 88 followed.]

Kutte Ammu v. *Purushotam Doss* 527

Oaths Act, Ss, 12, 11, 10—*Refusal to take oath—Effect of:*—The agreement to take the oath must be such that the court is in a position to administer it forthwith. If however, the form and place have not been settled or agreed upon and the court cannot administer it, a refusal to

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take the oath, will not entail on the party refusing a decision adverse to him on the ground of such refusal. [*Aiyakannu Nadar* v. *Muthia Nadar*, 17 M. L. J. 99 distinguished.]

Manji v. *Paramayya Hebbara* 618

Occupancy right *in Ryotwari lands*; *See* LANDLORD AND TENANT ... 845

Onus—*Mesne profits—assessment—tresspasser*:—*See* MESNE PROFITS ... 965

Opium Act, Ss. 4, 5, 9,—"*Sell*"—*Partnership agreement*—"*Partnership*," *meaning of*—"*Transfer*" *and* "*Transferable*," *meaning of*—*Statute—Construction*—*Policy of the Opium Act*.—*Held*:—A partnership agreement by which two licensed persons agreed to take a third man as a partner in their business of vending opium with a view to enable the plaintiff to carry on the opium business without a license being taken out by him for the purpose was illegal and no action was sustainable thereon even though it be that the third person was not to sell opium himself but was only to share the profits of the sale which is to be conducted by the licensed persons, as all partners must be taken to be selling the opium belonging to the partnership and the managing partner, their agent. The provisions of the Abkari and Opium Acts are not intended merely to protect the public revenue [*Natla Bapiraju* v. *Puran Achuta Rajajee*, (1910) M. W. N. 549 distinguished] and the prohibitions therein are based on public policy. *Held* also that the partnership was illegal, being a "transfer" in contravention of Cl. (26) of the license. Every contract of partnership is not *necessarily* a transfer, but it may in many cases involve a transfer. If two persons agree to start a business in partnership and to contribute capital therefor, there is no transfer. But if one person carrying on a trade or possessing stock and capital admits another into partnership with himself making the stock and capital the joint property of both, there is a transfer therein. Meanings of the words "transfer" and "transferable" dwelt upon. Principles of construction of statutes like the Opium Act, the Stamp Act and the Registration Act and distinctions therein referred to. [*Gouri Shankar* v. *Mumtaz Ali Khan*, I. L. R. 2 A. 411 commented on.]

Padmanabam v. *Sarada*... 425

Partnership, meaning—*Whether and when involves* "*transfer*" *of ownership*:—*See* OPIUM ACT, S. 4 425

————*Suit*—*Parties*—*No garnishee proceeding in firm name*:—*See* C. P. C., S. 115. 525

Partition decree, effect of—*Appeal, effect of on decree*—*Subsequent deaths, and births, effect of*:—*See* HINDU LAW—PARTITION DECREE ... 240

Partition suit—*Court fees*:—*See* COURT FEES ACT, S. 7 Cl. (iv) (*b*) 102 21

Penal Code, S. 147—*Common object after commencement of fight enough*:—The existence of a common object before the commencement of a sudden fight is not necessary for the conviction of rioting ... 805

————**S. 296**—*Conviction*—*Essentials*—*Disturbance of religious worship*:—It is not necessary for the purpose of S. 296, I. P. C., that

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the accused should have had an active intention to disturb religious worship. It is enough, if knowing that they were likely to disturb it by their music, they took the risk and did actually cause the disturbance.

Emperor v. *Seethaiah* 92

———**S. 341**—*Wrongful restraint of intending Emigrant—Emigration Act*:—The fact that a person either is or pretends to be an intending emigrant and goes to the depot and is there treated as such receiving meals and an advance of money does not confer either on the Emigration Agent or his watchman power to prevent him from leaving the depot when he desires to do so and a person who restrains him from going out of the depot is guilty of wrongful restraint within the meaning of S. 339, Penal Code.

The Public Prosecutor v. *Sheik Ahmed* 439

———**S. 361**—*De facto guardianship—Rights of*:—See Cr. P. C., S. 491. 195

———**Ss. 419, 511**—*Railways Act, S.* 112—*Travelling with a forged Pass*:—A person who travels with a forged Railway pass, but who has not been proved to have shown the pass to a Ticket Examiner or other Railway official before the completion of his journey can only be convicted of an attempt under Ss. 419 & 511, I. P. C. The conviction under S. 112 of the Railways Act confirmed.

Govindaswamy Naidu v. *Emperor* 748

———**S. 429**—"*Maiming*" *Cutting off the ears of a horse*:—Cutting off the ears of a horse amounts to maiming within the meaning of S. 429, I. P. C., Rev. Case, 583 of 1910 not followed. Meanings of the words "Maiming" and "wounding" considered.

Marigounda v. *Srinivasa Ragavachar* 843

———**Ss. 441, 457**—*House trespass—Essentials—Intention to annoy or intimidate*:—The accused entered a house in the possession of another during the latter's temporary absence by breaking open the door with a view to assert his title to the house and assaulted the servant in charge. The finding was that he had not the intention mentioned in S. 441, I. P. C. *Held*—per *Curiam*—that he was rightly convicted under S. 457, I. P. C. Per *Benson, J*:—Whether a man actually intends to cause annoyance or not he should be presumed to intend all the consequences which he knows will be the effect of his act. Per *Sankaran Nair, J.*:—The taking possession of the house by making forcible entry by breaking open the door and assaulting the servant in charge brings the accused within S. 457, I. P. C. [*Emperor* v. *Lakshmana*, I. L. R. 26 B. 538, followed. *Queen-Empress* v. *Rayapadayachi*, I. L. R. 49 M. 240; *Queen* v. *Hicklin*, 3 Q. B. 360; *Reg.* v. *Dixon* 3 (M. and S. 11); *Reg.* v. *Lovett*, 9 C. and P. 462 at 466 referred to. *Emperor* v. *Jangi Singh* I. L. R. 26 A. 194; *Emperor* v. *Baxir*, I. L. R. 27 A. 298 distinguished].

Sellamuthu v. *Karupan* 161

———**S. 446** (a)—"*With intent to commit an offence*"—*Essentials for conviction*:—For a conviction under the 1st part of S. 446 (a), I. P. C., it is enough if the Magistrate finds that the accused committed trespass with the intention of committing some offence, even though he does not find as to what the offence specifically is. [*Reg*, v. *Samban* foll, 1 Weir.

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533; *Reg* v. *Durgaya*, explained 1 Weir p. 524 ; *Reg.* v. *Rayapadayachi*, I. L. R. 19 M. 240 commented on.]

Seshayya v. *Emperor.* 781

———**S. 489** (d)—*Conviction—Essentials—Onus—"For the purpose of being used", meaning of*:—Per *Abdur Rahim* and *Sundara Aiyar*, *JJ.*—In a prosecution under S. 489 (*d*), I. P. C., where it is alleged that the accused had any instrument or material solely " for the purpose of being used" for counterfeiting any currency note, the onus is on the prosecution to show that the accused had formed in his mind the purpose or intention of counterfeiting currency notes. Per *Abdur Rahim*, *J.*—It may be in some cases a mere inspection of the articles would satisfy the court that they are capable of being used in the making of the counterfeit notes. But where this is not the case, the onus is clearly on the Crown to prove the purpose or intention. The resemblance need not be perfect, but it must be sufficient to deceive people of ordinary intelligence who are familiar with currency notes. Per *Ayling*, *J.*—The possession of even a single implement would be sufficient for conviction if the intention of the accused is proved. The intention must in almost every case be a matter of inference dependent on the facts. Where the nature of the articles is such as to render them peculiarly and specially suitable for counterfeiting work and useless for any other that can be suggested, the intention to use them for counterfeiting may be fairly inferred, subject to rebutment by the accused. Per *Sundara Aiyar*, *J.*—The Crown should prove that the accused had the objects *for the purpose* of counterfeiting. Mere intention to make oneself able to counterfeit currency notes is not enough for a conviction. The accused should have formed in his mind the purpose of using the articles for counterfeiting.

In re Abdul Rahiman 766

Plaint—*Pleadings inconsistent*:—A person who set up a permanent intermediate tenure in the lower court was not allowed to set up a case of occupancy right in appeal.

Linga Reddi v. *Kishna Rao Bahadur* 166

Pleadings—*Change of*:—Their Lordships declined to treat the suit as brought, *i.e.*, for enforcement of lien for non-payment of purchase-money directed to be paid to a third person as a suit for an account on the basis of agency or a suit for damages for non-performance of a contract.

Sivasubramania Mudaliar v. *Gnana Sambanda Pandara Sannidhi* ... 359

Practice—*Plaint—Amendment—Second appeal—New relief, addition of—Scope of amendment*:—Where an amendment is necessitated by the plaintiff's carelessness or mistake it would not ordinarily be fair to allow him to rectify his error if the amendment would derive the defendant of an advantage which he can legitimately claim to have gained by the plaintiff's mistake. But it would be hardly proper to apply this test to cases where the plaintiff cannot be charged with not having exercised reasonable care in the drafting of his plaint. A prior mortgagee brought a suit for sale without impleading the puisne mortgagee in possession and purchased the property himself and brought a second

Practice—(*Contd.*) PAGE.

suit against the puisne mortgagee for possession. The Full Bench decided that the proper remedy for the prior mortgagee purchaser was to bring a suit for sale, thereby setting at rest what was a doubtful and disputed question of law : *Held* by the Court that in the circumstances the plaintiff should be allowed in second appeal to amend his plaint by substituting therein a prayer for sale for the relief already asked for with liberty to the defendant to put in a fresh written statement.

Suthi Kutti v. *Achutan Nair* 47

Presidency Small Cause Courts Act, S. 36 and Rule 223—*Application to set aside ex-parte order ; No suit consequently no re-hearing—Revision by High Court* :—*See* C. P. C., S. 115. 525

Privy Council—*Practice—Criminal Proceedings—Special leave to appeal—What the applicants must show by their petition* :—His Majesty will not review criminal proceedings unless it be shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. [*In re Abraham Mallory Dillet*, 12 A. C. 459 followed.] The applicants ought to show the materials upon which one of those propositions can be established and ought fully to inform the Board of the facts.

Birch v. *The King-Emperor* 374

Pro-note, *suit on—Onus—Admission in pleadings or evidence—Defendant's case and plaintiff's case both disbelieved—Practice—Procedure—C. P. C. S.* 115:—Plaintiff brought a suit on a pro-note. The defendant admitted execution but denied consideration. The Judge disbelieved the defendant's evidence, but, without giving a decree to the plaintiff at once, examined the plaintiff on the question of consideration, but disbelieved his evidence also and found a consideration not set up by the plaintiff himself. *Held* per *Abdur Rahim*, *J.*—The onus being on the defendant to prove want of consideration and the same not having been discharged the fact that the plaintiff, in order to rebut the defendant's evidence, gave an untrue account as to the form of consideration cannot be taken as an admission or proof of want of consideration, especially where neither the pro-note nor the plaint stated any particular form of consideration. Per *Sundara Aiyar*, *J.*—The question of onus has absolutely no bearing on the case. It can make no difference whether the plaintiff's statement as to consideration was made in the plaint or in his evidence. An admission made by a party in his evidence unretracted and adhered to by him as the truth is as binding on him as one contained in the pleadings or in the negotiable instrument itself. It is not open even to the Judge or to the High Court to ignore the conclusion of the Judge that the plaintiff's case was false but the error committed by the Judge in giving the plaintiff a decree was a mere error of law and the High Court cannot interfere in revision.

Raghavalu Chetty v. *Sabapathy Chetty* 1031

——— *Unstamped—Suit on—Suit on original cause of action—Vendor and vendee—Enforcement of lien* :—Where a document which cannot be used in evidence is executed to evidence a complete pre-existing right, a suit may be maintained on the original right itself unless it be shewn that it was intended to merge the right in the document ; but where at the

Pro note—(*Contd.*) PAGE.

time that an obligation comes into existence, a document is executed as the evidence and record of that obligation, a suit to enforce it can be only on the document itself. [*Pothi Reddi* v. *Velayuda Sivan*, I. L. R. 10 M. 94 ; *Yarlagadda Veera Raghavayya* v. *Gorautha Ramayya*, I. L. R. 29 M. 111; *Sheik Akbar* v. *Shaik Khan*, I. L. R. 7 C. 256 referred to.] The plaintiff sold lands to defendant, received an unstamped pro-note on the same day for the purchase-money and sued on the note for a personal decree. *Held* that the suit was not maintainable. *Quaere*:—Whether a suit for the enforcement of vendor's lien is maintainable ?

Mallay v. *Ramayya* 462

Provincial Small Cause Courts Act, S. 25—*Revision—Technical objection and delay in filing petition* :—Where a Railway Company (petitioner) relies upon a mere technicality e. g., that the notice of suit was not on the Agent but only on the Traffic Manager, in order to defeat a just claim and where the petitioner has only come into court long after the period of 3 months, the court will not interfere in revision.

The Agent & Manager S. I. Ry. Co. v. *Vengu Patter* 1061

——————**Act, S. 31**—*Suit for mesne profits—Suit for mesne profits illegally carried away by defendants* :—A suit for recovery of mesne profits illegally carried away by the defendants which plaintiff was in possession is not governed by article 31 of the Provincial Small Cause Courts Act and is consequently cognisable by a Small Cause Court. [*Annamalai* v. *Subramania Aiyar*, I. L. R. 15 M. 298 followed. *Venkoba Rao* v. *Muthu Iyer, J.* 18 M. L. J. 88 not followed.

Rama Aiyar v. *Saminatha Aiyar* 442

————**Sch. 11, Art. 13**—*Suit for recovery of land cess by zamindar from inamdar* :—A suit for recovery of land-cess by the zamindar from the inamdar does not fall within Art. 13 of the Provincial Small Cause Courts Act. The cesses and dues contemplated in Art. 13 are payments which a person is entitled to as representing his interest in certain immoveable property and not because he possesses some interest in immoveable property. [*Zemindar of Tarla* v. *Latchiah*, 13 M. L. J. 211 ref. to.]

Maharaja of Vizianagram v. *Veeranna* 819

Registration Act, S. 17, Cl. 1.—*Compromise beyond the scope of suit not registered—How far valid in so far as it affects immoveable property—Evidentiary value* :—Non-registration of a compulsorily registrable document leads to two consequences: (1) it cannot be *received as evidence* of any transaction affecting immoveable property: (2) it shall not affect any immoveable property comprised therein. A compromise which comprised matters outside the scope of the suit and which consequently was not embodied in the decree or order of court as to those matters is incapable of affecting any property covered by the portion not so embodied in the decree or order, if unregistered, and the fact that there was an entry in the court's record of the compromise would not make any difference. *Obiter* :—How much of the compromise would be evidence under S. 35 of the Evidence Act would depend upon how much thereof could be regarded as having been entered in the record

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of the court. [*Bindesri Nath* v. *Gunga Saran Sahu*, I. L. R. 20 A. 171 (P.C.); *Pranal Anni* v. *Lakshmi Anni*, I. L. R. 22 M. 508 (P.C.) explained ; *dictum* in *Natesa Chetty* v. *Vengu Nachiar*, I.L.R. 33 M. 102 dissented from; *Raghubans Mani Singh* v. *Mahabir Singh*, I. L. R. 28 A. 78 declared not followed in *Kasi Kumbi* v. *Samar Kumbi*, I.L.R. 32. A. 206; *Saduruddin* v. *Chaggu*, I. L. R. 31 A. 13; *Birabhadra Nath* v. *Kalpatam Punda*, 1 C. L. J. 388; *Kalicharan Ghosal* v. *Ramachandra Mundal*, I. L. R. 30 C. 783; *Gurudas Singh* v. *Chandrika Singh*, I. L. R. 36 C. 193 approved ; *Jasimuddin Bishwas* v. *Bhuban Jelini*, I L. R. 34 C. 456 distinguished.]

Partichelamanna v. *Parti Rama Row* 870

Railways Act, S. 112.—Travelling with a forged pass:—*See* I. P. C., Ss. 419, 511 748

Ratification—*Essentials*:—There can be no ratification of a transaction void owing to the promisor possessing no contractual capacity.

Krishna Chety v. *Vellaichami Thevan* 1077

———**Ss. 49, 17**—"*In evidence of any transaction affecting such property*"—*Lease compulsorily registrable but unregistered—Not admissible in evidence in suit for specific performance*:—An agreement in writing to grant a lease which requires registration is a contract which affects immoveable property and cannot be received in evidence in a suit for specific performance of such agreement, whether possession was given in pursuance of the agreement or not.

Narayana Chetti v. *Muthiah Servai.* 44

———**Religious endowment**—*Archakaship—Succession to—Resignation—Effect of—No bar to subsequent succession*:—The plaintiff, an archaka, resigned his office (which consisted of the archakaship of a temple for two days in a month) and was succeeded by his mother :—*Held* that on the mother's death the plaintiff was in the absence of any disqualifying circumstance, the proper heir to the office and not his (plaintiff's) son.

Pattabhi Ramanujacharyalu v. *Alahaswara Charyalu* 490

———*Public and private Family temple—Alienation of temple property, whether allowable*:—Property belonging to a private temple of a family is trust property and cannot be alienated. Where a temple was originally a private temple there must be clear and strong proof of subsequent dedication to the public, to sustain a plea that the temple is a public temple. The members of a family may unanimously put an end to a private endowment such as a temple of the family.

Appu Pattar v. *Kurumba Umma* 588

———*Mutt, heads of—Power to pledge credit of mutt—Necessaries and financial necessity*:—The head of a mutt cannot have any larger authority to incur debts than the heads of other religious institutions or the guardian of an infant heir. He can pledge the credit of the mutt only for necessary purposes, and that too, only in cases of financial necessity. The conduct of festivals usually conducted in the mutt is a necessary purpose. [*Saminadha Pandara* v. *Sellappa Chetty*, I. L. R. 2 M. 175 explained ; *Prosunna Kumari Debya* v. *Golabchand* 2 I. A. 145 referred to.]

Nataraja Destkar v. *Karutha Ravuthan* 129

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———*Private temple—Properties of—Ownership in—Revocation of trust—Competency of members of family to bind future generations*:—Properties set apart for the purposes of a temple by a *tarwad*, even though the temple is a private temple as contradistinguished from a public temple, cannot be called tarwad properties; and the karnavan cannot dispose of those properties as if they were tarwad properties. The properties are trust properties and must continue to be regarded as trust properties until at any rate all the beneficiaries concerned, *i.e.*, all the members of the tarwad, put an end to the temple or to the endowment, assuming they can do so. [*Rupa Jagshet* v. *Krishnaji Govind*, I. L. R. 9 B. 169.] *Quaere* :—Whether the members for the time being can put an end to the trust so as to affect future generations?

Rairu Nambiar v. *Narayanan Nambiar* 585

———*Suit for removal of trustee and appointment of fresh trustee—C.P.C.* (1882), *S.* 539—*Religious Endowments Act, XX of* 1863, *Ss.* 14 *and* 18 :—A suit for the bare removal of a trustee of a mosque may be instituted with the leave of the court under S. 18 of Act XX of 1863. A suit for both the removal of a trustee and the appointment of a new trustee, instituted with leave obtained only under S. 18 of Act XX of 1863, but not with leave under S. 539, C. P. C. (1882), may be proceeded with in regard to the first prayer only; and in such a case the suit will not be bad for want of a prayer for possession.

Ghulam Ahmed v. *Shah Muhammed Yusuf.* 450

———*Trustee's power over archaka—Hereditary archaka—Ad interim suspension—Notice not necessary—Suspension whether and when incidental to power of dismissal—Courts, when will interfere with ad interim suspension for want of notice*:—No notice is required for an *ad interim* suspension pending inquiry into a complaint against a servant entitled to hold office during good behaviour or for life. [*Seshadri* v. *Nataraja*, I. L. R. 21 M. 179 distinguished.] The position of an archaka, though his tenure of office be hereditary, is essentially that of a servant. His position in relation to the trustee is not similar to the position of the trustee to the Temple Committee. It may not be that in every case where the right to dismiss exists, the right of suspension is necessarily incidental to it. Such might possibly not be the case where the right depends on the construction of statutes or of the rules of a corporation or of a club. But these analogies are not applicable to the case of servants subject to the discipline of a trustee. Even if it were that notice before an *ad interim* suspension is essential, a court will not set aside the order of suspension where, after enquiry by the court, it has been found proper and justifiable in the circumstances. [*The King* v. *The Mayor and Council of London*, 100 E. R. 96 referred to.] It may be otherwise where the propriety of the order itself is not reviewable by the court, in which case the order will be set aside for want of notice.

Seshadri Iyengar v. *Ranga Pattar.* 580

———*Trustee—Hereditary right—proof*:—The fact that the members of the plaintiff's family have held the office of Dharmakarta continuously since 1797 for over 100 years is enough to prove the hereditary right of the plaintiff's family to the office.

Ram Das v. *Hanumantha Rao* 952

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———*Trustee—powers to fine a subordinate*:—The right to fine a subordinate should be strictly made out and is by no means to be presumed to attach to the Superior office [0-9. The Vicharanakartaship of the Mahant in the case.]

Pedda Jiyangar v. *Mahant of Tirupati* 730

———*Scheme suit—Effect of—Bar to subsequent suit.*

See C. P. C., S. 92 952

Right to sue—*Assignor and assignee—Direction to pay consideration to third party—non payment—assignor's right to sue.*

See ASSIGNOR AND ASSIGNEES 982

Right of suit—*Third party Beneficiary*:—The rule that a person not a party to a contract cannot sue to enforce any rights created by it is one which requires considerable modifications in India. [*Khwaja Muhammad Khan* v. *Hussaini Begum*, I. L. R. 32 A. 410 (P. C.) referred to.] Where co-parceners in a Hindu family agree that payments should be made to female members for maintenance a female so provided for can sue for maintenance; and it does not matter that she was not legally entitled to it independent of the agreement.

Arumuga Gounden v. *Chinnammal* 918

Ryotwari lands—*Occupancy rights*:—It cannot be laid down that in all cases of ryotwari lands, the cultivating tenant cannot have in any case a right of occupancy in the land.

Veerana Ambalan v. *Annasawmi Aiyar* 846

Special damage—*Meaning of*:—*See* C. P. C., S. 95... 1052

Specific performance—*Minor—Contract for purchase of land—Mutuality—Want of*—*See* MINOR.

Specific Relief Act, S. 42—*Proviso—Suit for declaration in respect of property in the possession of Magistrate, but to possession of which plaintiff was entitled* :—The property in suit was in the possession of the Magistrate in virtue of an order of attachment under S. 146, Cr. P. C., which was subsequently set aside by the High Court. But before delivery was obtained by the defendant a co-trustee, plaintiff brought the suit for declaration of his title to co-trusteeship without asking for possession. *Held*:—That the suit was not barred by the proviso to S. 42 of the Specific Relief Act.

Malaiyya Pillai v *Perumal Pillai* 1022

———**Ss. 54 and 56**—*Injunction—Damages obstruction of light and air* :—*See* EASEMENTS 313

Succession Act.—Ss. 3 and 187—Will—Construction.:—A testator who died in 1879, made provision for his two daughters in his will in a clause set out in their Lordship's Judgment. One of the two daughters married in 1888 and the other in 1889, and they went to live in separate houses. It was contended that in view of S. 111 of the Indian Succession Act (X of 1865) the bequest in the said clause never took effect in as much as the bequests to the daughters were given only in the uncertain event of marriage, which did not happen in the life time of the testator: Held that the will dealt with the maintenance allowance for the daughters in a clause which stood by itself and which must be read by itself; that (in the construction) the clause contained no reference to marriage or any other future event, and the payment of the

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maintenance was, therefore not made contingent on the marriage of the daughters; and that as a consequence, S. 111 of Act X of 1865 did not apply. The plaintiff brought the suit to recover arrears of maintenance alleged to be due to her under her father's will in September, 1900, when no letters of administration has been granted. In October 1900, the testator's widow obtained from the District Judge a grant of letters of administration with the will annexed. On appeal that grant was modified by the High Court in February, 1903, by limiting it to the realization of the maintenance provided for the widow by the will. The letters granted by the District Judge were never formally altered in conformity with the order of the High Court on account of the death of the widow. The plaintiff's suit was decreed in December, 1903. It was contended that S. 187 of the Indian Succession Act (X of 1865) was a bar to the suit. Held that "probate" as defined in S. 3 of the Indian Succession Act (X of 1865) was in fact obtained from the District Judge, and the provisions of S. 187 of that Act were, therefore strictly complied with; that the subsequent limitation by the High Court, even if right, was immaterial; and that the Court was competent to deal with the case as the provisions of S. 187 of Act X of 1865 were complied with before it decreed the suit.

Statute—*Construction—Right of appeal not a matter of procedure* :—A right of appeal is not a mere matter of procedure and must be governed by the law in force at the time when the proceedings in the original court commenced and cannot be taken away by a new procedure code passed after the institution of the proceedings in the original court ... 764

Succession Certificate Act, S. 7, Cl. (3)—*Discretion—Judicial discretion—Appellate Court, powers of—High Court—Revisional powers of* :—An appellate court has the same power as the first court to exercise the discretion given by Cl. (3) of S. 7 of the Succession Certificate Act. The discretion vested in courts under Cl. (3) is a judicial discretion. An appellate court could hold that a question considered by the lower court to be intricate is not intricate and *vice versa*. The High Court cannot interfere in revision under S. 115, C. P. C., with an order of the District Judge arrived at by him on the ground that the question is intricate or otherwise; *Obiter*: but it may interfere if the District Judge on appeal had not come to any decision on the question of the rights of parties and had also declined to act under Cl. (3) of S. 7.

Ramakrishna Aiyar v. *Nagammal* 824

Summons—*Service of—mode of effecting service—Defendant absent in foreign territory*:—*See* C. P. C. O. 5, rr. 17—20 978

Suspension—*Whether and when incidental to powers of dismissal* :—*See* RELIGIOUS ENDOWMENT—TRUSTEE 580

Tort—*Animals ferae naturae—Elephants—Liability of custodian and owner*:—Elephants in India are of that class of animals, the custody of which throws upon both the custodian and the owner thereof the responsibility of keeping them safe. [*Maung Kya Dum* v. *Makyin and Narayana Chetti*, 2 U. B. Ruling 570 not foll.] The absolute liability of a person for any harm done by his animal, independently of any intent or negligence on his part, does not depend, on the manner in, or extent to, which such animals are employed, but upon the nature of the class

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to which such animal belongs or the particular kind of mischief committed. A person borrowed two elephants from individual people and when in his use, one of them gored the other to death. *Held* :—That the borrower as well as the owner of the animal which attacked were liable in damages to the owner of the deceased animal.

Vedapuratti and Mooppil Nair v. *Koppan Nair* 434

——**Libel**—*Defamation—Privilege—Witnesses—Affidavit—Evidence*:—Witnesses cannot be sued in a civil court for damages in respect of evidence given by them upon oath in a judicial proceeding, whether the evidence be one given in the box o n affidavit ; and relevancy is no measure of the extent of the privilege, at any rate, in civil actions.

Adivarammа v. *Ramachandra Reddi* 85

——*Locusts—Owner's right to drive away from land—Analogy to the course of a natural river—Liability to neighbouring owner* :—The principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners, are not necessarily appropriate to the course of an insect pest which it is the interest of every one concerned to repel or destroy. The pest has no settled course and whatever its course may be, no one is bound to respect it. The progress of fire would be a much nearer analogy to the moving horde of locusts than the course of a river. Visitations of locusts, though no doubt unpleasantly frequent, are in the nature extraordinary and incalculable events, rather than a normal incident like the rise of a river in a rainy season ; and an owner of land is justified in driving away locusts from his own land without being liable to his neighbour for the consequences. Even as a formal incident of agricultural industry one will be entitled to drive the locusts away just as they are entitled to scare crows without regard to the direction they may take in leaving. [*Menzies* v. *Breadalbane*, 3 Bligh N. S. 414, 418 distinguished; *Farquharson* v. *Farquharson*, unreported decision in 1741 ; *Smith* v. *Kenrick*, 7 C. B. 515 and *Whalley's case* 13 Q. B. D. 131 ref. to.]

Greyvensteyn v. *Hattingh* 674

T. P. Act, S. 6 (e)—*Right to sue for damages for breach of contract—Assignability*:—A mere right to sue for damages for breach of contract is not assignable either under the Tr nsfer of Property Act or under the common law, even though the breach was in respect of the discharge of an obligation binding on the transferee.

Gopala Iyer v. *Ramaswami Sastrial*... 153

——**S. 51**—*Execution sale—Purchaser's rights—Stranger purchaser—Value of improvements by purchase eviction—Good faith—Test Caveat emptor*:—*See* EXECUTION SALE 969

——**S. 55**—*Contract to the contrary—No presumption of intention to relinquish lien by taking personal security from a third person* :—There is no presumption that a vendor intends to relinquish his lien by taking a pro-note from a person other than the purchaser.

Karuppiah Pillai v. *T. R. Hari Row* 849

——**S. 55, Cl. 4** (b), **scope of**—*Vendors right to interest* :—*See* VENDORS AND PURCHASERS 236

T. P. Act—(*Contd.*) PAGE.

——**S. 61**—*Consolidation of mortgages:—Per Chief Justice:*—
—S. 61 of the Transfer of Property Act implies, as is shown by the illustration, that if there are different mortgages in favour of one and the same person not in respect of different properties but the same property, the mortgagor cannot seek to redeem any one mortgage without redeeming the others also. The same principle will be equally applicable to a mortgagee having several mortgages over the same property seeking to obtain an order for sale on one mortgage.
Balasubramania Nadar v. *Sivaguru Achari* 562

——**S. 90**—"*Legally recoverable*" *Purchaser of equity of redemption—Agreement with mortgagor (vendor) to pay mortgage money* :—The purchaser of the equity of redemption who undertakes with his vendor (the mortgagor) to pay the mortgage money to the mortgagee is not a person from whom "the balance is recoverable" within the meaning of S. 90, T. P. A. and the mortgagee has no right to avail himself of the purchaser's contract with the mortgagor to pay the money.
Jamna Das v. *Pandit Ram* 1158

——**S. 100**—Charge and mortgage—Distinction :—*See* MORTGAGE ... 562

——**S. 106**—*Presumption as to nature of tenancies* :—The presumption referred to in S. 106, T. P. A. is inapplicable to agricultural tenancies; and the mere fact of payment of a share of the produce by the cultivating ryot to the puttahdar is not sufficient to prove that the cultivator is the puttahdar's tenant in the strict legal acceptation of that term.
Veeranam Ambalam v. *Annasawmi Aiyar* 846

——**S. 107**—*Lessor and lessee—Lease—Registered instrument—Validity:*—Per *Full Bench.*—The registered instrument referred to in S. 107 of the Transfer of Property Act, in order to be valid, need not be signed by the lessor. Per *Chief Justice* and *Ayling, J.*—*Obiter.*—If a registered instrument signed by the lessee and accepted by the lessor were not a lease, the mere fact that the instrument was signed by the lessee does not preclude him from denying his liability thereunder. Per *Krishnaswami Aiyar, J* :—*Obiter* :—If the deed signed by the lessee were invalid the lessee is not liable except on the footing of use and occupation.
Ajam Sahib v. *Madura Sree Meenatchi Sundareswarar Devastanam.* 202

——**S. 130**—*Scope of—Semble* :—S. 130, T. P. A., does not apply to assignments of negotiable instruments. [*Arunachella Reddi* v. *Subba Reddi*, 17 M. L. J. 303, doubted.]
Venkatadri v. *Lakshminarasimha* 81

Trust—*Charitable trust—Board of Revenue, powers of—Madras Reg. VII of* 1817, *preamble, Ss.* 2 *and* 3— *Madras Act V of* 1884, *S.* 51 :—A trust created for the purpose of distributing *neermoru* (butter milk), etc., among people attending a festival is not a religious trust. *Held* also (there being no contest in the matter) that a provision for making *archana* to the goddess on a certain day of the week did not make the trust a religious one for that reason. The provisions of Madras Reg. VII of 1817 are applicable not only to endowments that were existing on its date but also to future endowments. Neither the words "have been" and "such endowments" in the preamble nor the words "have granted" in S. 2 have the effect of restricting the scope of the Regula-

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tion to existing endowments. The words " were " and " have been " in S. 3 should be taken to have reference to the time when the Board of Revenue would be called upon to take action. The Board of Revenue, under the provisions of Reg. VII of 1817, has undoubted power to appoint trustees for charitable endowments ; but it has no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him. In this respect there is no difference between a hereditary and a non-hereditary trustee. S. 51 of Madras Act V of 1884 empowers the Board of Revenue to make over to a local board both the management and right of superintendence of a charity. [*The Chairman Municipal Council, Rajahmundry* v. *Sasusla Venkatcswarulu.* I. L. R. 31 M. 111 and *Nillayathakshi Ammal* v. *Taluk Board of Mayavaram*, 20 M. L. J. 855 referred to.]

Venkatachala Pillai v. *Taluq Board, Saidapet* 305

Trustee—Adverse title, *setting up of*:—No person who has accepted the position of trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself. A person who obtains probate of his father's will as executor cannot afterwards repudiate the will :—*Held* that he could not do so.

Srinivasa Murthy v. *Venkatavarda Aiyengar* 669

Vendor and purchaser—*Consideration—Promise to maintain vendor—Failure—Vendor's remedy*:—Where a sale deed has been registered and possession has been given, the vendor is not entitled to get the sale deed set aside on the ground that there has been failure of consideration, even though the consideration is alleged to be a promise to maintain the vendor for the rest of his life. The vendor's remedy is to recover the consideration or its value. [*Sagaji* v. *Namdev*, I. L. R. 23 B. 525, *Baijnath Singh* v. *Palta*, I.L.R. 30 A. 125 ; *Govindammal* v. *Gopalachariar*, [16 M. L. J. 524 referred to and followed.]

Subbiar v. *Subramania Aiyar* 800

———**Estate taken**—*Life tenant and remainderman—Mortgage by life tenant for purposes of discharging previous holder's debts—Not binding on the remainderman* :—A testator devised his property to his widow for life with remainder to his foster son. The widow was not made an executor nor guardian under the will. The widow mortgaged portion of the testator's properties to meet chiefly the funeral expenses of the testator and discharge the debts of the testator. *Held* :—That the foster son's interest could not be affected by the alienation.

Ayirantha Chetty v. *Aramanathochi.* 73

———*Interest on purchase money when payable—T. P. A., S. 55, Cl. 4 (b), scope of*:—S. 55, Cl. 4 (*b*) of the Transfer of Property Act does not give the vendor an absolute right to interest on the purchase money irrespective of the equities and circumstances of each case. The object of the clause is to give the vendor a lien in respect of interest if only the interest is payable. In the absence of express and distinct stipulation, the vendor cannot " have both money and mud." Where the parties intend that both the payment of purchase money and the delivery of possession of the property should be carried out contemporaneously, interest on the purchase money is not payable so long as the vendor

Vendor and Purchaser—(*Contd.*) PAGE.

is in possession of the land. [*Leggatt* v. *Metropolitan Railway Co.*, 5 Ch. 176 dist. ; *Velayutha Chetty* v *Govindasami Naicker* commented on; *Subrahmania Aiyar* v. *Poovan*, I. L. R. 27 M. 28 referred to.]

Muthu Chetty v. *Karuppan Chetty* 236

Vendor and vendee—*Lien—Waiver—Direction to pay purchase-money to stranger—Remission, benefit of—Principal and agent—Pleadings—Change of*:—Where a defendant vendee admits non-payment of consideration in terms of the bond, the onus is on him to show that it was subsequently paid. A person who directs another to pay money to a third person is entitled to countermand that order before that person has entered into direct relations with the third person and agreed to pay it to him. But where the agent is directed or authorized by his principal to pay to a third person money existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay to him, or to receive or hold the money on his behalf or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he had fresh instructions from the principal not to pay to such third person. [*Griffin* v. *Weatherby*, L. R. 3 Q. B. 753 referred to.] If the person entitled to the payment excuses a portion of the amount in favor of the person directed to pay to him, that is a benefit derived by the latter from the creditor for which he is not bound to account to the person by whom he is directed to make the payment. A vendor's lien can be lost only by an express or implied contract of waiver; and a vendor who has directed the purchase-money or a portion thereof to be paid to a third party must be taken to have waived by a contract necessarily implied from his conduct the right to a lien for any portion of the money to be paid to the third person under the agreement. [*Webb* v. *Macpherson*, I. L. R. 31 C. 57 ; *Ramakrishna Aiyar* v. *Subramania Ayyar*, I. L. R. 29 M. 305 ; *Abdulla Beary* v. *Mammali Beary*, 7 M. L. J. 376 refered to.] Distinction between entrustment of money to another for payment to a stranger and direction to pay one's dues to the stranger pointed out.

Siva Subramania Mudaliar v. *Gnanasammanda Pandara Sannadhi*... 359

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rule in *Leake* v. *Robinson*, 2 Mer. 363 is not applicable to Hindu wills. As a general rule where there is a gift to a class some of whom are or may be incapacitated from taking because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for those members of the class who are capable of taking. [*Ram Lal* v. *Kannia Lal Sett*, I.L.R. 12 C. 663 approved and ref. to]. A will ran as follows:—"My mother and my wife shall, as along as they live hold possession of all my properties, movable and immovable, and enjoy and possess the same on payment of the Collectorate revenue and the Zamindar's rents, and by maintaining in-intact continuing the service of the established deities and the ancestral rites according to the practice heretofore obtaining and shall pay off my debts and realize my dues They shall not be competent in any way to transfer the immovable property to any one. On the death of my mother and my wife, the sons of my sisters, that is to say, their sons who are now in existence, as also those who may be born hereafter, shall, in equal shares, hol the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of established deities and the ancestral rites according to the practice heretofore obtaining." *Held* on the construction of the will—1. That the more prope meaning as regards the sisters' children would be that the bequest was confined to such of the sisters' children as were alive at the death f he testator. 2. Even if otherwise the bequest took effect in favour of such of the sister's children as were alive at the death of the testator. 3. Whatever be the meaning of the words "right of inheritance," they could not be taken to render meaningless the words which had only just been used." 4. That the nephews were intended to take a vested and transmutable interest on the death of the testator. though their possession and enjoyment were postponed.

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Munro J.
Ayling J.
1911, *January* 11.
} S. A. No. 643 of 1909.

Rent Recovery Act—Tender of draft muchalika, if essential—Time of such tender.

The law does not require the landlord to tender, after a decree of the Revenue Court directing the tenant to accept a patta, a draft muchalika also. At any rate he need not tender them both at the same time. If he tenders the patta and the tenant refuses to accept it that is sufficient justification for the landlord not tendering the draft muchilika.

G. S. Ramachandra Aiyar for appellant.

P. R. Sundara Aiyar for respondent.

Benson J.
V. Krishnaswami Aiyar J.
1911, *January* 12.
} S. A. No. 1065 of 1908.

Misjoinder of plaintiffs—Two different causes of action—Suit for contribution by two Mahomedan brothers—Election.

First and second plaintiffs were brothers of the first defendant who belonged to a *Mahomedan* family and they all owed a decree debt. After paying the debt in full the two plaintiffs sued for contribution from the first defendant. *Held* that the right of the two plaintiffs was distinct and related to two distinct causes of action and that the suit was bad for misjoinder. The High Court allowed one of the plaintiffs to proceed with his portion of the suit.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for appellants.

A. Krishnaswami Aiyar for respondent.

[Full Bench.]

Chief Justice.
V. Krishnaswami Aiyar J.
Ayling J.
1911, *January* 12.
} S. A. No. 864 of 1908.

The following question was answered in the negative by the Full Bench.—

"Whether a first mortgagee, who has purchased the mort gaged property in execution of a decree on his mortgage and sues

for possession or in the alternative for the recovery of his money, is entitled to a decree for possession subject to redemption by a puisne mortgagee with possession who was not a party to the suit by the first mortgagee?"

The following were the propositions laid down by the Full Bench in coming to the above conclusion.

(1) A second mortgagee is entitled to the same rights as the first mortgagee with reference to his security, having regard to the nature of his mortgage:

(2) The purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded by him in his suit on his mortgage:

(3) Their rights are unaffected by the suit of the first mortgagee to which they were not made parties and the decree passed therein and the sale made in pursuance thereof:

(4) The purchaser in such a suit, whether it is the mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage but only those that subsist in him at the date of the suit.

K. P. M. Menon for appellant.

T. R. Ramachandra Aiyar and *K. P. Govinda Menon* for respondents.

Chief Justice.
Sankaran Nair J.
1911, *January* 16.

O. S. A. 54 of 1909.

Adoption of Sudra after marriage—Invalidity of.

An adoption of a Sudra after his marriage is invalid.

T. R. Ramachandra Aiyar for appellant.

T. Ethiraja Mudaliar for respondent.

Benson J.
Sankaran Nair J.
1911, *January* 17.

S. A. 201 to 204 of 1904.

Madras Act II of 1864—'*Defaulter*'—*Levy of water-cess—Who ought to pay: zemindar or tenant?*

It is to the registered proprietor and not to the tenant that the Government looks for payment of water-cess levied on the land; he is the 'defaulter' within the meaning of Act II of 1864 in case of non-payment. The tenants from whom water-cess has been levied are entitled to a refund of the same from the zemindar.

P. R. Sundara Aiyar for appellant.

The Advocate-General (*P. S. Sivaswami Aiyar*); *The Government Pleader* (*C. F. Napier*) and *T. R. Ramachandra Aiyar* for respondents.

Abdur Rahim J.
Ayling J.
1911, *January* 17. } Cr. R. C. 483 of 1910.

Cr. P. C. S. 360.—*Deposition of witnesses—"Read in the presence of accused or his pleader"—Meaning of.*

A deposition ought to be read in the presence of the accused or his pleader. The law does not require that it should be in his hearing. If, because the pleader is engaged in the examination of another witness, he cannot hear the deposition read out, it is for him to apply to the court to defer the examination of the witness so as to enable him to hear the deposition.

L. A. Govindaraghava Aiyar for accused.

C. J. Napier for the Crown.

Munro J.
1911, *January* 20. } C. R. P. 197 of 1910.

Oaths Act, Ss. 8, 9, 10—*Form of Oath.*

So long as the form of the oath is not settled upon, there is no binding agreement from which the party agreeing to be bound cannot resile.

K. Ramanath Shenoi for petitioner.

B. Sitarama Rao for respondent.

Rahim J.
Ayling J.
1911, *January* 20. } Referred Case 1 of 1910.

Estates Land Act, S. 3, *Cl.* (2), *Sub-cl.* (*d*).

A minor Inam is not an estate within the meaning of S. 3 Cl. (2), Sub-cl. (*d*) of the Estates Land Act and civil courts have jurisdiction to try suits for arrears of rent in connexion therewith.

Plaintiff not represented.

K. S. Krishnaswami Aiyangar for defendant.

[FULL BENCH.]

Chief Justice.
Benson J.
Munro J. — S. A. 736 of 1908.
Sankaran Nair J.
1911, *January*, 27.

Hindu Law—Joint Family—Alienation by one member—Changes in the family—What share available for the alienee.

Held by the Full Bench that in a case of alienation by a member of a Joint Hindu family the alienee can proceed against the share of the alienor as at the date of the alienation and is not affected by subsequent births and deaths among the members of the family.

T. Ethiraja Mudaliar for appellant.

Advocate-General (*P. S. Sivaswami Aiyar*) and *T. M. Krishnaswami Aiyar* for respondent.

Benson J.
Sundara Aiyar J. — Ap. 235 of 1909.
1911, *January*, 24.

Hindu Law—Maintenance—Demand not necessary—Arrears—Widow's right to claim money for her own religious ceremonies.

No demand is necessary to entitle one to get the maintenance due and one liable to pay the same will not be relieved of his liability to pay unless the person entitled has waived his or her right or has induced a belief that the same will not be claimed. A widow is entitled to the expenses necessary for performing religious ceremonies conducive not only to her husband's benefit but also to the benefit of herself.

T. R. Venkatarama Sastry for appellant.

T. R. Ramachandra Aiyar, *N. Rajagopalachari* and *K. S. Ganapathy Aiyar* for respondent.

NOTES OF RECENT CASES.

Abdur Rahim J.
Ayling J.
1911, *January* 19.

Referred Trial 51 of 1910.

Postmortem certificate—What it must contain—Cr. P. C., S. 162—*Inquest report—recording statement verbatim in—No illegality.*

A *post mortem* certificate must show that the body was dissected and must contain observations of the dissecting officer not only on the external injuries but also on the internal ones.

There is nothing in the Criminal Procedure Code to prevent *verbatim* statements being recorded in the inquest reports, of persons examined at the inquest; but, on the other hand, such *verbatim* statements help the court in arriving at the truth.

N. Rajagopalachariar for the accused.

The Public Prosecutor (*C F. Napier*) contra.

Munro J.
Sankaran Nair J.
1911, *January* 24.

Crl. R. C. 332 of 1910.

Forest permit—Production to officer—Cancellation of permit—Cancellation not communicated—Grazing then—No offence.

A forest permit for grazing cattle was taken by the officer from the person to whom it was given and it was afterwards cancelled, but the cancellation was not communicated to the party: *Held* that conviction for unauthorized grazing after giving the permit to the officer cannot be sustained as the cancellation was not communicated to the party.

L. A. Govindaraghava Aiyar for petitioner.

The Public Prosecutor (*C. F. Napier*) contra.

Chief Justice.
Munro J.
S. Nair J.
1911, *January* 24.

Crl. M. P. 9 of 1911.

Dt. Magistrate, C. and M. Station, Bangalore—European British subjects—Offences by—Cognizability.

The District Magistrate of the Civil and Military Station, Bangalore, has jurisdiction to take cognizance of an offence against an European British subject in the said place.

B. W. S. Lawrance for petitioner.

The Advocate-General (*P.S. Sivaswami Aiyar*) for the Crown.

Abdur Rahim J.
Ayling J.
1911, *January* 24.

S. A. 1516 1909.

Resignation of office of Archakaship—Effect of, on fresh vacancy occurring.

Plaintiff resigned his office of Archakaship and his mother as the next heir succeeded to the office. The question was whether the plaintiff could succeed to the office on the death of his mother. *Held* : he could. On the death of the mother, the office reverted to the family, and as representative of the family, the plaintiff succeeds and the anomaly of a person succeeding as his own heir does not arise in such a case.

P. Narayanamurthi for appellant.

T. Prakasam for respondent.

Abdur Rahim J.
Ayling J.
1911, *January* 26.

L. P. A. 1 of 1910.

S. 273, *C. P. C.—Pending attachment, holder of the attached decree cannot apply for execution—Liability of the attaching decree-holder for allowing the decree to be barred.*

A decree in favour of the judgment-debtor was attached but as the attaching decree-holder took no steps to realize the decree the decree was barred. In a suit by the judgment-debtor (holder of the attached decree) for damages : *Held* : he was entitled to it. S. 273, C.P.C., prohibits an application for execution by the holder of the attached decree pending attachment and as he had no means of saving his decree, the attaching decree-holder was bound to take the necessary steps to realise the decree or keep it alive.

K. P. M. Menon for appellant.

C. Madhavan Nair for respondent.

Abdur Rahim J.
Ayling J.
1911, *January* 27.

C. M. S. A. 44 of 1910.

S. 99, *T. P. A.—Not applicable to consent decrees—Waiver of benefit of S.* 99.

In a suit on a mortgage, the parties compromised and it was provided in the Razi decree that the defendant should have 6 months' time to pay and in default plaintiff was to be at liberty to execute the decree (which in terms was only personal). On default the decree-holder attached the mortgage property but the judgment-debtor objected that under S. 99, T. P. A. the property could not be sold. *Held* : S. 99 did not apply to consent decrees and the defendant must be taken by his conduct to have waived the benefit of S. 99.

M. Subrahmania Aiyar for appellant.

K. Ramachandra Aiyar for respondent.

Benson J.
Sundara Iyer J.
1911, *January* 30.

A. S. 73 of 1908.

Grant to widow for maintenance—Widow's Estate.

Where property is given to a widow who is entitled to maintenance by the co-parceners of her husband and she is in possession of the properties so given, ordinarily she takes only a widow's estate :

Obiter.—It is not impossible to confer on her an estate descendible to her own heirs.

T. V. Seshagiri Aiyar for appellant.

The Advocate-General (*P. S. Sivaswami Aiyar*) for respondent.

Benson J.
Sundara Aiyar J.
1911, *February*, 3.

Ap. 4 of 1908.

S. 5, *Revenue Recovery Act—Separate registry—Arrears before—Who is the defaulter.*

A land which has been separately registered in the name of a person can be sold after the separate registry for arrears due before the separate registry, and he is the 'defaulter' under S. 5

of the Revenue Recovery Act, whose property can be sold even for arrears before the separate registry.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for appellant.

L. A. Govindaraghava Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1911 *February* 6.

A. S. 76 of 1908.

C. P. C. of 1859, *S.* 246—*Party to the order—Scope of investigation—Estoppel between mortgagee and mortgagor.*

Suit for redemption. The defendant, the mortgagee, admiting the mortgage,contended that the plaintiff had only a mortgage interest; that he (the defendant) had purchased the equity of redemption from a person in whose favour there was an order to that effect in a claim proceeding in connection with a case in which the plaintiff was the judgment-debtor (the order was under S 246 of C.P.C. of 1859) and which had not been set aside by suit, and as his mortgage was higher in amount than the plaintiff's, the plaintiff was not entitled to redeem. There was no evidence that the judgment-debtor had been served in the claim proceeding.

Held : (i) Defendant having come in under the plaintiff, was estopped from denying the plaintiff's title and was bound to make over possession and fight out his other titles in actions framed for the purpose.

(ii) The only order that could be made under S. 246, C.P.C. of 1859, was one upholding or releasing the attachment; if the claimant was found to be in possession, the court was bound to release the attachment; if otherwise, it had to uphold the attachment. In this respect, the later codes differ from the code of 1859.

(iii) The judgment-debtor cannot be considered a party to an order in a claim proceeding when no notice has been served upon him upon the claim. The wording of S. 246, C. P. C. of 1859, did not make any difference in the matter.

T. R. Ramachandra Aiyar for appellant.

J. L. Rozario for respondent.

NOTES OF RECENT CASES.

Munro J.
Sankaran Nair J. — A. S. 167 of 1910.
1911, *February* 7 & 8.

Appeal—Order granting probate—Proper stamp.

A memorandum of appeal against an order granting probate need not bear an *ad valorem* stamp as it falls under Art. 1, Schedule III, and not under Art. 1, Schedule I, of the Court Fees Act.

K. Narain Row for appellant.

S. Swaminadhan for respondent.

Abdur Rahim J.
Ayling J. — C. M. A. 175 of 1909.
1910, *February* 8.

Decree—Construction—Mortgage—T.P. Act, S. 90.

A mortgage decree in the form "the defendants do pay.... etc...and in default property be sold, &c" is a personal decree and can be executed against the other properties of the judgment-debtor without an order under S. 90, T. P. A.

G. S. Ramachandra Ayair for appellant.

S. Srinivasa Aiyangar and *T. Ramachandra Row* for respondents.

Benson J.
Munro J. — S. A. 844 of 1907.
1911, *February* 9.

Adverse possession—Simple mortgagee not barred by adverse possession against mortgagor.

A simple mortgagee is not barred by adverse possession against the mortgagor commencing in point of time after the date of the mortgage. The idea of adverse possession involves the capacity to repel hostile possession. S. A. 1683 of 1909 dissented from.

T. Rangachariar for appellant.

The Advocate-General (*P.S. SivaswamiAiyar*) for respondent.

Benson, J.
Sundara, Aiyar J. — A. S. 13 of 1908.
1911, *February* 9.

Charitable endowment—Power of the Board of Revenue and the Taluk Board—Suit for possession—When trustee not removed, not competent.

(i) It is competent for the Board of Revenue to transfer the management of charitable endowments to the Taluk Board with all the powers of trustees.

(ii) But it is not competent for the Taluk Board to sue for possession of the trust properties from the trustee in possession so long as he has not been validly dismissed from office.

T. R. Venkatrama Sastry and *A. Viswanatha Aiyar* for appellant.

C. F. Napier for respondent.

Abdur Rahim J.
Ayling J.
1911, *February* 9.
C. M. A. 64 of 1910.

Provincial Small Cause Courts Act, S. 23—*Court having jurisdiction to determine the title.*

The court to which the plaint is to be presented under S. 23, Provincial Small Cause Courts Act, is the court which would have had jurisdiction to try the suit but for the bar placed by S. 16 of the Act and not, for instance, the court which can try suits for the recovery of immoveable property, if the title involved is title to immoveable property.

H. Balakrishna Rao for appellant.

S. S. Setlur for respondent.

Abdur Rahim J.
Ayling J.
1911, *February* 10.
L. P. A. 49 of 1910.

Letters Patent appeal—Judgment—Order merely rejecting petition against Magistrate's order under S. 145, *C. P. C.*

There is no appeal under the Letters Patent from an order of a single judge rejecting a revision petition against an order under S. 145, Criminal Procedure Code, when no reasons are given for the same.

P. Narayanamurthi for appellant.

V. Ramesam for respondent.

Benson, J.
Sundara Aiyar, J.
1911, *February* 13.
A. S. 193 of 1107.

Compromise decree—Res judicata—C.P.C., S. 257-*A—Public policy—Waiver.*

The extent to which compromise decrees are binding in subsequent suits as *res judicata* is to be determined on a construction of the terms of the compromise, aided, if necessary, by the pleadings in the case. If the compromise proceeds upon the basis of the validity of an agreement, the judgment is *res judicata* whenever in future litigations a question arises as to the validity of such agreements. Section 13, C.P.C., is not strictly applicable to such a case. In some respects a compromise decree stands on a higher footing than decrees passed after contest. For instance while decrees after contest may not conclude on questions of law, compromise decrees might. The case analogous to compromise decrees is that of award decrees. While partaking some of the incidents of a contract between parties, a compromise stands on a higher footing than a mere contract and all the defences that would be open to a party in suits upon contracts are not open in the case of compromise decrees.

A compromise which upholds an agreement of the kind contemplated by S. 257-A is not against public policy in the sense that the decree passed in accordance therewith is void. The judgment-debtor can waive the benefit of the section and a compromise decree implies such a waiver.

L. A. Govindaraghava Aiyar for appellant.
K. Srinivasa Aiyangar for respondent.

Munro J.
Sankaran Nair J.
1911, *February* 15.

S. A. 640 of 1909.

Res judicata—Issue—Not expressly raised and decided.

In a suit for declaration as to the proper terms of a patta, it was declared that a particular patta was proper. By mistake, the patta included lands not belonging to the landlord. No question as to the identity or the title to the lands was expressly raised or decided in the previous suit. In a subsequent suit in which the question of title to these lands arose:

Held:—Per *Sankaran Nair* J.:—The title to the lands is not *res judicata.* There is no *res judicata* on an issue when the issue has not been expressly decided unless deciding to the contrary in the subsequent litigation would interfere with the operation of the previous decree.

Per *Munro* J.—The relationship of landlord and tenant being necessarily involved in the previous decision it operated as *res judicata*.

T.V. Seshagiri Aiyar for appellant.

Swaminathan for respondent.

Abdur Rahim J.
Ayling J.
1911, *February* 15, 16.
S. A. 1940 of 1908.

Appropriate Relief-Granting of.

Where the plaintiff asks for a certain relief to which he is not entitled, the court should not dismiss the suit on that ground, but should grant such relief as he is entitled to.

S. Srinivasa Aiyangar for appellant.

K. Srinivasa Aiyangar and *T. R. Venkatarama Sastri* for respondents.

Abdur Rahim J.
Ayling J.
1911, *February* 16.
S. A. 787 of 1909.

Limitation Act, Arts. 89; 115—*Loan to agent.*

Monies taken by an agent working under an agreement, which provides for the agent taking a loan or loans, come under Article 115 and not under Article 89 of the Limitation Act; and if no dates are fixed for their repayment, limitation runs for each loan from its date.

T. R. Venkatarama Sastri for appellant.

T. Rangachari for respondent.

Benson J.
Sundara Aiyar J.
1911, *February* 17.
S. A. 21 of 1909.

Stanom—Suit for mere—Maintainalility of.

A suit merely for a *stanom* without asking for the properties, if any, attached to it, is not maintainable, being one merely for an honour.

T. R. Ramachandra Aiyar and *M. Kunjunni Nayar* for appellant.

P. Kundu Panikar and *J. L. Rosario* for respondent.

NOTES OF RECENT CASES.

Abdur Rahim J.
Ayling J.
1911, *February* 17.
C. M. A. 33 of 1909.

Order XLI, r. 23—Remand—Difference between the old C.P.C. and the new.

Order XLI, r. 23 does not restrict the power of remand to strictly preliminary points as S. 564, C. P. C. of 1882, did. As such, the appellate court is not precluded from remanding a case for disposal according to law even when the question on which the case has been disposed of is not strictly a preliminary point.

J. L. Rosario for appellant.

C. V. Anantakrishnier for respondent.

Munro J.
Sankaran Nair J.
1911, *February* 22.
S. A. 1218 of 1909.

Suit for lands, emoluments of Karnam office—S. 1 of the Limitation Act of 1877—Madras Regulation VI of 1831—No Bar—No Prescription.

S. 1 of the Limitation Act of 1877 bars lands coming under Madras Regulation VI of 1831 being adversely possessed, and the Regulation prevents any suit being laid in civil courts for the recovery thereof, so that if there be no adverse possession for twelve years under Act IX of 1877 the lands could be recovered by the office-holder.

T. R. Ramachandra Aiyar for appellant.

T. Rangachariar for respondent.

Benson J.
Sundara Aiyar J.
1911, *February* 28.
A. S. 44 of 1908.

Mixing up of Trust funds—Three brothers and their sister's husband living together and purchasing properties—Shares how determined.

When there is a mixing up of trust funds it is for the trustee to show what portion of it belongsto him or the whole belongs to the *cestui-que-trust.*

This rule is different from the other which gives the *cestui-que-trust* a lien upon the estate purchased partly with trust funds, and partly with the funds of the trustee.

Where three brothers and their sister's husband were living together and were purchasing properties with the income of their properties the true rule to determine their share in properties so purchased is to adjudge a share to each each proportionate to the capital advanced, *i. e.*, the property of each party. In the absence of any criterion afforded by the capital, the shares ought to be equal according to the rule enunciated in S. 45, T. P. A.

T. Prakasam for appellant.

V. Ramesam for respondent.

Benson J.
Sundara Aiyar J. } Ap. 118 of 1908.
1911, *March* 13.

Hindu Law—Adoption to a female—Unknown in Southern India.

Adoption to a female, though prevalent in some parts of Northern India, is not at all known in Southern India.

John Adam, *J. C. Adam* and *T. Prakasam* for appellant.

The Advocate-General (*P. S. Sivaswami Aiyar*) for the respondent.

Benson J.
Sundara Aiyar J. } A. S. 107 of 1908.
1911, *March* 9.

Will—Appointment of disciple—Revokable.

An appointment of a person as a disciple, made by a will, is revokable.

The Advocate-General (*P. S. Sivaswami Aiyar*) and *T. V. Gopalaswami Mudaliar* for appellant.

S. Srinivasa Aiyangar and *S. Somasundaram Pillai* for respondent.

Benson J.
Sundara Aiyar J. } Ap. 97 of 1908.
1911, *March* 3.

Hindu Law—Mortgage by manager and some junior members only—Debt for family purpose—Binding on all members.

A mortgage by the manager and some only of the junior members of a Hindu family will be binding on all the members of the family if the debt is for the purposes of the family. It is not necessary that the manager must describe himself as such in the mortgage-deed.

Swaminadhan for appellants.

T. V. Narayaniah for respondents.

Benson J.
Sundara Aiyar J.
1911, *March* 3. } Ap. 43 of 1908.

Trust—Suit for removal of trustee—No prayer for appointment of trustee—Alienation, invalidity of—Possession, no right to—Sufficient cause of action.

A suit by a person who has got a sufficient cause of action only for the removal of trustees is maintainable without a prayer for the appointment of new trustees; such a person may similarly pray for a declaration of the invalidity of certain alienations by the trustees without asking for possession of the properties if he is not entitled to possession.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for appellant.

Swaminadhan and *G. S. Ramachandra Aiyar* for respondents.

Benson J.
Sundara Aiyar J.
1911, *March* 3. } A. S. 138 of 1908.

Insurance, contract of—Amount due—Representatives, right of, to—Succession certificate—Married Women's Property Act—Not applicable to Hindus.

The Married Women's Property Act does not apply to Hindus. The fact that an insured person wanted the insurance amount to be paid to certain members of his family after his death does not create a trust. The money due is due to the deceased as a debt to him and a succession certificate in favour of his representatives is a sufficient protection for the insurance company to pay, and non-payment thereafter will be wrongful withholding of the money, making them liable for future interest.

D. M. C. Downing and *Short & Bewes* for appellant.

T. V. Seshagiri Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 6.

C. M. P. 498 of 1911.

Ss. 10 *&* 15, *Letters Patent—C.P.C., S.*119, 122—*Ord.* 3, *rr.* 1 & 2—*No right for a recognised agent to plead in High Court for his principal.*

A right to appear in court for his principal given to a recognised agent by Ord. 3, rr. 1 & 2, C.P.C., does not include a right to plead. It means simply that one can take proceedings to submit oneself to jurisdiction. The High Court has, under the Letters Patent and the Legal Practitioners Act, and under Ss. 119 and 122, C.P.C., power to make rules as to who shall plead for parties before the High Court in its original and appellate jurisdiction and in the lower courts. Section 10 of the Letters Patent provides as to who alone can plead before the High Court, and others, such as recognised agents, cannot have a right to plead.

Govindaraja Mudali by agent *Sayalam Pillai* for petitioner.
The Advocate-General (*P. S. Sivaswami Aiyar*) amicus curiæ.

Benson J.
Sundara Aiyar J.
1911, *March* 7.

Ap. 201 of 1908.

S. 17, *Registration Act—Lease—Number of documents constituting—Proposal and acceptance in one deed—Indefiniteness of period—Lease not void for—Assignment of tank bed lands by zemindar—Validity of.*

An assignment of a portion of a tank-bed to certain people by the zemindar is not void and his tenants have no right to avoid it.

There is no authority for the proposition that a number of documents which result in a lease require registration if no one of them by itself required registration. A proposal and acceptance of a lease, if contained in one and the same paper, may require registration.

Obiter.—A lease is not void for indefiniteness merely because it does not mention the duration of the lease.

C. S. Venkatachari for appellant.
K. Srinivasa Aiyangar for respondent.

NOTES OF RECENT CASES.

Munro J.
Sankaran Nair J. — S. A. 1670 of 1909.
1911, *February* 17.

S. 168, *Madras Act IV of* 1884—*Discretion—Exercise of—Courts cannot interferet with—Public street.*

A municipality, has under S. 168 of Madras Act IV of 1884, absolute discretion to order the removal of any encroachment on giving notice and courts are not entitled to question the correctness of the exercise of such discretion.

A street which was before the advent of Madras Act IV of 1884 under the control of the Sanitary Association, and over which the public were passing and repassing, may well be regarded as a public street within the meaning of S. 3, Cl. (xxiv) of Act IV of 1884.

T. V. Seshagiri Aiyar and *T. V. Muthukrishna Aiyar* for appellants.

Advocate-General (*P. S. Sivaswami Aiyar*) for respondent.

Benson J.
Sundara Aiyar J. — S. A. 1000 of 1909.
1911, *March* 6.

Ss. 101 *Cl.* (*c*), 111 *&* 114, *T. P. Act—No change from the old law.*

Payment of rent is not a condition precedent to the enforcement of the right mentioned in Cl. (*c*) of S. 108 of the T. P. Act. If may be that in some cases where a tenant sues for damages for dispossession he will be required to have performed his part of the contract, *viz.*, payment of rent. The Transfer of Property Act has not made any change in the law in this respect.

T. Rangachari and *N. T. Shamanna* for appellant.

C. V. Anantakrishna Aiyar for respondent.

Benson J.
Sundara Aiyar J. — A. S. 120 of 1908.
1911, *February* 27.

Minor—Hindu Law—Testamentary capacity.

A minor (Hindu) cannot make a will. Decision of *Benson* and *Moore* JJ. in 16 M. L. J. 135 followed.

T. Ramachandra Rao for appellant.

T. Prakasam for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 7.
} Ap. 93 & 94 of 1908.

C. P. C. (1882) *S.* 539—*Cannot remove a trustee—Hereditary trustees—Dismissal of one—Devolution cannot be by selection—Appointment of a stranger as additional trustee, on management.*

Under S. 539, C. P. C. (1882) the court cannot remove an existing trustee. Where a family has got a hereditary trusteeship of a charity, succession to the trusteeship cannot be by selection but must be by inheritance. The High Court approved and confirmed the appointment made by the lower court of a stranger as additional trustee to act in conjunction with the hereditary trustee.

The trust in this case was for the feeding of the public and of the villagers from out of the proceeds of a certain tope dedicated for the purpose, on certain occasions.

R. Kuppuswami Aiyar and *V. Ramesam* for appellants.

P. Nagabhushanam for the respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 8.
} Ap. 115 of 1908.

Devise to three females—Partition agreeing not to question each other's alienation—Devise by one female – Whether reversionary interests of others are affected.

Where three females divided the properties devised to them agreeing not to question each other's alienation by "gift, sale or in any other manner" a *devise* by one of the females of property so got by her or division cannot be questioned by her as the words "gift, sale or in any other manner" are wide enough to cover a power to devise so as to affect the reversionary rights of the other two females.

Advocate-General (*P. S. Sivaswami Aiyar*) for appellant.

T. Subramania Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 7.

A. S. 176 of 1908.

Negotiable instruments—Giving a Hundi to a third party for a debt—Conditional payment.

The established rule of presumption is that a bill of exchange or a hundi operates only as a conditional discharge although it may be proved that it was taken as an unconditional payment. Even a receipt given for the money covered by the hundi or an endorsement on the hundi will not discharge the liability. There is no rule that a hundi in favour of a third party for the amount due, who is not bound to present the same operates as a discharge.

C. V. Anantakrishna Aiyar for the appellant.

V. Viswanatha Sastri for respondent.

Sankaran Nair J.
Ayling J.
1911, *March* 8.

S. A. 1466 of 1909.

Limitation Act S. 12*—Delivery of judgment during long vacation—Application for copy* 17 *days after re-opening—No deduction of time.*

Judgment in a case was during the long vacation and the application for obtaining copies of judgment and decree was not made on the re-opening day but 17 days thereafter. *Held* that the time between the date of delivery of judgment and the date of re-opening of the court ought not to be deducted as time requisite for obtaining copies.

Advocate General (P. S. Sivaswami Aiyar) for appellant.

K. Ramachandra Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 8.

A. 131 of 1908.

Evidence Act, S. 112*—Illegitimacy—Non-access — Onus—Living apart, no proof of non-access.*

The onus of proving the illegitimacy of a son born to the wife of a person, on the ground of non-access lies on those who set it up ; the fact that the wife lived apart from her husband is no proof of non-access.

P. Narayanamurthi for appellant.

T. Prakasam and *K. Srinivasiengar* for respondents.

Munro J.
Abdur Rahim J.
1911, *March* 8.

O. S. A. 46, 52 & 56 of 1909.

Insolvency Act—Power of court to interfere with the discretion of the Official Assignee when sale subject to confirmation.

When sales by the Official Assignee are made subject to confirmation by the court, the court is not restricted to cases of fraud for interference with the discretion of the Official Assignee in effecting such sales and may interfere even on the ground that a higher price has been offered since.

Odgers for appellant in O. S. 46.

C. R. Tiruvenkatachariar for appellant in O. S. 52 & 56.

Downing for respondents.

Benson J.
Sundara Aiyar J.
1911, *March* 13.

A. S. 178 of 1908.

Arbitrator's decision—Court's right to correct only obvious errors—No jurisdiction to go into the case—All matters in issue to be left to arbitration

A court can correct only obvious errors in the award of an arbitrator. It has no jurisdiction to set it aside in such a case and go into the merits of the case itself and substitute its judgment and decree. A court must ordinarily refer all matters in dispute between the parties to the arbitrator and not only some.

H Balakrishna Row for appellant.

T. Prakasam for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 13.

Ap. 137 of 1908.

Inamdar and tenant—Suit in ejectment—No presumption that inamdar is the owner of both warams—Onus of letting into possession on the inamdar.

There is no presumption that an Inamdar is the owner of both the warams. Before he can invoke in his favour the presumption that a tenure is one from year to year, in the absence of anything to show that it is otherwise, he has to prove that he let

the tenants into possession and that they so entered into possession. The inam in this case was in a Zemindari.

V. Ramesam for appellant.

P. Nagabhushnam for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 15.

A. S. 129 of 1908.

Hindu Law—Debt by manager having funds to discharge prior debts—Minor members—Validity against—Onus on lender.

A loan incurred by a manager of a joint Hindu family for discharging a prior debt binding on a minor member of the family will not, merely on that account, be binding on the minor. The creditor must prove that he made enquiries and learnt that there was a necessity. It is not enough for him to show that he enquired and that there was a prior debt.

R. Kuppuswami Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 16.

A. P. 211 of 1908.

Specific Relief Act, S. 42—Tenants in common—Each getting tenants to attorn to him alone in respect of some plots—No ouster when scrambling for posession—Inam—No claim of reversion by Government—No lapse ipso facto.

Though a suit for mere declaration and injunction will not be sufficient when there has been an ouster of the plaintiff, no ouster can be inferred when each of two tenants in common tries to get some tenants to attorn to him alone which will merely amount to a scramble for possession. The fact that the conditions on which an inam was granted provide for a reversion to Government under certain circumstances does not, when those circumstances come to exist, make the inam *ipso facto* lapse to Government when there is no claim made by the Government in respect of its revesionary right.

T. R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar and *G. S. Ramachandra Aiyar* for appellant.

T. Prakasam for respondent.

Chief Justice.
Sankaran Nair J.
1911, *March* 21.

O. S. 3 of 1910.

Minor—Guardianship of person—Not desirable to appoint presumptive heir except when necessary.

Usually it is not desirable to appoint a persumptive heir as guardian of the person of a minor.

If another suitable guardian is not avaiable the presumptive heir, if eligible, may be appointed.

T. R. Ramachandra Aiyar and *K. Ramachandran* for appellant.

M. A. Tirunarayanachari and *Short and Bewes* for respondent.

Chief Justice.
Sankaran Nair J.
1911, *March* 20.

C. M. P. 1912 of 1910.

Amendment of decree—A second appeal to High Court dismissed for default—High Court to amend lower appellate court's decree.

Even where a second appeal is dismissed for default the High Court has power to amend the decree of the lower appellate court so as to bring it into conformity with its judgment.

T. K. Govinda Aiyar for petitioner.

P. Kunda Paniker for respondent.

[FULL BENCH.]
Chief Justice
Munro J.
Sankaran Nair J.
1911, *March* 20.

Referred Case No. 8 of 1910.

Court Fees Act—Return of plaint by City Civil Court—Presentation to—Presidency Small Cause Court—Whether plaintiff entitled to credit of previous court fees.

A plaintiff can get credit for the amount of the court fees paid on a plaint presented to the City Civil Court which returned the same to be presented to the proper court, when he presents it to the Presidency Small Cause Court, in spite of the fact that the City Civil Court cancelled the court fees originally affixed.

C. K. Mahadeva Aiyar for appellant.

C. Venkatasubramiar, V. V. Srinivasa Aiyangar, M. Kunjunni Nayar and *T. Rajagopalachari* for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 22.

A. S. 54 of 1908.

Opium Act, Ss. 4, 5, 9, *Rule* 26—*License to sell restricting transfer—Subrenting—"Transfer," meaning of—Taking a partner is a transfer—Partnership in vending opium—Contract Act, S.* 23 *—Illegal contract and opposed to public policy.*

Ss. 4, 5, and 9 of Opium Act prohibit sale by unlicensed persons and make such sale penal. They and the rules framed thereunder prohibit any transfer, sub-renting and engaging agents to sell without licenses for the same. If plaintiff enters into a partnership with the defendants who alone as farmers got a license to sell opium in a district, and who had a license to sell through an agent, the agent becomes also the agent of the plaintiff A partnership effects a transfer of the rights of the partners As plaintiff's partnership with the defendants gave him in law a right to vend opium through their agent and transferred to him their right in the sale of opium without a license the partnership was illegal and opposed to public policy and cannot give him a right on that footing; and a suit for dissolution of the partnership and winding up must be dismissed.

T. R. Ramachandra Aiyar and *T. Ramachandra Row* for appellant.

C. Madhavan Nair and *T. Prakasam* for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 22.

A. S. 154 of 1908.

Invalid adoption—Possession for 12 *years as adopted son—Effect of—No change of status—Estoppel.*

Posession for more than the statutory period of properties under an invalid adoption can give only a right to those properties but cannot change the status of the person; so that if there is no estoppel, members of the natural family of such person can succeed to those properties as his heirs. Mere treatment and recognition as adopted son in mistaken belief of the validity of the adoption cannot estop the members of the natural family from setting up the invalidity.

T. R. Ramachandra Aiyar, *S. Gopalsawmi Aiyanger* and *C. Padmanabha Aiyangar* for appellant.

K. Srinivasa Aiyangar and *R. Rangasawmi Aiyangar* for respondent.

Munro J.
Sankara Nair J.
1911, *March* 23 — S. A. 572 of 1909.

Hiudu Law—Gift of land to daughter long after marriage—Binding nature of, on son of the donor—Land also could be given.

In a joint Hindu family consisting of a father and his son, the plaintiff, who owned 200 acres of land, the father, 40 years after the marriage of his daughter, gave her 8 acres of land as marriage dowry. *Held* (1) that the custom of giving marriage dowries for brides or for the couple in joint families is valid and binding on the other members if reasonable in amount ; (2) that not only jewels and money alone can be given as dowries as prescribed by texts of Hindu Law but that the gift can be also of immoveables; (3) that a gift of 8 acres was, in the circumstances of the case, reasonable ; and (4) that the gift being on account of marriage dowry was not invalid by reason of the lapse of 40 years safter marriage.

The Advocate-General (*P. S. Sivaswami Aiyar*), for appellant.

P. Narayanamurthi and *V. Ramesam* for respondents.

Benson J.
Sundara Aiyar J.
1911, *March* 14 — S. A. 1528 of 1909.

Hiudu Law—Marriage expenses—Binding on joint family.

Marriage expenses of a male member of a joint Hindu (Sudra) family are binding on the family. *Kameswara Sastry* v. *Veeracharlu* followed[1].

N. Rajagopalachari for appellant.

T. Natesa Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 24. — S. A. 1089 of 1909.

Res judicata—Suit on application by junior members—How far binding against other members.

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1. (1910) 20 M. L. J. 855.

The order passed on an application by some of the *Anandaravans* for permission to execute the decree as their *Karnavan* was acting in fraud of them would not be *res judicata* against the other members of the family. It is only the *Karnavan* that can in law represent the family.

Ryru Nambiar for appellant.

T. R. Ramachandrier for respondent.

Sankaran Nair J.
Ayling J.
1911, *March* 24. } S. A. 1089 and 1210 of 1906.

Elephant—Animals 'feraenature'—Whether 'feraenaturae or not question of law.

Elephants are animals *ferae naturae* and the owners and custodians thereof are liable for any mischief they might do irrespective of any question of negligence. The mere fact that they are largely used in this country or that they are capable of being tamed does not make them any the less *ferae naturae*. The question whether a particular species is *ferae naturae* or not is a question of law and not a question of fact.

J. L. Rosario and *V. Anantakrishna Aiyar* for appellant.

The Advocate-General. (*P. S. Sivaswami Aiyar*) and *K. P. Govinda Menon* for respondent.

Chief Justice.
Munro J.
Sankaran Nair J.
1911, *March* 27. } In the matter of a First Grade Pleader of Bellary.

High Courts—Charter, Act, S. 15—*Contempt before lower court—Jurisdiction of High Court.*

High Courts in India have, like the Court of King's Bench in England, inherent power to punish contempt to inferior courts, civil and criminal.

The word "superintendence" in S. 15 of the Charter Act refers only to superintendence of courts and not to contempts committed by parties.

The Advocate-General (*P. S. Sivaswami Aiyar*) in support of the rule.

S. Swaminadan amicus curiae against the rule.

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Benson J.
Sundara Aiyar J.
1911, *March* 29.
L. P. A. 50 of 1910.

Appeal—Award of compensation for wrongful attachment before judgment—Decree.

An award of compensation for wrongful attachment before judgment is appealable if embodied in the decree in the suit. [*Narasinga Bhakshi* v. *Govinda Bhakshi*[1] distinguished.]

V. Venkatachari for appellant.

Respondent unrepresented.

Benson J.
Sundara Aiyar J.
1911, *March* 30.
L. P. A. 72 of 1910.

Promissory Note—Intention to create one unnecessary, if deed is one.

Their Lordships agreed with the view of *Abdur Rahim* J. to the following effect and dismissed the L.P.A.—"If a document is in terms a pro-note an intention to create one is not necessary."

T. R. Venkatarama Sastri for appellant.

N. Rajagopalachari for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 30.
Ap. 69 of 1908.

Hindu Law—Manager of joint family business—Right of suit by, without joining others—Joint promisees—Payment to one to defraud others.

A payment to one of several joint promisees in collusion with the person paid and to defraud the other joint promisees is not a valid payment as against them. [*Baikunt Nath Chakravarti* v. *Hara Lal Pal Chowdhury*[2] followed.]

A manager of a joint Hindu family business can alone sue on a bond executed in the name of another member without joining the other family members. [*Kishen Persad* v. *Har Narayan Singh*[3] followed.]

T. V. Seshagri Aiyar and *Kundu Panikar* for appellant.

S. Srinivasa Aiyar and *K. N. Aiya Aiyar* for respondent.

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1. (1900) I.L.R. 24 M. 62.
2. (1911) 13 C. L. J. 234.
3. (1911) 15 C. W. N. 14.

Benson J.
Sundara Aiyar J. } S. A. 1144 of 1909.
1911, *March* 30.

Private temples and endowments—Nature of—Not like ordinary joint property.

Property allotted by a *Tarwad* at the time of partition and separation into three *Tarwads*, to the temples of the Tarwad in which the public were not interested, is nevertheless not Tarwad property jointly owned by the three Tarwads. It is property vested in the idol of which the members of all the Tarwards are beneficiaries and nothing short of the consensus of all the members of the three Tarwads can give another turn to or abolish the endowment, if that can be done at all.

Kunjunni Nayar for appellant.

J. L. Rosario and *Ryru Nambiar* for respondent.

Benson J.
Abdur Rahim J. } A. Ss. 68 of 1906 and 73 of 1907.
1911, *April* 4.

Hindu Law—Succession—Spiritual benefit—Rules of preference—" Brother's son " does not include " grandson."

The word " brother's son " in the rule of succession under the *Mitakshara* which gives him the right of inheritance, does not include the brother's grandson. After exhausting the enumerated heirs in the *Mitakshara*, the procedure to be adopted in determining the preferential heir is to exhaust the nearest line to the 7th degree before proceeding to a more distant line. The doctrine of spiritual benefit is of little, if any, use in determining the heir; its utility is to be restricted to supplying a ground of preference between two otherwise equally eligible heirs.

P. R. Sundara Aiyar and *S. Gopalaswami Aiyangar* for appellant.

The Advocate-General (*P. S. Sivaswami Aiyar*) for respondent.

Chief Justice.
Munro J. } O. S. A. 15 of 1910.
1911, *April* 5

Limitation—C. P. C, S. 258—Uncertified payment—Execution and recovery again—Suit for damages—Starting point, whether first payment or the second.

Assuming that there is a cause of action accruing at the end of the 90 days mentioned in S. 258, C. P. C., on failure to

certify a payment as on breach of contract, the judgment-debtor who is compelled to pay again has a cause of action to sue, in damages which accrues on the day he is compelled to pay again.

C. P. Ramaswami Aiyar for appellant.

K. Ramachandran for respondent.

Chief Justice.
Munro J.
1911, *April* 7.

O. S. A. 9 of 1910.

Hindu Law—Maintenance of a coparcener's widow—Obligation on all branches of joint family—Partition subsequent to suit—Effect of right of survivorship—To whom it passes when there are brothers and uncles.

In a suit by the widow of one of two brothers who had two uncles, claiming maintenance, against not only her brother-in-law but also his two uncles all of whom constituted at the time of the suit members of a joint Hindu family but became divided after the settlement of issues: *Held* (1) that the subsequent partition did not affect the plaintiff's right against them all; (2) that a provision made by them in the partition for her maintenance to which she did not assent was not binding on her; (3) that not only her brother-in-law but also the uncles were liable for her maintenance; and (4) that any property belonging to the joint family was chargeable for the maintenance to whomsoever it might have fallen in the division. [*Hemangini Dossee* v. *Kedar Nath*[1], distinguished.]

C. V. Anantakrishna Aiyar for appellant.

Venkatasubba Rao and Radhakrishnayya for respondents.

Benson J.
Sundara Aiyar J.
1911, *April* 10

Crl. R.C. 43 of 1911.

Crl. P. C., S 256—Charge—Accused wishing to cross-examine after—Witnesses not summoned—Prejudice—Retrial.

If prosecution witnesses are not summoned, when after the framing of the charge the accused wants to cross-examine them further and a conviction ensues it cannot be said that the accused was not prejudiced ; the object of the further cross-examination was to direct the examination to the precise charge framed and a retrial must be ordered.

H. Balakrishna Row for petitioner.

The Public Prosecutor (*C. F. Napier*) for the Crown.

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1. (1889) I. L. R. 16 C. 758 (P. C.)

Chief Justice,
Sankaram Nair J. } S. A. 133 of 1911.
1911, *April* 11.

Contract Act, Ss. 46, 49, 53—*Repudiation—Cause of action—Reasonable time—What is.*

Where *A* contracts with *B* to pay *B*'s debts to *C*, *A* must perform, and *B* is entitled to insist on the performance by *A* of the same within a reasonable time; *B* is not entitled to wait until *C* recovers the amount from him and then base his cause of action against *A* as dating from the date of *C*'s recovery. Three years is a reasonable time for the performance of such contracts. The promisee is not bound to treat the repudiation of the promisor as putting an end to the contract; he may treat it as continuing until the time fixed for performance.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for appellant

T. R. Venkatrama Sastri for respondent.

Benson J.
Sundara Aiyar J. } S. A 861 1909.
1911, *April* 12.

Adverse possession—Landlord and tenant—Encroachment on neighbouring land of the landlord.

There is no rule of law which throws the onus of proving notice on the tenant encroaching on the neighbouring land of his landlord before he can plead adverse holding of the same on the same terms as the lands included in the lease.

R. Rangasawmi Aiyangar for appellant.

T. Rangachariar for respondent.

Benson J.
Sundara Aiyar J. } S. A. 153 of 1909.
1911, *March* 15.

Malabar Law—Property bought in the name of Anandaravan—No presumption as to ownership—Question of fact.

Though several decisions of this court have held that property bought in the name of an *Anandaravan* belongs *prima facie* to the *tarwad*, there is no presumption either way, *i.e.*, whether it

belongs to him or to the *tarwad*, and the question of ownership is one of fact to be determined on various circumstances of each case, such as relationship of the *Anandaravan* to the *Karnavan*, the existence of private funds in his hands, etc.

J. L. Rosario for appellant.

K. P. Govinda Menon for respondent.

Benson J.
Sundara Aiyar J.
1911, *March* 15.

A. S. 211 of 1907.

Specific Relief Act, S. 42—*Declaration cannot be given when ineffectual.*

Where a declaration prayed for *viz.*, that the defendant was not the plaintiff's (widows') adopted son, would not give her a right to the properties in defendant's possession, who pleaded also a will in his favour disposing of the same: *Held* that as mere declaration would be useless and could not be given without a a decision that the will was false, the question of the genuiness or otherwise of the will must be tried by the lower court.

K. Narayana Row for appellant.

P. Narayanamurthi for respondent.

NOTES OF RECENT CASES.

Benson J.
Sundara Aiyar J.
1911, *April* 19.

Ref. Case 4 of 1910.

Hindu Law—Widow's right to marry her daughter without consulting husband's relations—Marriage expenses—Liability of relations to pay—S. 69, Contract Act.

A Hindu widow is entitled to marry her daughter without consulting her husband's relations and without being liable to show that she consulted them and that they improperly refused consent.

Such relations who have been joint with the deceased and bound to get the girl married are bound in law to reimburse the mother of the girl the expenses of the marriage.

It is doubtful whether S. 69 of the Contract Act will apply to such a suit by the mother of the girl.

T. R. Venkatarama Sastry and *T. S. Rajagopala Aiyar* for plaintiff.

T. Ethiraja Mudaliar for defendant.

Benson J.
Sundara Aiyar J.
1911, *April* 20.

S. A. 306 of 1910.

Hindu Law—Alienation by a co-parcener of property—No other property in existence at the time of suit—No right for the co-parcener to sue for partition.

After a co-parcener alienated his share in certain property he cannot bring a suit for partition if at the time of the suit there exist no other joint family properties.

T. M. Krishnaswami Aiyar for appellant.

K. Bashyam Aiyangar for respondent.

Benson J.
Sundara Aiyar J.
1911, *April* 20.

S. A. 190 of 1911.

Art. 49, 89 & 145, *Limitation Act—Refusal cannot be implied from mere silence.*

Where the plaintiff gave defendant certain jewels for procuring a loan from a stranger and the jewels were returned to the defendant after discharge of the loan, the retention of the jewels by defendant is on account of the plaintiff and a suit for their return is not governed by Art. 145 but by Art. 49 of the Limitation Act.

A refusal to return cannot be inferred from mere silence.

S. Krishnamurthy for appllant.

S. Srinivasa Aiyar for respondent.

Wallis J.
Munro J.
1911, *April* 20.

S. A. 1456 of 1909.

Landlord and tenant—Forfeiture—Demand for possession as upon notice to quit.

Where a forfeiture is incurred by the tenant, and a demand for possession is made as upon a notice to quit, the suit for ejectment is maintainable though the notice to quit is found insufficient.

J. L. Rosario for appellant.

C. V. Anantakrishna Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1911, *April* 20.

S. A. 10 of 1910.

S. 42, Specific Relief Act—Forged authority to adopt—No adoption in pursuance thereof—No right to sue for declaration of forgery.

Where a woman sets up a deed of authoritiy to adopt but has not adopted a boy in pursuance thereof, a suit for a declaration that it is a forgery does not lie at the instance of her husband's reversioners. Under S. 42 of the Specific Relief Act such a deed does not actually prejudice the plaintiffs' rights but *may* only lead to an act, *i.e.*, adoption which will affect their rights.

P. Nagabhushanam for appellant.

P. Narayanamurthi for respondent.

NOTES OF RECENT CASES.

Benson J.
Sundara Aiyar J.
1911, *April* 21.
S. A. 1543 of 1908.

Zemindari—Inamdar only entitled to melwaram.

An inamdar in a Zemindari is entitled only to the melwaram and is not the owner of the kudivaram.

[S. A. 705 of 1909 followed ; 30 M. 502 distinguished.]

P. Nagabushanam for appellant.

T. Prakasam for respondent.

Benson J.
Sundara Aiyar J.
1911, *April* 21.
S. A. 1515 of 1909.

Deed—Construction—Power of Attorney—Substituting one creditor for another, is not.

Where a person in management of properties is forbidden to add to the liabilities,it is no addition to the liability if he substitutes one creditor for another for a liability already existing.

J. L. Rosario for appellant.

T. Richmond for respondent.

Benson J.
Sundara Aiyar J.
1911, *April* 21.
S. A. 1137 of 1099.

Principal and agent—Suit upon original consideration, when pro-note outstanding not produced—Undertaking to procure endorsement of pro-note—Damages.

Where an agent took a promissory note in payment of a debt due to the principal benami in the name of a third person and subsequently at the settlement of accounts between himself and the principal undertook to get an endorsement from the benamidar but failed to do so: *Held* that the principal was entitled to the amount of the note and an offer to get the note endorsed is

no defence to the suit. A suit upon the original consideration when a pro-note is outstanding and is not produced is unsustainable.

C. V. Ananthakrishna Aiyar for appellant.

R. Rangasami Aiyangar for respondent.

Chief Justice.
Munro J.
1911, *April* 25.

O. S. A. 23 of 1910.

Mortgage—Subrogation—Decree upon a mortgage—Subsequent mortgage to pay off the decree.

The fact that a decree has been passed on the foot of a mortgage does not preclude a subsequent mortgagee from claiming priority *pro tanto* when the amount of his mortgage has gone in discharge of the mortgage decree.

K. Srinivasa Aiyangar, *E. V. Sarma* and *C. P. Ramaswami Aiyar* for appellant.

K. R. Subrahmania Sastri and *Balarama Rao* for respondent.

Chief Justice.
Munro J.
Sankaran Nair J.
1911, 25*th April.*

L. P. A. 98 1909.

Will — Construction — Admissibility of extrinsic evidence — Resulting trust.

Per Chief Justice and *Munro* J. (*Sankaran Nair* J., *contra*).— A will in terms giving property to *A* who is also appointed executor, but proceeding on to say "I have no doubt you will carry out my wishes", even if taken along with the surrounding circumstances such as that the legatee was no relation of the testator, and was not in need of the testator's bounty, and that the relations of the testator were not provided for, does not cut down the interest of the legatee and import a resulting trust. A letter written sometime after is not admissible to show what the wishes referred to were, when there is no indication that the wishes expressed in the letter were the wishes referred to in the will.

Sundara Aiyar J.
Ayling J.
1911, *April* 28.

C. M. A. 109 of 1910.

Madras Acts, Estates Land Act, S. 26, Cl. (3)— *Suit for declaration—Civil Courts—Cognizability.*

A suit for a declaration that a putta granted by the predecessor in title of the plaintiffs is not binding on them can be brought in a civil court under S. 26, cl. (3).

The Advocate-General (*P.S. Sivaswami Aiyar*) for appellants

P. Narayana Murthi for respondent.

Sundara Aiyar J.
Ayling J.
1911, *May* 3.

C. M. A. 197 of 1909.

Statute—Construction—Right of Appeal—Effect of statute taking away right of appeal—Pending application.—C. P. C. S. 353.

An order under S. 353, C.P.C., made by the lower court was subsequently reversed and the application was remanded by the High Court. Before any order was made afresh, the Provincial Insolvency Act came into force which gave appeals only by leave of court: *Held*: that the vested right of appeal was not taken away by the new Act.

K. Ramanatha Shenai for appellant.

K. Narayana Rao for respondent.

Benson J.
Abdur Rahim J.
1911, *May* 4.

A. S. 25 of 1907.

Negotiable Instruments Act, S. 43—*Transferee for consideration but with notice of failure of consideration.*

Section 43 of the Negotiable Instruments Act, is not intended to cover cases where the transferee is aware of the fact that the consideration for the pro-note failed, and on that account the indorser had no power to negotiate the note.

T. R. Venkatarama Sastri for appellant.

S. Srinivasa Ayangar and *T. V. Gopalaswami Mudaliar* for respondent.

Sundara Aiyar J.
Ayling J.
1911, *May* 4.

C. M. A. 114 of 1910.

C. P. C., S. 48—*Presidency Small Cause Court decree transferred to the City Civil Court—Applicability.*

A decree of the Presidency Court of Small Causes was transfered to the City Civil Court for execution. At the time of the application to the City Civil Court for execution, twelve years had already expired from the date of the Presidency Small Cause Court's decree. *Held*: S. 48, C.P.C, does not apply to the Presidency Small Cause Court decrees and, therefore, the application was not barred.

Joseph Satya Nadar for appellant.
Devasahayam for respondent.

NOTES OF RECENT CASES.

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Abdur Rahim J.
Sundara Aiyar J.
1911, *July* 24.
S. A. 1656 of 1909.

Easement of light—Material disturbance—Injunction, remedy—Structural alteration to nullify the effect of, no ground for refusing.

Granted material disturbance of an easement of light, the facts that by some structural alteration such as putting up sky-lights the effect of such disturbance can be nullified and that otherwise costly building sites would be rendered useless, are not considerations sufficient to justify refusing a mandatory injunction.

S. Srinivasa Aiyangar for appellant.

B. Sitarama Rao for *C. V. Anantakrishnier* for respondent.

Ayling J.
Spencer J.
1911, *July* 26.
C. M. A. 88 of 1909.

Succession Certificate Act—Appeal—Order refusing to revoke certificate.

There is no appeal from an order under the Succession Certificate Act refusing to revoke a certificate.

C. V. Anantakrishnier for appellant.

T. R. Ramachandra Aiyar for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 2.
S. A. 107 of 1909.

Compromise decree—C. P. C., S. 11, *Expl.* (4)*—Order* 2, *r.* 2*—Suit for partition against family and against alienees.*

S. 11, C. P. C., does not apply in terms to compromise decrees, nor does the doctrine of *res judicata* by constructive adjudication in Ex. (4) to S. 11. Accordingly, when a suit for partition is instituted for several items, but while compromising the claim, a

few items are left out by inadvertence, the fact that the suit has been disposed of on the basis of the compromise does not preclude the plaintiff from suing afresh for partition of the items left out.

Order 2, r. 2 (C. P. C.) has no application when the parties to the two suits are not same, *e.g.*, when the first suit is a suit for partition in respect of items in the possession of members of the family and the second in respect of items the possession of alienees.

T. R. Ramachandra Aiyar for appellant.

T. R. Venkatarama Sastri for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 2. } S. A. 1471 and 1472 of 1909.

Ejectment—Ryotwari land—Burden of proof—Defendant admittedly paying a share of produce—No admission of tenancy—No presumption of year to year tenancy.

Even in case of ryotwari lands, the presumption of year to year tenancy arises only when it is shown, or when the defendant admits, that he is a tenant and came under the plaintiff. From the mere fact that the defendant has been paying a share of the produce to the plaintiff there is no presumption that he is a tenant, or that he is a tenant from year to year. It is for the plaintiff in a suit for ejectment to make out his title to eject.

K. N. Aiyya for appellant.

T. Sitaramaya for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 2. } S. A. 238 of 1910.

Vendor and Purchaser—Sale price portion of which to be paid to third party—Mode of payment may be varied by vendor—Not a mere covenant to indemnify.

Where a person sells his land to another for a certain price stipulating that a portion of it is to be paid over to a third party

in discharge of a debt due to him from the vendor, the proper view to take of the transaction is that it is not a mere covenant to indemnify the vendor against the claim of the third party but that it only indicates a mode of discharge which may be varied by the vendor and that in all cases the vendor is entitled to sue for the money if the defendant fails to pay the same within a reasonable time or for the matter of that if he has not had to make the payment. The benefit of any concession or the negligence of the third party to sue enures to the vendor unless in the meanwhile the purchaser has entered into direct relations with the third party and the concession is in respect of such new obligation.

The Advocate-General (*P. S. Sivasawmi Aiyar*) and *T. Rangaramanujachari* for appellant.

S. Srinvasa Aiyangar for respondent.

Chief Justice
Phillips J.
1911, *August* 4. } A. S. 212 of 1907.

Hindu Law—Adoption—Consent of sapinda purchased by bribe, illegality of—Evidence Act, S. 32, Cl. (5)—*'Relates to' meaning of.*

If the consent of a sapinda to an adoption is purchased by the payment of a bribe to him such consent as well as the adoption made on its strength are illegal. A statement of a deceased sapinda to the effect that he received a bribe for giving his consent to an adoption is relevant under S. 32, Cl. (5), of the Evidence Act, though it is made before the existence of relationship by adoption, *i.e.*, before the adoption. The words 'relates to,' etc., in S. 32, Cl. (5), are wide enough to cover cases that will not be covered by English law.

T. R. Ramachandra Aiyar and *N. Rajagopalachari* for appellant.

C. V. Anantakrishnier for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 7. } S. A. 1102 of 1910.

Vendor's lien—Pro-note taken from agent negotiating the loan—Lien not excluded.

The vendor's lien is not lost merely by the fact that he takes a promissory note from the agent who negotiated the sale. Under the Transfer of Property Act, there must be a contract to exclude the vendor's lien, express or by necessary implication.

C. S. Venkata Chari for appellant.

S. Srinivasa Aiyangar for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 8 } C. M. P. 866 of 1911
C. R. P. 317 of 1911.

Guardian and Wards Act, S. 11, *Cl.* (4)—*Persons entitled to oppose—Person interested.*

Under S. 31, Cl. (4), of the Guardian and Wards Act, any person interested (in this case a person claiming under a prior agreement to lease) may oppose the application to grant sanction to a proposed alienation (a lease) by the guardian though notice goes only to relations and friends.

C. P. Ramaswami Aiyar for petitioner.

T. Ranga Chariar for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 11. } S. A. 148 of 1910

Hindu Law—Co-widow—Right to recover the entire estate—No right when exclusive title is set up.

A tenant-in-common (here a co-widow) cannot recover the entire estate when the claim set up is exclusive and in denial of the right of the other co-owner. The decree will be limited to her share of the estate.

T. M. Krishnasamy Aiyar for appellant.

T. Narasimha Aiyangar for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 11. } S. A. 1309 and 1310 of 1911.

Right to the issue of commission—Adjournment in the discretion of the court.

Parties have a legal right to have a commission issued for the examination of witnesses any time before the date fixed for the disposal of the suit, though adjournment of the suit so as to enable them to derive the benefit of such a commission is entirely in the discretion of the court followed.

B. Sitarama Rao for appellant.

K. Y. Adiga and *K. Sadashiva Rao* for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 16.
S. A. 631 of 1909.

Property in possession of receiver after order appointing was set aside—Declaratory relief, sufficient, if asked for.

When property is in possession of a receiver appointed by a magisterial court, though the order had been set aside at the date of the plaint, it is sufficient for the party not in possession to sue for a declaration ; no relief for possession can and need be asked against the defendant though the defendant might at any time be entitled to get possession from the receiver, on application to the magistrate as the party from whom possession was taken.

T. Rangachari for appellant.

V. C. Seshachari for respondent.

Philiphs J.
1911, *August* 15.
C. R. P. 701 of 1910.

C. P. C., S. 48—*Date of the appellate decree—Starting point for calculation of* 12 *years.*

When there has been an appeal, and a decree has been passed therein whether affirming, varying or reversing, the only decree that is capable of execution is the appellate decree and for the purposes of S. 48, time ought to be calculated from the date of the appellate decree and not of the original decree.

B. Sitarama Rao for petitioner.

K. Narayana Rao for respondent.

Philiphs J.
1911, *August* 15. } Cr.R. C. 196 of 1911.

I. P. C., S. 429—'*Maining*,' *meaning of*

"Maining" in S. 429, I. P. C., is not confined to depriving the animal permanently of any limb which serves as a weapon of defence or means of support, but includes cases such as clipping the ear which leave a permanent injury behind and affect the ful and free operation of any organ of the animal.

Swaminathan for petitioner.

The Public Prosecutor C. F. Napier for the Crown.

Ayling J.
Spencer J.
1911, *August* 16. } L. P. A. 91 of 1909.

Letters Patent, Cl. 15—"*Judgment*"—*What is.*

Mr. Justice *Sankaran Nair's* judgment in a Revision Petition—Letters Patent—was as follows:—

"In the exercise of my discretion I do not think this is a case for interference, even assuming the judge is wrong. The petition is dismissed with costs."

Held that this was not a judgment within S. 15 and that therefore no L P.A. lay against it

T. Prakasam for appellant.

P. Nagabhushanam for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 21. } S. A. 999 of 1910.

Malabar Law—Repudiation of title by Karnavan—Family karar requiring document to be signed by Anandravan—Effect of.

Under a family *karar*, it was provided that no document by the Karnavan was to be binding against the Tarwad unless it was written by a certain Anandravan. In a document not so written the Karnavan repudiated the title of the jenmi in a plot of land which the Tarwad held on *kanom*. It was sought to be shown that the Anandravan in question subsequently ratified the act of the karnavan. *Held*: The document did not bind the

Tarwad nor did the disclaimer of title therein. The ratification by the Anandravan being of no greater consequence than the act of the Karnavan himself did not make it any the more binding against the Tarwad.

C. V. Anantakrishna Aiyar for appellant.

T. R. Ramachandra Aiyar for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 21.
C. M. A. 51 of 1909.

Remand— Irregular remand under old code—Permitted by new code—No interference necessary.

The lower appellate court remanded the case for disposal under circumstances not justifying the same under S. 562 of C. P. C. of 1882 but permissible under the code of 1908. Under these circumstances the High Court did not feel themselves bound, having regard to Order XLI, r. 3, to set aside the order of the lower appellate court.

V. Vishvanatha Shastry for appellant.

B. Narasimha Row for respondent.

Ayling J.
Spencer J.
1911, *August* 22.
L. P. A. 4 of 1911.

Limitation Act of 1908, *Ss.* 3, 4, 14.

If a person files a suit on the reopening day of a court after long vacation during which the period of limitation expired and if it is afterwards returned for presentation to the proper court, it becomes barred when it is so presented in the latter court, for although the period of the pendency of the suit in the first court can be deducted under S. 14, the period of the vacation of the former court cannot be deducted under S 4 as the vacation of the latter court, especially if the latter court reopened earlier after its long vacation.

N. Rajagopalachari for appellant.

S. Ramaswami Ayiar for respondent.

Chief Justice.
Phillips J.
1911, *August* 24.
A. S. 292 of 1909.

Mortgage—Clog on redemption—What is.

Any stipulation which enables the mortgagee to remain in possession even after payment is had is a fetter on the equity of redemption; a stipulation giving any additional advantage to the mortgage during the continuance of mortgage is good.

The Advocate General (*P. S. Sivaswami Aiyar*) for appellant.

V. Vishwanatha Shastri for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *August* 25.
C. R. P. 59 & 60 of 1910.

Pronote—Consideration, proof of—Story of both sides false—Result—Jurisdiction.

In a suit upon a pronote purporting to be for cash received, defendant alleged a particular set of facts which would show that there was no consideration and plaintiff alleged *contra* certain other set of facts which would show the consideration for the pronote. The story of both sides was disbelieved but a decree was given to the plaintiff acting on the presumption of consideration in the case of every pronote.

Held per *Abdur Rahim* J. the decision was right.

Per Sundara Aiyar J:—When the plaintiff alleges a particular consideration and that is disbelieved, then there is no scope for the application of the presumption of consideration.

Both the Judges agreed in dismissing the case as involving no question of jurisdiction.

K. R. Subrahmania Sastry for petitioner.

G. Krishnasami Aiyar for respondent.

NOTES OF RECENT CASES.

Ayling J.
Spencer J.
1911, *August* 23.
L. P. A. 61 of 1910.

Letters Patent Appeal—No memo of objections.

No memo of objections can lie in a Letters Patent Appeal.

T. V. Gopalaswami Mudaliar for appellant.

M. K. Narayanaswami Aiyar for respondent.

Sundara Aiyar J.
Ayling J.
1911, *August* 31.
C. M. A. 223 of 1909.

Mesne profits—Public charges—When can be deducted—Trespasser's estate managed by Court of Wards—Trespasser not entitled to deduct commission paid to Court of Wards.

Public taxes, such as water rate paid, would be deducted in calculating mesne profits. But where the person so entitled to deduct gets muchilikas from tenants for water tax paid by him but remits the same as being irrecoverable and there is no evidence that it is really irrecoverable, he is not entitled to deduct.

The fact that the ryots were poor and the crops failed would not justify remission as against the plaintiff decree-holder, nor does the fact that the trespasser's estate is managed by the Court of Wards enable him to deduct 2½ per cent. commission paid by him to them over and above the usual collection charges since a trespasser cannot burden the real owner with an unnecessarily costly establishment.

T. R. Tiruvenkatachariar for appellant.

K. Srinivasa Aiyangar and *M. Purushotam Naidu* for respondent.

Philips J.
1911, *August* 31.
C. R. P. 236 of 1910.

Indian Railways Act, 1890, *Ss.* 77, 140—*Notice of claim for loss of goods to the Traffic Manager instead of to Agent—When valid—Technical plea in revision.*

A notice of claim for loss of goods sent by Railway is not bad simply because it was sent to the Traffic Manager instead of to the Agent if it was shown that the Agent either authorized such claims to be settled by the former or that the Agent somehow knew the claim. Such a mere technical plea will not be allowed in revision to defeat the just claim of the plaintiff.

T. Rangachari for petitioner.

C. V. Ananthakrishna Aiyar for respondent.

Sundara Aiyar J.
Ayling J.
1911, *September* 6.
C. M. S. A. 35 of 1910.

Limitation for applying for possession—Auction-purchaser—Date of issue of certificate.

Under the Limitation Act of 1877, time for an auction-purchaser making an application for delivery of possession runs only from the date of the issue of sale certificate and not from the date of the confirmation of sale.

P. Narayana Murthi for appellant.

V. Ramesam for respondent.

Sundara Aiyar J.
Ayling J.
1911, *September* 6.
C. M. S. A. 60 of 1910.

Mortgagor's right to apply for sale—Redemption action—Non-payment within prescribed time.

In a suit for redemption it is open to the mortgagor to apply for sale when he is not able to redeem the property by payment within the fixed time.

P. Kundu Panikar for appellant.

N. A. Vaidyanatha Aiyar for respondent.

Sundara Aiyar J.
Ayling J.
1911, *September* 7.

C. M. A. 259 of 1909.

Provincial Insolvency Act—Order of adjudication—Matters to be investigated before.

Creditors are not entitled before an adjudication order is made under the Provincial Insolvency Act, on an application by the debtor, to have an opportunity to produce evidence in disproof of the debtor's allegation that he is unable to pay his debts and that his debts amount to Rs. 500 or more. Nor are these matters on which the court is to be satisfied upon evidence. Apart from cases of abuse of process, the court is bound to make an order of adjudication when a petition is presented by a debtor declaring his inability to pay his debts and that his debts amount to Rs. 500.

A. Visvanathan for *T. R. Venkatrama Shastriar* for appellant.

V. C. Sheshachariar for respondent.

Sundara Aiyar J.
Ayling J.
1911, *September*

C. M. A. 184 of 1910.

Cr. Pr. Code, S. 195—*Appeal from an order of Pr. Small Cause Court Judge—Appellate Bench, cognisance by.*

An appeal from an order of the Presidency Small Cause Court Judge granting sanction under S. 195, Cr. Pr. Code, lies to the High Court and may be disposed of by the Bench taking appellate work only as the jurisdiction exercised by the High Court in that matter is appellate jurisdiction and not original jurisdiction such as would come within the purview of the judge sitting on the original side.

Hon'ble L. A. Govindaraghava Aiyar and *S. Guruswami Chetty* for appellant.

K. Ramanatha Shenoi and *G. Krishnasami Aiyar* for respondent.

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NOTES OF RECENT CASES.

Sundara Aiyar J.
Ayling J.
1911, *September* 7.
C. M. A. 259 of 1909.

Provincial Insolvency Act—Order of adjudication—Matters to be investigated before.

Creditors are not entitled before an adjudication order is made under the Provincial Insolvency Act, on an application by the debtor, to have an opportunity to produce evidence in disproof of the debtor's allegation that he is unable to pay his debts and that his debts amount to Rs. 500 or more. Nor are these matters on which the court is to be satisfied upon evidence. Apart from cases of abuse of process, the court is bound to make an order of adjudication when a petition is presented by a debtor declaring his inability to pay his debts and that his debts amount to Rs. 500.

A. Visvanatha Aiyar for *T. R. Venkatrama Sastriar* for appellant.

V. C. Seshachariar for respondent.

Sundara Aiyar J.
Ayling J.
1911, *September* 6.
C. M. A. 184 of 1910.

Cr. Pr. Code, S. 195—*Appeal from an order of Pr. Small Cause Court Judge—Appellate Bench, cognisance by.*

An appeal from an order of the Presidency Small Cause Court Judge granting sanction under S. 195, Cr. Pr. Code, lies to the High Court and may be disposed of by the Bench taking appellate work only as the jurisdiction exercised by the High Court in that matter is appellate jurisdiction and not original jurisdiction such as would come within the purview of the judge sitting on the original side.

Hon'ble L. A. Govindaraghava Aiyar and *S. Guruswami Chetty* for appellant.

K. Ramanatha Shenoi and *G. Krishnasami Aiyar* for respondent.

Abdur Rahim J.
Spencer J.
1911, *September* 11.

S. A. 625 of 1909.

Subrogation—No right of subrogation unless the prior incumbrance is wholly discharged.

There is no right of subrogation unless the prior incumbrance is wholly discharged.

K. N. Aiya for appellant.

C. V. Ananthakrishnier for respondent.

Chief Justice
Phillips J.
1911, *September* 13

A. S. 210 of 1908.

Mokhasa granted in lieu of service after Permanent Settlement—Onus as to right to resumption on the mokhasadar.

In the case of a *mokhasa* created by a zemindar after the Permanent Settlement for personal service in lieu of wages the onus is upon the *mokhasadar* to prove that the *mokhasa* is not resumable.

T. Rangachari and *S. Varadachari* for appellant.

The Advocate-General (P. S. Sivaswami Aiyar), V. Ramesam and *B. N. Sarma* for respondent.

Abdur Rahim J.
Phillips J.
1911, *September* 14.

S. A. 1073 of 1910.

Mulgeni (permanent) lease—Forfeiture—Period of grace—Reasonableness of the clause—Relief not grantable.

A *mulgeni* lease provided that rent should be paid within 15th March every year, in default at least within the 15th June; failing payment even then, the lease should be forfeited and the landlord be entitled to recover possession without paying for improvements. The rent was Rs. 176 and odd. Having regard to the clause as to improvements, the amount of rent and the length of the period of grace the lower court held that the court had power to relieve against forfeiture. *Held*, on appeal, that the doctrine of relief against forfeiture is based on the principle that the clause is inserted only *in terrorem* and is not intended to be

acted upon, and as such the court has no power to relieve when, by allowing a period of grace, the parties have expressly indicated that it is not so.

B. Sitarama Rao for appellant.

H. Balakrishna Rao for respondent.

Sundara Aiyar J.
Phillips J.
1911, *September* 15. } S. A. 334 of 1910.

Muhammadan Law—Transfer for consideration—Life estate good.

The provisions of Muhammadan Law do not apply to transfers for consideration. Accordingly when a husband transfers (in consideration of his wife's dower) property to his wife for her life, the grant is effectual according to the intention of the parties, neither being invalid nor conferring an absolute estate on the grantee.

K. V. Narasimham for *K. Ramanath Shenoi* for appellant.

K. Narayana Rao and *B. Sitarama Rao* for respondent.

Sundara Aiyar J.
Phillips J.
1911, *September* 15. } L. P. A. 52 of 1911.

Limitation Act (1908), *S.* 7—*Joint decree-holders one of whom is manager can give discharge.*

Section 7 of the Limitation Act (1908) applies to decrees in favour of two people constituting a joint Hindu family one of whom is the manager. The manager of a Hindu family is a person who can give a discharge without the concurrence of the other members of the family.

C. V. Ananthakrishnier and *P. Gangadhara Aiyar* for appellant.

K. Balamukunda Aiyar for respondent.

Sundara Aiyar J.
Phillips J.
1911, *September* 20. } C. M. A. 113 of 1910.

Appeal against preliminary decree after final decree, if competent.

A party is not disentitled from appealing from the preliminary decree because, at the time he files the appeal, a final decree has already been passed in pursuance of such preliminary decree. He is not bound to appeal against the final decree.

K. P. Madhava Rao and *K. P. Laxman Rao* for appellant.

K. Narayana Rao and *S. Annaji Rao* for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1911, *September* 21.

L. P. A. 13 of 1911.

Limitation Act, Arts. Ss. 7, 8, 44—*Sale by guardian of two minors—One attaining majority—Effect of—Suit after three years.*

The natural guardian of two Hindu infants who constituted a joint family sold property belonging to them. More than three years after the elder of them attained majority but within that time from which the younger did, the latter brought a suit for the recovery of the property. Reliance was placed upon Art. 44 of the Limitation Act.

Held by *Abdur Rahim* J. :—Art. 44 is but an illustration of S. 7 and the provisions of S. 8 are equally applicable to cases coming within Art. 44 as within Art. 144 and the younger was barred when the elder was.

Held by *Sundara Aiyar* J. :—Section 8 has no application to cases covered by Art. 44. Section 7 has application only to cases coming within articles where time would run against the minor but for his minority and not to a case like this where his majority is the starting point for limitation. The guardian, however, could be taken only as dealing with the individual shares of the two minors and the plaintiff could recover only his own share in the property.

S. Varadachariar for appellant.

The Advocate-General (P. S. Sivaswami Aiyar) for respondent.

Chief Justice.
Spencer J.
1911, *September* 19 & 21.

Ap. 227 of 1905.

Void contract—No ratification possible—Alienation by natural guardian while there was a certificated guardian—Estoppel, no

cause of action—Knowledge—No estoppel against express provision of statute—Expression of intent creates no estoppel—Costs—Separate defence.

A void contract cannot be ratified. Where there is a certificated guardian the natural guardian has no right to alienate the ward's property.

There can be no estoppel in favour of one who knows the truth.

Estoppel is only a rule of evidence and does not give rise to a cause of action. There can be no estoppel against an express provision of a statute.

An expression of what one wishes or hopes to do in the future, *e g.*, intending to pay his debts, does not give rise to an estoppel.

S. Srinivasa Aiyangar for appellant.

T. Rangachariar and *C. S. Venkatachari* for respondent.

Sundara Aiyar J.
Phillips J.
1911, *September* 21.

S. A. 279 of 1910.

Alienation to defeat creditors—No defence even if consideration paid.

Conversion by alienation of one's property into cash so as to place it beyond the reach of one's creditors is fraudulent as against them and is voidable by them. In such a case it is no defence to say that consideration was paid.

M. B. Doraiswami Aiyangar for appellant.

Kundu Paniker for respondent.

Sundara Aiyar J.
Phillips J.
1911, *September* 21.

S. A. 40 of 1910.

Limitation Act, S. 20—*Agent's clerk cannot make a valid part payment.*

Even assuming a trustee in bankruptcy can make a valid part payment so as to save limitation, his clerk has no power to make any such valid payment.

C. V. Anantakrishna Aiyar for appellant.

T. R. Krishnaswami Aiyar for respondent.

Abdur Rahim J.
Spencer J.
1911, *September* 27.

C. M. S. A. 45 of 1910.

C. P. C., S. 48—Fraud of one of the judgment-debtors—Whether the whole decree is kept alive.

Per *Sundara Aiyar* J.:—Under S. 148, C.P.C., the fraud of one of several judgment-debtors keeps the decree alive only against the judgment-debtor guilty of such fraud and not as against all the judgment-debtors.

Per *Phillips* J:—When the decree is joint, the fraud of one of the judgment-debtors keeps the decree alive against all.

J. L. Rosario for appellant.

C. V. Anantakrishna Aiyar for respondent.

Abdur Rahim J.
Spencer J.
1911, *September* 28.

C. R. Ps. 20 &c. of 1910.

Company—Inducing to become shareholder by fraud and misrepresentation—Delay in repudiating contract after knowledge—Effect of.

Delay in repudiating the status of a shareholder after one becomes aware of the fraud and misrepresentation by which he was induced to become shareholder is a bar to getting rid of the liability as a shareholder.

S. Setlur and *V. Ramaswami Aiyangar* for petitioner.

The Advocate-General (*P.S. Sivaswami Aiyar*) and *T. Ramachandra Row* for respondents.

Abdur Rahim J.
Phillips J.
1911, *September* 28.

S. A. 1616 of 1909.

Limitation Act, Art. 29—Suit for refund of value of attached property sold by other people in execution of their decrees against stranger.

The article of the Limitation Act which is applicable to a suit brought by an attaching creditor for the recovery of the value of property attached and sold at the instance of other people on

the ground that the latter had no right to attach the said properties as they did not belong to their judgment-debtor but on the other hand belonged to his judgment-debtor is Art. 29 and not Art. 120.

K. V. Krishnasamy Aiyar for appellant.

K. Ramachandra Aiyar for respondent.

Abdur Rahim J.
Phillips J.
1911, *September* 28. } S. A. 1499 of 1909.

Trespass—Mandatory injunction.

Per *Abdur Rahim* J.—In a suit for mandatory injunction to pull down a building erected on plaintiff's site, the court ought, as a rule, to direct the injunction to issue when it is found that the defendant has so trespassed on the plaintiff's land. There is a material difference between cases of trespass and cases of disturbance of easements or natural rights.

Per Pillips J.:—Even in cases of trespass, when the injury by allowing the trespass to continue is insignificant to the plaintiff while the injury to the defendant, if the injunction is to issue, would be very great, the court may properly refuse mandatory injunction and grant only damages instead.

C. V. Anantakrishna Aiyar for appellant.

C. S. Venkatachari for respondent.

Sundara Aiyar J.
Phillips J.
1911, *September* 28. } S. A. 272 of 1910.

Suit for compensation for wrongful attachment—Malice—Damage—Proof of and necessity for.

A suit for compensation for improper attachment before attachment will not lie without proof of malice. Making reckless allegations against the judgment-debtor with a view to prevent him from deferring payment as he had done on previous occasions is sufficient proof of malice to sustain the action for compensation. The special damage which is said to be of the gist of such

actions is not necessarily proved pecuniary damage. Allegations and acts that must necessarily affect the credit and reputation of the judgment-debtor are sufficient evidence of damage.

A. Krishnasamy Aiyar for appellant.

T. K. Govinda Aiyar for respondent.

Abdur Rahim J.
1911, *September* 29. } C. R. P. 316 of 1911.

Striking off defence for not appearing to be examined as witness —Interlocutory order without jurisdiction—Charter Act, S. 15—*Interference under.*

There is no provision of law by which a court can strike off the defence of a defendant who has failed to appear before the court in pursuance of an undertaking given by him so as to enable the other party to examine him as a witness.

The High Court has power under the Charter Act to set aside interlocutory orders passed without jurisdiction or with gross irregularity, though it may not have such power under S. 622, C. P. C.

Abdur Rahim J.
1911, *September* 29. } C. R. P. 217 of 1911.

*Parties—Suit for specific performance of contract of sale by the father—*Sons *proper parties, when possession also is sought for.*

In a suit for specific performance of a contract of sale by a Hindu father the sons are proper parties when there is a claim for possession also in the suit.

A. Ramachandra Aiyar for petitioner.

B. Sitarama Rao for respondent.

Abdur Rahim J.
1911, *September* 29. } C. R. P. 275 of 1911.

Summary suits for rent—Not suits of small cause nature— C.P.C., S. 102,

Summary suits for rent under the Estates Land Act are not suits of a small cause nature within the meaning of S. 102, C. P. C., so as to preclude the filing of second appeals. Sch. II, Art. 44, of the Provincial Small Cause Courts Act, takes them out of the category of suits of small cause nature,

V. Ramesam for petitioner.

S. *Srinivasa Aiyangar* for respondent.

Abdur Rahim J.
Spencer J.
1911, *October* 3.

C. M. A's 150 and 151 of 1910.

C.P.C., S. 60, *Cl. (n)—Attachment of right to future maintenance—Whether crops of lands allotted for maintenance can be attached.*

If land be given for maintenance, the land and its crops are attachable in execution of a decree against the maintenance-holder, being her property, and are not within the rule that a right to future maintenance cannot be attached.

C. Krishnamachariar for appellant.

T. R. Venkatarama Sastri for respondent.

Abdur Rahim J.
Spencer J.
1911, *October* 4.

C. M. A. 216 of 1910.

Estates Land Act—Remand Order—No appeal against.

No appeal lies against an order of remand made on appeal in a case under the Estates Land Act.

S. Ramaswamy Aiyar for appellant.

R. Rangaswamy Aiyangar for respondent.

Sundara Aiyar J.
Phillips J.
1911, *October* 4.

Cr. M. P. 44 of 1911.

Sanction—Prima facie evidence—Grant of, on the ground that statements might be proved to be false.

In a case where sanction was granted against a witness for perjury in respect of some statement of his on the ground that the applicant (the accused in the previous case) might be able to

prove them false (no evidence having been let in for the defence) their Lordships held that the sanction was not properly granted. The court ought to grant sanction only when the court finds that there is *prima facie* evidence and not merely on a possibility of conviction.

B. Sitarama Rao for *C. V. Anantakrishna Aiyar* fo appellant.

Respondent *unrepresented.*

Abdur Rahim J.
Spencer J.
1911, *October* 4.

C. M. A. 41 of 1910.

Decree in mortgage suit—Construction—"Do pay", meaning of—Whether personal liability created—S. 90, T. P. Act.

If the decree directs that defendant 'do pay' the decree amount, it imposes a personal liability on the judgment-debtors, even if it be a mortgage decree. Where a mortgage decree gives concurrent remedies both against the person and against the property, execution can be had against both and in such a case it is not necessary to resort to S. 90 of T. P. Act. Such a decree, though irregular as not being in conformity with the forms in the Civil Procedure Code, is binding if not corrected on appeal.

C. V. Ananthakrishna Aiyar for appellant.

T. Rangachariar and *A. Ramachandra Aiyar* for respondent.

Sundara Aiyar J.
Phillips J.
1911, *October* 6.

S. A. 478 of 1910.

Pronote—Construction acknowledgment.

A document which is styled a promissory note and which contains an undertaking to pay is not the less a promissory note because it contains an acknowledgment of liability and it ought not to be construed as an acknowledgment.

The Advocate General (P.S. Sivaswami Aiyar), T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for appellant.

K. V. L. Narasimham and *K. N. Gopaul* for respondent.

Sundara Aiyar J.
Phillips J.
1911, *October* 6.

S. A. 477 of 1910.

Estoppel—Decree in favour of creditor against debtor and the debtor's indemnifier—Subsequent suit by debtor against indemnifier—Estoppel against indemnifier.

If *A* agrees to pay *B*'s debts due to *C* and *C* sues both *A* and *B* and gets a decree against them which *B* pays, then in a suit by *B* against *A* that judgment conclusively estops *A* from adducing evidence that the debt was paid to *C* before the prior suit. The same will be the result if *C* sues *B* alone and *B* gives notice to *A* of the action and judgment is given against *B* after a fair contest.

T. V. Seshagiri Aiyar for appellant.

N. Rajagopalachariar for respondent.

Sundara Aiyar J.
Phillips J.
1911, *October* 6.

C. M. P. 1388 of 1910.

Tout, definition—Lower Criminal Courts not Subordinate to District Judge.

The fact that a person would take clients to vakils and receive remuneration from clients will not make him a tout. In declaring one a tout the District Judge is not entitled to publish his name in the lower criminal courts of the District as those courts are subordinate not to the District Court but to the Sessions Court.

V. Purushothama Aiyar for petitioner.

Pleadership Board *unrepresented.*

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1911, *October* 6.
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Phillips J.
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V. Purushothama Aiyar for petitioner.

Pleadership Board *unrepresented.*

Abdur Rahim J.
Spencer J.
1911, *October* 9.
C. M. A. 45 of 1910.

Guardian & Wards Act—Summary proceedings or otherwise—Judge bound to come to decision.

Proceedings under the Guardian and Wards Act for the appointment or removal of guardians are not summary and the court cannot decline to take evidence. At all events, whether the proceedings are summary or not, the court ought to come to some conclusion on the materials before it and cannot say that it would not determine whether the natural guardian is mismanaging and whether, under the circumstances, a new guardian ought to be appointed until in a properly framed suit the mismanagement is established.

The Advocate-General (*P. S. Sivaswami Aiyar*) and *S. Varadachariar* for appellant.

C. V. Anantakrishnier for respondent.

Abdur Rahim J.
Spencer J.
1911, *October*, 10.

C. M. A. 183 of 1910.

Order XLI, r. 6—"*Recorded*"—*Appeal.*

On an application under Order XLI, r. 6, to direct the decree-holder to furnish security, the court made no order but simply "recorded" the petition. *Held*: that such a disposal was not warranted by the code, and also that an appeal lay from such a disposal as a matter relating to execution.

V. Nagabhushanam for appellant.

K. V. L. Narasimham for *T. Prakasam* for respondent.

Sundara Aiyar J.
Phillips J.
1911, *October* 10.

S. A. 473 of 1908.

The fact that the inamdar who had given a lease to another got the lease cancelled during the middle of the Fasli and became the landlord after cancellation will not entitle him to issue patta for rent for the period prior to the cancellation.

J. Krishna Rau and *T. V. Gopalaswami Mudaliar* for appellant.

Joseph Satya Nadar and *S. Muthia Mudaliar* for respondent.

Sundara Aiyar J.
Phillips J.
1911, *October* 13.

S. A. 248 of 1910.

Estoppel—Judgment in suit between parties interested—Binding in suits between strangers or parties and strangers.

In a suit between the Agraharamdars and the Berikais (service tenure holders) it was held that the lands belonged to the latter and not the former. The Government subsequently resuming the Service Inam the Agraharamdars brought a suit for a declaration of their title against the Government.

Held: in the face of the judgment in favor of the Berikais, it was not open to the Agraharamdars to contend that the land did not belong to the Berikais. When there is a conclusive decision of a court of law upon a question exclusively relating to two people, it is not open either to the parties to the suit or strangers to question the correctness of such decision in an action between either of the parties and a stranger.

P. Narayanamurthi for appellant.

S. Swaminathan for the *Government Pleader* for respondent.

Sundara Aiyar J.
Phillips J.
1911, *October* 13.
S. A. 714 of 1910.

Possession for 11 *years and abandonment—Title in neither party—Plaintiff cannot succeed.*

Where plaintiff was in possession of a site for 11 years and then abandoned it and the defendant began to occupy it some years after, and both parties were found not to have had any other title :—*Held* that plaintiff cannot succeed on the strength of his former possessory title as he abandoned the same and the possession vested then in law in the real owner.

V. Purushothama Aiyar for appellant.

T. M. Krishnaswami Aiyar for respondent.

Sundara Aiyar J.
Phillips J.
1911, *October* 16.
Crl. M. P. 313 of 1911.

Cr. P. C., S. 526—*Transfer—No bias but reasonable apprehension in accused's mind— Ground for transfer.*

Even though a Magistrate may not be biassed against an accused, yet if his acts have created in the accused's mind an apprehension not unreasonable that he will not have a fair and impartial trial, a transfer is desirable.

V. Rama Das and *N. S. Narasimhachari* for petitioner.

P. R. Grant for the *Public Prosecutor* for the Crown.

Sundara Aiyar J.
Spencer J.
1911, *October* 17.

S. A. 255 of 1910.

Aliyasantana family—Presumption of partition.

When for all that is known four branches of an Aliyasantana family are found living separately in exclusive enjoyment of property in the possession of each for over 100 years, the presumption is that they are divided in interest and the onus is on the party who sets up non-division in interest to prove that it is so.

B. Sitarama Rao for appellant.

K. Narayana Rao for respondent.

Abdur Rahim J.
Phillips J.
1911, *October* 17.

C. M. A. 135 of 1910.

Act XXXV of 1858, *S.* 3*—Relative—Right to apply.*

A Hindu lunatic's deceased husband's step-sister's husband is a relative within the meaning of S. 3 of Act XXXV of 1858 entitled to apply for the institution of an enquiry into the matter of the lunacy.

M. B. Doraiswami Aiyangar for appellant.

K. V. Venkatarama Aiyar for respondent.

Benson J.
Abdur Rahim J.
1911, *October* 18.

S. A. 180 & 817 of 1910.

Hindu Law—Family debt—Decree against manager—No description as manager—Effect of.

It is settled law that a decree obtained against a person who is really the manager of a Hindu family for a debt binding upon the family is binding upon the other members of the family. The fact that the manager is not described in the case as manager will not make it the less binding if in fact he was so.

S. Srinivasa Aiyar for appellant.

The Advocate-General (P. S. Sivaswami Aiyar) for respondent.

Benson J.
Rahim J.
1911, *October* 19.

S. A. 468 of 1910

Hindu Law—Adoption by widow with son's assent—Invalidity of.

An adoption made by a widow with the assent of her deceased adopted son is invalid. It is not necessary that an assent of a sapinda should be acted upon at once but the death of a person who assents operates as a revocation of the assent and an adoption made after such death, which is not approved of or dissented from by the sapindas existing at the time, is invalid.

The Advocate-General (P. S. Sivaswami Aiyar) for appellant.

T. R. Krishnaswami Aiyar and *K. B. Ranganada Aiyar* for respondent.

Benson J.
Abdur Rahim J.
1911, *October* 19.

C. M. A. 59 of 1908.

Estoppel—Execution—Agreements in—Enforceability in execution.

Contracts made between parties to the decree in the course of execution and relating to the execution of the decree, agreeing to pay in execution some money, etc., in addition to or in substitution for the original decree, are binding upon them and are enforceable in execution, especially if they have been acted upon, *e. g.*, by payment of a portion of the money, and they estop the judgment-debtor from contending thereafter that such agreements are enforceable only in a separate suit.

T. V. Seshagiri Aiyar for appellant.

L. A. Govindaraghava Aiyar for respondent.

Sundara Aiyar J.
Spencer J.
1911, *October* 20.

O. S. A. 31 & 32 of 1911.

Guardian & Wards Act—Minor motherless daughter—Welfare of minor primary consideration—Father ignored in favour of maternal relations.

The welfare of the minor is the primary consideration in applications for guardianship under the Guardian and Wards Act, and even legal rights such as those of a father, as in this case, will be ignored if, under all the circumstances, the enforcement of such legal rights will not be consistent with the welfare of the minor.

T. Ethiraja Mudaliar for appellant.

M. N. Doraiswami Aiyangar for respondent.

Sundara Aiyar J.
Spencer J.
1911, *October* 20.
S. A 514 of 1910.

Madras Act V of 1884, *S.* 64, *Cl.* (3)—*Construction of.*

A mittadar owning also the kudivaram and who leases his land to another for a certain rent annually is liable to pay the tax calculated on the amount of his lease and not on the amount of the melvaram payable on neighbouring lands of similar description, as there is a merger of kudivaram and melvaram.

T. M. Krishnaswami Aiyar for appellant.

S. Swaminadhan for the *Government Pleader* for respondent.

Sundara Aiyar J.
Spencer J.
1911, *October* 20.
S. A. 499 of 1910.

Sale for benefit of minor—Not a void transaction.

If a minor was only a beneficiary under, and not a contracting party to, a sale which is in the name of a minor, the sale is good as at the most the property only of the minor will be liable for any objection under the contract. In all cases of sale to a minor, where contractual obligations flow therefrom or where there was an agreement by the minor, the sale is void.

[S. A. 881 of 1909 followed.]

K. R. Subramania Aiyar for appellant.

K. Parthasarathy Aiyangar for respondent.

Sundara Aiyar J.
Spencer J.
1911, *October* 20.
S. A. 768 of 1910.

Easement—Right of way—Obstruction by raising a wall 3 feet high.

A wall three feet high across a way is a substantial obstruction and the fact that the plaintiff can easily scale over the wall in order to repair his wall is no ground for refusing a mandatory injunction.

K. Bhashyam for appellant.

K. Venkatrama Aiyar for respondent.

Abdur Rahim J.
1911, *October* 20.
C. R. P. 314 of 1910.

Representative suits—Death of original plaintiff—Others represented may be permitted to continue suit.

There is nothing to prevent the court from bringing on record, in suits under S. 30, C. P. C., when the parties that originally instituted the suit are dead, other persons who were represented and who are desirous of being brought on record as party plaintiffs and of continuing the suit.

S. Srinivasa Aiyangar and *Muthia Mudaliar* for petitioner.

S. V. Padmanabha Aiyangar for respondent.

Benson J.
Spencer J.
1910, *October* 23.
S. A. 495 of 1910.

Otti—Right of pre-emption—Not available as a defence.

A right of pre-emption under an otti mortgage is not available as a defence in a suit for redemption by the vendor from the mortgagor.

G. S. Ramachandra Aiyar for appellant.

K. P. Laxman Rao for respondent.

Benson J.
Spencer J.
1911, *October* 25.
S. A. 708 of 1910.

Conditional discharge—Mortgage discharged by pro-note.

A has a mortage on the property of *B*. *B* sells a portion of the property to *C* asking him to discharge the mortgage. *C* gives a pro-note to *A* and discharge is endorsed on the mortgage

bond. *Held* notwithstanding, that the discharge was only a conditional discharge and it is open to *A* to sue on the mortgage when payment is not made on the pro-note.

Nagabhushanam for appellant.

T. Ramachandra Rao for respondent.

Benson J.
Spencer J.
1910, *October* 25. } S. A. 718 of 1910.

Construction—Suit for declaration of right to attach A's share—A's son's share not included.

In a suit by a creditor for a declaration that his judgment-debtor's share in the family property (the family consisting of his father, brothers and son) is liable for his debt, the declaration is to be restricted to strictly his share and ought not to be extended so as to include the share of his minor son.

V. C. Sesachari for appellant.

V. Purushothma Aiyar for respondent.

Benson J.
Spencer J.
1910, *October* 25. } S. A. 722 1910.

Amendment—Cause of action—Suit for delivery of accounts.

In a suit for delivery of accounts on the footing that the defendant was the servant of the plaintiff and the accounts were plaintiff's though maintained by the defendant: *Held* (1) that the suit as framed is maintainable; (2) also that the plaintiff ought to be allowed to amend the plaint by including a claim for the amount due upon the accounts.

V. C. Seshachariar for appellant.

C. Madhavan Nair for respondent.

Spencer J.
1911 *October*, 26. } C. M. P. 2088 of 1911.

Security for costs—Revision petition under S. 115*—Practice.*

It is not competent for the court to order security for costs of the respondent in a C. M. P. under S. 115, C. P. C.

V. Purushothama Aiyar for petitioner.

A. Krishnasamy Aiyar for *T. Subrahmania Aiyar* for respondent.

NOTES OF RECENT CASES.

Abdur Rahim J.
Sundara Aiyar J. } S. A. 949 of 1910.
1911, *October* 31.

Hindu Law—Marriage of orphan girl by her maternal uncle—Paternal grandfather and paternal uncle giving up guardianship—Marriage expenses.

When the paternal grandfather and paternal uncle practically gave up their right to the guardianship of an orphan Brahmin girl who remained with her maternal uncle for some years: *Held* that under the circumstances the maternal uncle had a right to perform her marriage at the marriageable age against their wish that the marriage should be performed later at their house and entitled to recover from their family properties the marriage expenses.

C. V. Anantakrishna Aiyar for appellant.

S. Srinivasa Aiyar for respondent.

Abdur Rahim J.
Spencer J. } C. M. P. 2034 of 1909.
1911, *October* 31.

Ganjam and Vizagapatam Agency Rules 18, 20—*Summary dismissal—When will High Court interfere.*

Though it is true that when summarily dismissing an appeal under Rule 18 of the Ganjam and Vizagapatam Agency Rules the Agent is not bound to write a judgment yet unless he Agent has dealt with the questions arising in the case properly in which case the Agent may be entitled to dismiss the appeal summarily, the High Court can ask him to review his judgment.

T. Rangachari for appellant.

C. R. Tiruvenkatachari, *T. Narasimhachari* and *S. V. Padmanabha Aiyar* for respondent.

Benson J.
Sundara Aiyar J. } S. A. 824 of 1910.
1911, *November* 1.

Sale certificate—Mistake—Evidence—Admissibility of.

A party is entitled to show that the sale certificate on which he sued contained a mistake as to the date of the document the right in which the plaintiff bought in court auction.

[*Palaniappa* v. *Shadagopa* [1] followed.]

M. Subramania Aiyar for appellant.

K. V. Kirshnaswami for respondent.

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[1] (1911) M. W. N. 133.

Benson J.
Sundara Aiyar J.
1911, *November* 1.

S. A. 1039 of 1910.

Deed—Construction—Use of words 'Kanom' 'Jenmashandy' and Anubhavam.'

A document which states that the land was given orginally as kanom and that the grantee shall be janmashandy and shall perform his duties and enjoy the land is not necessarily to be construed as giving a perpetual occupancy right even if the receipt for money states it to be for the anubhavam of the grantee, unless there are express words conferring such a right.

J. L. Rosario and *T. R. Krishnaswami Aiyar* for appellant.

C. N. Ananthakrishna Aiyar for respondent.

Benson J.
Spencer J.
1911, *November* 7.

S. A. 755 of 1910.

Suit for declaration of title—Limitation Act, Art. 120—*Attachment and sale—Each gives a distinct cause of action—Not barred if within* 6 *years of sale.*

A suit for declaration that a court sale is not binding as the property belongs to the plaintiff and not to the judgment-debtor is not barred because more than six years have elapsed from the date of attachment. Attachment gives a cause of action, and so also does the sale. But the latter is a fresh cause of action distinct and different from the first and providing a fresh starting point for limitation.

The Advocate-General (*P.S. Sivaswami Aiyar*) for appellant.

L. A. Govindaraghava Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1911, *November* 8.

S. A. 252 of 1910.

Sale for water-cess—Incumbrances swept away.

A sale for arrears of water-cess conveys title to the purchaser free of all incumbrances. Water-cess stands on a different footing from arrears of income-tax, &c., being public revenue and a first charge on the land.

C. S. Venkatachari for appellant.

K. N. Aiya for respondent.

Benson J.
Sundara Aiyar J.
1911, *November* 9.

C. A. 540 of 1910.

Malabar Tenants' Compensation Act—Contracts restricting right to make improvements and contracts restricting amount of compensation claimable, difference between.

A contract before 1886 by which a kanomdar undertook not to claim more than Rs. 25 as compensation for improvements effected by him (his right to remove the improvements if worth more not being taken away) is not a contract which restricts the making of improvements but only one restricting the amount of compensation that can be claimed and is therefore not saved (impliedly) by the Malabar Tenants' compensation Act, S. 19.

J. L. Rosario for appellant.

Kundu Panikar and *C. V. Anantakrishna Aiyar* for respondent.

Benson J.
Sundara Aiyar J.
1911, *November* 10.

S. A. 475 of 1910.

Foreign Judgment against partnership—Suit upon—Partner not individually served and not appearing.

A foreign (Singapore) judgment against a partnership (presumably under Order 48-*a*, Judicature Act) cannot be the basis of a suit in the British Indian Court against a partner who was not individually sued and who did not appear. Such a judgment does not contain or involve a direction to pay personally and on the analogy of suits under S. 30, C. P. C. (1882), and suits against the manager of a Hindu family, is executable only against the property of the partnership.

C. V. Anantakrishna Aiyar for appellant.

S. Srinivasa Aiyangar for respondent.

Abdur Rahim J.
1911, *November* 10.

C. R. P. 543 of 1910.

Negotiable Instruments—Payee wrongly named by mistake—Evidence admissible to show mistake—S. C. Court can incidentally rectify mistake and grant relief.

Evidence is admissible to show that the payee's name in a negotiable instrument was wrongly entered instead of plaintiff's name by mistake; and a Small Cause court can while giving

the main relief incidentally grant rectification of the document. [*Subba Narayana* v. *Ramasamy* [1] distinguished. 63 American Decision 609 followed.]

P. S. Subranania Aiyar for petitioner.

Respondent *not represented.*

Wallis J.
1911, *November* 10. } Crl. Appeal 363 of 1911.

False evidence out of fear—Conviction for—Legality of.

The fact that a person gave false evidence out of fear of the Police Inspector does not make him any the less guilty of giving false evidence.

Percy Grant for the Public Prosecutor.

C. Kunhi Raman for accused.

Benson J.
Sundara Aiyar J.
1911, *November* 14. } S. A. 733 of 1910.

Religious Endowment—Co-Urulans—Parties to suits for redemption—Karar authorising institution of suits by one notwithstanding.

The fact that a *Karar* between the Uralans of a Devaswom provides that they are to manage the Devaswom by turns, and that each man during his term may institute suits, does not in law enable the uralan in management to sue by himself without making the other Urulans parties for the redemption of the Devaswom properties outstanding on kanom.

K. P. M. Menon for appellant.

Kunjunni Nair for respondent.

Abdur Rahim J.
Spencer J.
1911, *November* 15. } C.M.A. 120 of 1910.

Sub-mortgage of mortgage decree—Application for execution of mortgage decree—Decree for sale on his suit on sub-mortgage.

The sub-mortgagee of a mortgage decree who gets a decree for sale in a suit upon his sub-mortgage is in the position of an attaching decree-holder of another money decree and can apply for execution of the decree mortgaged to him.

C. V. Anantakrisna Aiyar for appellant.

K. Ramachandra Aiyar for respondent.

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1. (1906) I.L.R. 30 M. 88.

Benson J.
Sundara Aiyar J.
1911, *November* 15.

S. A. 775 of 1910.

Stridhana grant—Muhammadans governed by Marumakkatayam law and Muhammadan law—Difference between.

The customary incident of a Stridhana grant to a Marumakkatayam Mopla at the time of his marriage by which, on divorce, the grant becomes void, cannot attach to a grant to a Mopla governed by the Mahomedan law. The reason of the rule *viz* as by the marriage the family of the woman which is otherwise bound to maintain her is relieved of the charge during the marriage but as soon as the marriage ceases is again bound to maintain her it is only reasonable that a grant for maintenance should be void as soon as the Taward's duty of maintaining revives and that of the grantee ceases obviously does not apply to Mahomedans governed by the Mahomedan Law.

Ryru Nambiar for appellant.

Respondent *not represented.*

Benson J.
Sundara Aiyar J.
1911, *November* 16.

S. A. 1782 1910.

Suit for specific performance — Subsequent Vendee—Decree, frame of.

In a suit for specific performance the subsequent vendee with notice of the contract is a proper party; and the decree to be passed is to direct him to convey the property to the plaintiff; but having regard to the practice in this Presidency of directing the vendor alone to convey, with a declaration that the conveyance in favour of the subsequent vendor is not binding on the plaintiff, and the compiications that any attempt to interfere with the decree with the lower Courts would involve, their Lordships declined to interfere with the decree.

T.M. Krishnasami Aiyar for appellant.

T.R. Ramachandra Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1911, *November* 16.

S. A. 1327 of 1910.

Landlord and Tenant—Patta—Rent to be delivered to third party—Right to trees.

Rent is rent, though it is to be delivered to a third party and batta is received on such delivery from such third party;

and it may be properly entered in the patta (here it was a tender of jack fruit to be delivered at the Tiruvoduthurai Mutt at the Guru Pooja).

Under the Estates Land Act, it is for the landlord to make out that he is entitled to any kind of trees by reason of any contract or custom, and a right cannot be taken as established by mere implications and inferences from facts such as that rent is paid for them.

S. Muthia Mudaliar for appellant.

G. S. Ramachandra Aiyar for respondent.

Abdur Rahim, J.
1911, *November* 16.
C. R. P. 741 to 743, of 1910.

Limitation—Step-in-aid of execution—Application for execution by oral transferee of decree—Unavailing.

An application for execution by an oral transferee of a decree which can under no circumstances be recognised for the purpose of execution, is not a step-in-aid of execution so as to save limitation.

T. M. Krishnaswami Aiyar for petitioner.

Venkatramana Aiyar, for respondent.

Benson J.
Sundara Aiyar J.
1911, *November* 16.
S. A. 129 of 1910.

Misdescription of property in sale proclamation and sale certificate—Purchaser pending attachment not affected by attachment unless property identifiable or purchase with knowledge of mistake.

Whatever be the effect of the absence of a proper attachment as between the judgment-debtor and the purchaser in execution, as between the purchaser in execution and a third party purchasing the property from the judgment-debtor pending the attachment, the latter is not affected unless the description of the property attached and sold is sufficiently specific for the purpose of identification, or unless it is proved that he was aware of the mistake when he made the purchase.

M. Subrahmania Aiyar for *T. V. Gopalasamy Mudaliar*, for appellant.

S. Muthia Mudaliar for respondent.

Benson .
Sundara Aiyar J.
1911, *November* 17.

S. A. 1714 of 1910.

Gadaba service—Hereditary Village Officers Act—Not within.

The *Gadaba* service is not an office coming within the Hereditary Village Offices Act of 1895. It is a purely personal service unconnected with any public duty.

S. Srinivasa Aiyangar for appellant.

V. Ramesam for respondent.

Sundara Aiyar J.
Spencer J.
1911, *November* 21.

S. A. 534 of 1910.

Hindu Law—Gift by uncle to niece—Validity of.

It is permissible under the Hindu Law for the undivided brother of the father of a girl to make a gift of a small portion of the family immoveable property under the circumstances that would have justified her father in making the same and such a gift is not open to question by the sons of the donor.

M. D. Devados, for appellant.

T. R. Ramachandra Aiyar for respondent.

Benson, J.
Rahim, J.
1911, *November* 22.

C. M. S. A. of 1911.

Limitation Act, Art. 178—(1877)—*S.* 273, *C. P. C.* (1882)—*S.* 144, *C. P. C.* (1908).

Where the holder of a decree in a suit attaches a decree in the same court which is in favour of his judgment-debtor, there is no stay of execution occasioned by the attachment and an application for executing the attached decree is a step in aid of execution though execution could not issue.

A decree under which restitution is available can be attached and it can only be executed and no suit can be based upon the decree under Act V of 1908.

S. Swaminadhan for appellant.

T. R. Ramachandra Aiyar for respondent.

Sundara Aiyar J.
Spencer J.
1911, *November* 23.

Crl. R. C. 99 of 1911.

Income-tax Act, Ss. 41 *to* 44.

S. 44 of the Income-tax Act is not subsidiary to Ss. 41 to 43 and the information required under S. 44 is in addition to the information mentioned in Ss. 41 to 43.

G. S. Ramachandra Aiyar and *S. Gopala Sarma* for petitioner.

Percy Grant for the Public Prosecutor.

Benson, J.
Sundara Aiyar, J.
1910, *November* 24.

S. A. 982 of 1909.

Evidence—Books of history—Order 1, r. 8—*Defendants not consenting—Religious Endowments—Roman Catholic Church—Trustee ship—Regulated by Canon Law—Application for Roman Catholic worship for* 90 *years—Diversion not permissible—Limitation.*

(1) Order 1, r. 8, C. P. C. (S. 30 old code) does not require that the defendants who are sued as representing others must consent to be so sued. The court may direct them to continue to represent though they object to so representing.

(2) In the case of Hindu religious institutions usage governs the selection of trustees in the absence of rules framed by the founder. In the case of Roman Catholic churches, on the other hand, it is the Canon Law that governs. *Quaere.*—Whether usage may be proved to modify the Canon Law in respect of a particular church or churches.

(3) In the absence of evidence as to the antecedent state of things, it may be presumed from 90 year's use of a church as a Roman Catholic church that that was the object for which it was originally dedicated and it is not open to the majority of the worshippers who have since seceded from the Roman Catholic faith to apply it for the purposes of the Syrio-Chalean rituals.

(4) Secession of a trustee of a Roman Catholic church from that faith unfits him to continue in the office of trustee.

(5) The rule that one of the trustees may sue a stranger trespasser in ejectment does not apply to the case of one trustee suing another who misbehaves.

(6) In this case, their Lordships gave leave to the plaintiff (trustee) to amend the plaint by adding a prayer for removal of the misbehaving trustee.

(7) There is no limitation to a suit by a trustee to recover possession of moveables from another who claims himself to be a trustee so long as the latter has not acquired the office of trusteeship by adverse possession.

(8) When there is no claim that a particular property is the private property of the man in whose name the land is registered (who is a trustee), and when the income of the property has been for a long time applied for the purposes of a church, the proper inference to make is that it is church property.

(9) Books of history ought not to be used for the purpose of proving recent events which have not become notorious facts of history such as the period during which a particular missionary stayed at a particular place, the date of his death, &c.

T. R. Ramachandra Aiyar for appellant.

J. L. Rosario and *K. R. Subrahmanya Sastry* for respondent.

Benson J.
Abdur Rahim J.
1911, *November* 21. } C. M. S. A. 22 & 23 of 1909.

Attachment of more than warranted—Good pro-tanto—Right of heir under Succession Act, disposable, attachable—Party.

(1) Attachment of the entire property as the property of *A* does not cease to have any effect when it is found that *A* has only a fractional interest as one of the heirs of the owner of the property. It operates to the extent of the judgment-debtor's interest.

(2) The heirs under the Succession Act have an attachable, disposable interest.

(3) Though ordinarily the Administrator General who has taken out letters is a necessary party, when administration has been completed, it is unnecessary to make him a party. Not making him a party is a mere irregularity and has only the effect of not affecting his superior powers of disposition in the course of administration.

Joseph Satya Nadar for appellant.

T. R. Ramachandra Aiyar for respondent.

Benson J.
Abdur Rahim J.
1911, *November* 28.

S. A. 929 of 1910.

Amendment—Claim for indemnity amended to include claim for money paid subsequently to decree pending second appeal.

Plaintiff (the mortgagor) brought a suit against the 1st defendant, the mortgagee, and his son, the 2nd defendant, to recover the sum which was decreed in favour of a sub-mortgagee, the existence of whose mortgage had not been mentioned at the time of the discharge of the defendant's mortgage by the plaintiff; in the alternative that the defendant should pay the money into court to be paid over to the sub-mortgagee. Both the courts below dismissed the suit as premature. After the second appeal was filed, the plaintiff paid the money to the sub-mortgagee. Their Lordships in second appeal directed that the plaint should be amended so as to include a claim for the money paid in discharge of the sub-mortgagee's claim.

C. V. Anantakrishna Aiyar for appellant.

T. R. Krishnasamy Aiyar for respondent.

Sundara Aiyar J.
Spencer J.
1911, *November* 29.

S. A. 1042 of 1910.

Aliyasantana Law—Family karar—Land assigned for maintenance—Suit by family for possession against stranger in possession by collusion of members.

Under a family *karar* between members of an Aliyasantana family, a particular property had been assigned for the maintenance of two of them. One of such members, in whose name the sale-deed stood (the sale deed contained a clause of re-purchase) and who had been the *ejaman* of the family before the karar, purported without the concurrence of the other members to receive the money on the footing that it was a mortgage and put the vendors into possession. The other members of the family sued, as representing the family, for a declaration that no payment had as a fact been made, that he had no authority to receive the money, that the document was not a mortgage, and that his acquittance was not binding, and for possession. Both the courts below gave them possession, declaring that the acquittance was bad. The karar purported to be irrevocable nor had it been revoked. *Held*: that the family was not entitled

to recover possession and in substitution of the decree in the lower courts a decree was made in favour of the members for whose maintenance the property had been assigned.

B. Sitarama Rao for appellant.

H. Balakrishna Rao for respondent.

Sundara Aiyar J.
Spencer J.
1911, *November* 29.

S. A. 1044 of 1910.

Hereditary Village Offices Act—Carpenter's service inam—Cognisance of suits for emoluments of.

Suits for the emoluments of carpenter's service inam are not cognisable by civil courts.

V. Ramdas for appellant.

V. Ramesam for respondent.

Sundara Aiyar J.
Spencer J.
1911, *November* 30.

S. A. 1322 of 1910.

Declaratory suit—Widow disposing of property as property of minor stranger, as guardian—Maintainability of.

Where a widow, acting as a guardian of a minor stranger, purports to dispose of the property forming part of her husband's estate, the reversioner can sue for a declaration that the property forms part of the widow's estate and that his reversionary right is not affected by any such dealings of the widow or stranger.

V. Ramdas for appellant.

T. Prakasam and *P. Venkataramana Rao* for respondent.

Sundara Aiyar J.
Spencer J.
1911, *December* 1.

S. A. 1430 of 1910.

Malabar Law—Demise by junior member—No presumption that it is on behalf of Tarwad—Onus.

There is no presumption, when a junior member of a Malabar Tarwad makes a demise, that he makes it on behalf of the Tarwad. The onus of proving it to be so is on those who set it up.

C. V. Anantakrishna Aiyar for appellant.

J. L. Rosario and *K. P. Govinda Menon* for respondent.

Sundara Aiyar J.
Spencer J.
1911, *December* 1.

S. A. 1541 of 1910.

Possessory title—Transfer of it by lease, etc., though out of possession.

A person who has only a possessory title to a property can make a transfer of it by lease, etc., even though he may be out of possession when he granted the lease.

V. Ramdas for appellant.

V. Ramesam for respondent.

Sundara Aiyar J.
Spencer J.
1911, *December* 5.

Crl. A. 567.

Ss. 175, 471, *I.P.C.*—"*User*" *of a forged document—Production or giving evidence in support is not user.*

Production of a document in obedience to a summons of court, which one is bound to obey, is not using the document. Nor is giving false evidence in support of it a user of it.

[*Asimuddi* v. *The King Emperor* [1] followed.]

R. Sadagopachariar and *C. V. Anantakrishna Aiyar* for appellant.

The Public Posecutor (*C. F. Napier*) for the Crown.

Sundara Aiyar J.
Spencer J.
1911, *December* 15.

C. M. P. 2056 of 1911.

S. 13, *Letters Patent—Presidency Small Cause suit—No power for High Court, Appellate Side, to transfer it to High Court.*

It is not the Appellate Side of the High Court but it is the High Court in its Extraordinary Original Civil Jurisdiction that has power to transfer a suit from the file of the Presidency Small Cause Court to the Original Side of the High Court.

M. Subramania Aiyar for petitioner.

T. Ethiraja Mudaliar for respondent.

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1. (1907) 11 C.W.N. 838, 840.